Freedom or Feardom of Expression of Judges? Exploring the 'Chilling Effect' on Judicial Speech

Mohor Fajdiga* and Saša Zagorc**

*University of Ljubljana, Slovenia, email: mohor.fajdiga@pf.uni-lj.si
**University of Ljubljana, Slovenia, email: sasa.zagorc@pf.uni-lj.si

Freedom of expression of judges – 'Chilling effect' of measures taken against judges (and prosecutors) – Silence or modification of speech – Rule of law crisis – 'Chilling effect' as one of the circumstances determining the proportionality of an interference with freedom of expression – Flexible approach in determining the sources of the 'chilling effect' – Little attention devoted by the Court to the quality of legislative enactment – Measures may not have imminent repercussions for a given judge, may be light, and may take the form of a threat – 'Chilling effect' may extend from one legal profession to another – 'Chilling effect' explains why the Court affords greater protection of freedom of expression to prominent judges – Greater consistency in the Court's application of the 'chilling effect' argument would be welcome – First step of an ambitious research quest to determine whether judges feel free to express their opinions, or live in a state of feardom.

Introduction

Courts safeguard fundamental rights and the rule of law through formal procedures. Sadly, backsliding on the rule of law has shown that this is not enough. The deliberate undermining of checks on the elected branches of power and attempts to 'capture' the judiciary have pushed many judges to employ unconventional methods to defend the rule of law: they raised their voices and protested against harmful judicial 'reforms'. In response, many have faced stringent sanctions. Probably the most emblematic Hungarian judge, former judge at the European Court of Human Rights, András Baka, was dismissed from the post of Supreme Court president.[1] One of the most visible figures of the

[1]ECtHR (GC) 23 June 2016, No. 20261/12, *Baka* v *Hungary*.

European Constitutional Law Review, 19: 249–270, 2023

doi:10.1017/S1574019623000093

Polish resistance against the capture of the judiciary, judge Żurek, was subjected to endless disciplinary proceedings[2] and was dismissed from the Polish National Council of the Judiciary.[3] Many others have seen their judicial careers shattered. However, many more remained silent. The legal community has predominantly focused on a few vocal judges, whereas a large number of their silent colleagues were neglected. This article seeks to do the opposite, by exploring one of the likeliest reasons for their silence: the 'chilling effect' created by sanctions in response to judicial speech.

The 'chilling effect' has become a common feature of freedom of expression adjudication at the national, regional, and global level.[4] However, legal scholarship has paid very little attention to this legal metaphor.[5] Major contributions come from the United States.[6] The European scholarly debate has been very timid despite the prominent role of the 'chilling effect' in the jurisprudence of the European Court of Human Rights.[7] Recent events such as the rule of law crisis seem to have sparked interest in the 'chilling effect' in Europe,[8] but significant gaps remain. On the one hand, legal scholars who have

[2]M. Gałczyńska, 'Attack of the Disciplinary Commissioners on Judge Żurek. "They Are Ridiculing Themselves"' (*Rule of Law* 1 June 2022) https://ruleoflaw.pl/attack-of-the-disciplinary-commissioners-on-judge-zurek-they-are-ridiculing-themselves/, visited 9 June 2023.

[3]ECtHR 16 June 2022, No. 39650/18, *Żurek* v *Poland*.

[4]'Chilling effect' was born in US Supreme Court decisions in the 1950s and 1960s. It was embraced by national, regional, and global actors at large. *See*, for example, UNHRC, General Comment No. 34: Article 19: Freedoms of opinion and expression, 102nd session, Geneva, 11-29 July 2011, para. 47; IACtHR 3 September 2012, *Uzcátegui et al.* v *Venezuela*.

[5]H. Bosmajian, *Metaphor and Reason in Judicial Opinions* (Southern Illinois University Press 1992).

[6]The first article dedicated to the 'chilling effect' dates back to 1968: unknown author, 'The Chilling Effect in Constitutional Law', 69 *Columbia Law Review* (1969) p. 808. F. Schauer, 'Fear, Risk and the First Amendment: Unravelling the "Chilling Effect"', 58 *Boston University Law Review* (1978) p. 685; D. Solove, 'A Taxonomy of Privacy', 154 *University of Pennsylvania Law Review* (2006) p. 477; L. Kendrick, 'Speech, Intent, and the "Chilling Effect"', 54 *William & Mary Law Review* (2013) p. 1633; R.A. Sedler, 'Self-Censorship and the First Amendment', 25 *Notre Dame Journal of Law, Ethics & Public Policy* (2012); M. Youn, 'The Chilling Effect and the Problem of Private Action', 66 *Vanderbilt Law Review* (2013) p. 1471; J.W. Penney, 'Understanding Chilling Effects', 106 *Minnesota Law Review* (2022) p. 1451.

[7]R.Ó. Fathaigh, 'Article 10 and the Chilling Effect : A Critical Examination of How the European Court of Human Rights Seeks to Protect Freedom of Expression from the Chilling Effect' (dissertation, Ghent University 2019) http://hdl.handle.net/1854/LU-8620369, visited 9 June 2023; T. Baumbach, 'Chilling Effect as a European Court of Human Rights' Concept in Media Law Cases', 6 *Bergen Journal of Criminal Law & Criminal Justice* (2018) p. 92; J. Townend, 'Freedom of Expression and the Chilling Effect', in H. Tumber and S. Waisbord (eds.), *The Routledge Companion to Media and Human Rights* (Routledge 2017) p. 73.

[8]L. Pech, 'The Concept of Chilling Effect: Its Untapped Potential to Better Protect Democracy, the Rule of Law, and Fundamental Rights in the EU' (Open Society Foundations 2021) https://www.opensocietyfoundations.org/publications/the-concept-of-chilling-effect, visited 9 June 2023.

written about the freedom of expression of judges have not addressed the 'chilling effect'; rather, they have focused on legal and ethical standards concerning judicial speech or analysed supranational jurisprudence or national experiences with judicial free speech.[9] On the other hand, Fathaigh conducted a valuable analysis of the use of the 'chilling effect' in the Article 10 jurisprudence of the European Court of Human Rights. However, he examined it without a special focus on judges.[10] This article aims to fill this gap. It studies the 'chilling effect' in relation to the freedom of expression of judges. It seeks to shed new light on this invisible silencing force, which could prove particularly valuable in the current gloomy reality of some European countries.

In the first section, the article offers a theoretical account of the 'chilling effect'. It then concentrates on the jurisprudence of the European Court of Human Rights concerning the freedom of expression of judges. It first underlines the general principles that the Court has developed over the last three decades. It then zooms in onto the 'chilling effect' argument in the Court's Article 10 jurisprudence concerning judges. It provides a descriptive account of the 'chilling effect' in this line of jurisprudence. However, it aims to go beyond the mere description thereof: it critically analyses its application from the perspective of the 'chilling effect' theory; shows how the general principles applicable to judicial speech reflect the Court's concern about the 'chilling effect'; and how the 'chilling effect' doctrine can help to understand them in a new way. The paper concludes by underlining the importance of the 'chilling effect' on judicial speech for the current European reality.

[9]W. MacKay, 'Judicial Free Speech and Accountability: Should Judges Be Seen but Not Heard?', 3 *National Journal of Constitutional Law* (1993) p. 159; H.P. Lee (ed.), *Judiciaries in Comparative Perspective* (Cambridge University Press 2011); S. Shetreet and S. Turenne, *Judges on Trial: The Independence and Accountability of the English Judiciary*, 2nd edn. (Cambridge University Press 2013); S. Dijkstra, 'The Freedom of the Judge to Express His Personal Opinions and Convictions under the ECHR', 13 *Utrecht Law Review* (2017) p. 1; D. Kosař and K. Šipulová, 'The Strasbourg Court Meets Abusive Constitutionalism: *Baka v. Hungary* and the Rule of Law', 10 *Hague Journal on the Rule of Law* (2018) p. 83; J. Jahn, 'Social Media Communication by Judges: Assessing Guidelines and New Challenges for Free Speech and Judicial Duties in the Light of the Convention', in M. Elósegui et al. (eds.) *The Rule of Law in Europe: Recent Challenges and Judicial Responses* (Springer 2021) p. 137; A. Seibert-Fohr, 'Judges' Freedom of Expression and Their Independence: An Ambivalent Relationship', in M. Elósegui et al. (eds.) *The Rule of Law in Europe: Recent Challenges and Judicial Responses* (Springer 2021) p. 89; S. Dijkstra, *Walking the Tightrope: The Judge and His Freedom to Express His Personal Opinions and Convictions* (Eleven International Publishing 2023).

[10]Fathaigh's dissertation examines judicial free speech along with the freedom of expression of lawyers as one of the categories of cases analysed. Given the important recent developments in the European Court of Human Rights' case law and the fundamentally different roles of judges and lawyers, his insights can be valuable, but are not sufficient: Fathaigh, *supra* n. 7.

A THOERETICAL ACCOUNT OF THE 'CHILLING EFFECT'

Courts and legal scholars claim that the 'chilling effect' – the fear of sanctions and other negative repercussions for expressing one's opinion – may result in silence or the modification of speech.[11] Of course, the 'chilling effect' is not the only explanation for such behavioural reaction. It does not always result in self-censorship either. As social scientists know, human behaviour depends on an extremely complex cocktail of factors,[12] such as context, personal traits, individual assessment that the public expression of opinion would cause more harm than good,[13] one's personal world-view, individual risk-aversion,[14] and inertia.[15] A person may decide to speak out even if he or she knows that a sanction will follow. However, only a few – some call them avant-garde[16] – are willing to pay the price. Others are not. This is why the courts have rightly paid attention to the 'chilling effect' in their jurisprudence.

One could look at the 'chilling effect' in two different ways: as a behavioural phenomenon and as a legal doctrine designed to respond to this phenomenon.[17] When faced with (potential) sanctions, people are deterred from speaking about a certain topic at all (suppression of speech) or compelled to choose milder, more indirect, or subtle ways of communication (modification of speech). This is the 'chilling effect' understood as a behavioural phenomenon in a nutshell.[18] The French expressions – '*effet inhibiteur*' and '*effet dissuasif*' – catch the idea even better. The 'chilling effect' is in fact a common feature of law, which incentivises individuals to act in a prescribed way in order to avoid negative repercussions.[19]

[11] *See* e.g. Schauer, *supra* n. 6.

[12] *See*, e.g., D. Bar-Tal, 'Self-Censorship as a Socio-Political-Psychological Phenomenon: Conception and Research', 38 *Advances in Political Psychology* (2017) p. 37; A.F. Hayes et al., 'Validating the Willingness to Self-Censor Scale: Individual Differences in the Effect of the Climate of Opinion on Opinion Expression', 17 *International Journal of Public Opinion Research* (2005) p. 443.

[13] Sedler terms this self-censorship good: Sedler, *supra* n. 6, p. 14.

[14] Schauer, *supra* n. 6, p. 698. S. Bedi, 'The Myth of the Chilling Effect', 35 *Harvard Journal of Law & Technology* (2021) p. 268 at p. 273.

[15] We understand inertia as passivity, which results from a lack of awareness of the importance of freedom of expression and a lack of incentives to speak out.

[16] E. Noelle-Neumann, 'The Spiral of Silence A Theory of Public Opinion', 24 *Journal of Communication* (1974) p. 43.

[17] Penney, *supra* n. 6, p. 1469.

[18] Kendrick, *supra* n. 6, p. 1678. Bedi, *supra* n. 14, p. 274; Townend, *supra* n. 7, p. 77–78. Penney recently argued that such conventional understanding of the 'chilling effect' is insufficient and proposes an alternative theory of the 'chilling effect' that relies on social science insights. He claims that the 'chilling effect' has a productive side in the sense that it may encourage speech, if this is the social norm in a particular context: Penney, *supra* n. 6. However, the influence of his recent work has not yet reached the courts.

[19] Kendrick, *supra* n. 6, p. 1639, 1649. Kendrick notes that the idea of deterrence forms the basis of other legal doctrines, such as the exclusionary rule in criminal proceedings.

It is sometimes described as the sword of Damocles hanging over the heads of individuals.[20] Understood in this sense, the 'chilling effect' is based primarily on deterrence: fear of the negative consequences that speech or other behaviour could provoke. As such, it can be regarded as a general (and special) prevention mechanism. The strength of the 'chilling effect' varies depending on several factors, such as the type and intensity of the sanction, the probability that a sanction will actually be imposed, the ambiguity of the regulation of speech, unpleasant aspects linked to judicial proceedings arising from speech, the actual or perceived external effects of the sanction, the cost of obtaining legal advice prior to speaking, the risk of losing benefits, individual risk-aversion, and the perceived benefit arising from the contemplated speech.[21] When we understand the 'chilling effect' in this first sense – as a behavioural reaction – we have to admit that some 'chilling effect' is inevitable in any regulation, especially in relation to freedom of expression, where the regulation has to be drafted in general terms to satisfy the reality of life.[22] Furthermore, the 'chilling effect' may be *desirable*, in the sense that it only affects socially valueless speech[23] and does not spill over to valuable speech. Rare cases where a desirable 'chilling effect' occurs normally do not concern expression on matters of public interest.[24] A 'chilling effect' is therefore not necessarily negative, but can be positive – even desirable.[25] The 'chilling effect' is one of the factors the courts consider when they balance competing interests. If the legislation is carefully construed and it aims at regulating valueless speech, while it also supresses some valuable speech, the benefits of achieving this legitimate aim may outweigh the incidental 'chilling effect'. In such case, despite encroaching upon valuable speech, the 'chilling effect' resulting from the regulation is *acceptable*[26] due to the high social value of the conflicting legitimate interest and the overall greater social value of the regulation compared with no regulation at all.[27] In a different scenario, when the social value of supressed speech is greater than the social value of the other interest at stake, such 'chilling

[20]Joint dissenting opinion of Judges Costa and Thomassen in ECtHR (GC) 10 June 2003, No. 33348/96, *Cumpănă and Mazăre* v *Romania*, para. 7; *Arnett* v *Kennedy*, 416 U.S. 134 (1974) p. 134 (Marshall J., dissenting).

[21]Schauer, *supra* n. 6, p. 696-701; Kendrick, *supra* n. 6, p. 1645, 1654.

[22]Schauer, *supra* n. 6, p. 700-701; Kendrick, *supra* n. 6, p. 1652.

[23]In the US context, authors use the term 'unprotected' speech to describe speech which, by definition, has no societal value and thus does not come under the ambit of the First Amendment.

[24]Fathaigh, *supra* n. 7, p. 250, 374, points to ECtHR 25 November 2008, No. 23373/03, *Biriuk* v *Lithuania*, and ECtHR 23 June 2016, No. 22567/09, *Brambilla and Others* v *Italy*.

[25]*Cf.* Pech, *supra* n. 8, who defines the 'chilling effect' as inherently negative.

[26]Schauer, *supra* n. 6, terms this a benign 'chilling effect'. *See also* Townend, *supra* n. 7, p. 77.

[27]Of course, under the assumption that there is no alternative legislative solution that would further the governmental interest to the same extent while having a weaker 'chilling effect'.

https://doi.org/10.1017/S1574019623000093 Published online by Cambridge University Press

effect' is *unacceptable*.[28] Henceforth, the courts may rely on a desirable or acceptable 'chilling effect' and find no violation of freedom of expression.[29]

As we have seen in the previous paragraph, a regulation aiming to limit valueless speech (and thus intended to produce only a desirable 'chilling effect') may affect valuable speech as well. Our legal systems are not perfect. They cannot draw a clear line between protected and unprotected expression. They rely on judges, who are only human and make mistakes. Moreover, individuals are generally not experts in free speech law. As a result, they can only rarely be sure that their speech is protected and will be safeguarded in an eventual judicial proceeding. Consequently, they may decide not to speak even when the actual regulation does not cover their expression. In other words, due to the imperfections of the legal system and legal subjects, the regulation of unprotected speech deters people from expressing their otherwise protected opinions.[30]

This argument has led the US Supreme Court to establish the 'chilling effect' as a legal doctrine, which is the second way in which one may refer to the 'chilling effect'. What is the aim of the 'chilling effect' doctrine? In the words of the US Supreme Court, the pioneer court[31] when it comes to the 'chilling effect',[32] this doctrine creates 'breathing space' for protected speech,[33] or in other words, a zone of 'strategic protection'[34] for valuable speech.[35] It requires that some valueless speech be safeguarded, for the sake of the social value of protected speech, which may otherwise be supressed. As argued by Schauer, the leading scholar in this field, the 'chilling effect' doctrine is in fact a 'principled distortion of ideal rules'. In an ideal world, the regulation would catch only unprotected speech and leave protected speech unrestricted. Nevertheless, this is far from reality. Therefore, the courts have come up with the 'chilling effect' doctrine to protect valuable speech, which would otherwise be 'chilled'. The 'chilling effect' doctrine is thus underpinned by the idea that protected speech, which would be supressed without 'the distortion of ideal rules', is more valuable than unprotected (or even harmful) speech which is safeguarded as a result. This preference is a consequence

[28]Kendrick, *supra* n. 6, p. 1683. Schauer, *supra* n. 6, uses the term *invidious chilling effect*.

[29]ECtHR 8 December 2020, No. 33794/14, *Panioglu* v *Romania*, para. 123; ECtHR 8 December 2005, No. 40485/02, *Nordisk Film & Tv A/S* v *Finland*.

[30]Schauer, *supra* n. 6, p. 692-701.

[31]As shown by Fathaigh, the European Court of Human Rights embraced the 'chilling effect' argument under the influence of the jurisprudence of the US Supreme Court, where the 'chilling effect' doctrine was born. *See* Fathaigh, *supra* n. 7, p. 17-38.

[32]*Wieman* v *Updegraff*, 344 U.S. 183, 195 (1952); *Gibson* v *Florida Legislative Investigation Committee*, 372 U.S. 539 (1963). *See also* Townend, *supra* n. 7, p. 74.

[33]*New York Times Co.* v *Sullivan*, 376 U.S. 254, 271-272 (1964).

[34]*Gertz* v *Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

[35]Schauer, *supra* n. 6, p. 708.

of the social consensus that freedom of expression is of utmost importance for democratic society and that speech should be encouraged.[36] According to Schauer, the 'chilling effect' concept rests on the commonly accepted proposition that protecting some valueless speech is more socially advantageous than supressing some protected speech, similarly as the whole of criminal procedure rests on the social consensus that it is better to let ten guilty individuals escape justice than to condemn one innocent person. The 'chilling effect' is thus a fruit of the conviction that error is inevitable and that error to the detriment of speech is worse than error to the detriment of another constitutional value.[37] Yet, this principled preference is limited: it only holds until the harm of leaving speech unrestricted outweighs the benefits of such an approach.[38]

The 'chilling effect' doctrine is concerned not only with a speaker who is sanctioned for publicly expressing his or her opinion, but it also seeks to address the dissuasive effect on other individuals in a similar position. The 'chilling effect's' devil is that it deprives society as a whole of valuable expression.[39] The doctrine therefore responds by offering the overprotection of speech to remedy this harm.[40] The 'chilling effect' doctrine can be used outside the realm of freedom of expression[41] and sometimes speech itself can have a 'chilling effect' on some other constitutionally protected behaviour.[42] For example, regulation leaning excessively towards protecting free speech deters plaintiffs from filing defamation suits and may thus turn out to be a heavy blow for one's personal reputation. Such regulation can discourage respected people from entering public life, which has a negative impact on our democracy.[43] Why then are courts using the doctrine predominantly in the context of freedom of expression?[44] For most scholars, the answer again lies in the prominent place freedom of expression occupies in the Western constitutional tradition.[45] Giving other legitimate interests, such as

[36]*Cf.* Penney, *supra* n. 6, p. 1475, 1476, 1512, 1513.

[37]Schauer, *supra* n. 6, p. 702, 703, 732.

[38]Ibid., p. 732.

[39]In the words of the Court, the 'chilling effect' 'works to the detriment of society as a whole': *Baka*, *supra* n. 1, para. 167; ECtHR (GC) 15 December 2005, No 73797/01, *Kyprianou* v *Cyprus*, para. 174.

[40]Fathaigh, *supra* n. 7, p. 367; Baumbach, *supra* n. 7, p. 92.

[41]Schauer, *supra* n. 6, p. 692, points to other 'affirmative' rights and positive guarantees such as freedom of association, the right to counsel, and equality. *See also* Pech, *supra* n. 8, p. 9-10.

[42]Even on speech itself: Penney, *supra* n. 6, p. 1511-1513.

[43]Townend, *supra* n. 7, p. 78; Schauer, *supra* n. 6, p. 709.

[44]Fathaigh, *supra* n. 7, p. 352, found that between 1959 and 2018 more than 70% of the judgments in which the European Court of Human Rights refer to the 'chilling effect' concerned Art. 10.

[45]Schauer, *supra* n. 6, p. 692, 704, 705; D.A. Farber, 'Free Speech without Romance: Public Choice and the First Amendment', 105 *Harvard Law Review* (1991) p. 554.

personal reputation, the same benefit, especially when in conflict with freedom of expression, could, at least in some cases, counter the very idea of the 'chilling effect' doctrine.

Interestingly, legal scholars have been questioning the 'chilling effect' doctrine. They agree that it is an elusive notion, 'a highly flexible metaphor'[46] that relies predominantly on intuition[47] rather than on an actual empirically measured 'chilling effect' in the sense of a behavioural response to the regulation of speech. This lack of empirical support is understandable since the 'chilling effect' is extremely hard to measure empirically.[48] Kendrick, for example, argues that both the 'chilling effect' and the remedies to counter it rely on 'predictions about the behaviour of speakers under counterfactual conditions' and 'involve intractable empirical difficulties'.[49] It is therefore not surprising that some scholars argue that the US Supreme Court 'has founded the chilling effect [doctrine][50] on nothing more than unpersuasive empirical guesswork'.[51] However, the scholarly community has recently moved away from questioning the very existence of the 'chilling effect'.[52] What seems to remain uncertain is its strength in different contexts and under different circumstances. Therefore, the courts should continue to apply the doctrine, but with an awareness that their decisions necessarily rest on estimations and not on empirical proof.[53]

How does the European Court of Human Rights apply the doctrine of 'chilling effect' in Article 10 cases? The 'chilling effect' is an important consideration that the Court generally takes into account in the phase of proportionality balancing.[54] However, it is not the only relevant factor. Before focusing on the central issue of the article – the analysis of the Court's application of the 'chilling effect argument in its jurisprudence concerning the freedom of expression of judges – we first need to have a closer look at the general principles that the Court has established in this field. Only then will we be able to understand and evaluate the role of the 'chilling effect' argument in the Court's case law.

[46]Townend, *supra* n. 7, p. 73.

[47]Kendrick, *supra* n. 6, p. 1638.

[48]Bedi, *supra* n. 14, p. 281-284; Penney, *supra* n. 6, p. 1462.

[49]Kendrick, *supra* n. 6, p. 1638.

[50]Added by the authors.

[51]Kendrick, *supra* n. 6, p. 1633; Bedi, *supra* n. 14.

[52]Penney, *supra* n. 6, p. 1461.

[53]Kendrick, *supra* n. 6, p. 1685-1687.

[54]However, the Court sometimes refers to the 'chilling effect' also when determining the victim status, the existence of the interference or the question of whether the interference was prescribed by law. Here the 'chilling effect' seems to be used to justify the Court's scrutiny of situations where concrete measures have not (yet) been taken or have failed to produce any meaningful consequences for the applicant. An example from the field of freedom of expression of judges is ECtHR (GC) 28 October 1999, No. 28396/95, *Wille* v *Liechtenstein* (*see* Fathaigh, *supra* n. 7, p. 355-358).

The freedom of expression of judges: key considerations arising from the jurisprudence of the European Court of Human Rights

Protection of freedom of expression before the European Court of Human Rights differs in relation to the role of right-holders in a democratic society.[55] The Court approaches cases concerning judges differently than cases concerning journalists, teachers, lawyers, or politicians. Such a functional approach has two important implications. First, the general principles guiding the determination of concrete cases should not be transferred uncritically from one group of applicants to another. Second, one does not need to study the whole body of the Court's Article 10 jurisprudence to understand the Court's case law concerning a specific group. One may meaningfully analyse only one category of speech, as this article does with the freedom of expression of judges. However, the analysis will also cover prosecutors, as the Court has consistently interpreted the freedom of expression of both groups of judicial professionals identically.

Judges enjoy the right to freedom of expression in the same manner as any other citizen.[56] However, their role in a democratic society imposes important limitations on their free speech. The society has to regard judges and courts as proper forums for the independent and impartial resolution of conflicts. The concern over public trust or, as the Convention puts it, the authority of the judiciary,[57] has important implications for their freedom of expression. In the words of the Court, judges have a duty of discretion and restraint. In principle, they should not comment on pending cases, respond to criticism, and should avoid the use of media, even when provoked. They should express themselves in a dignified manner.[58] They should also avoid political expression. However, the fact that their expression has political implications does not necessarily preclude them from expressing their opinion. The Court generally offers a high level of protection to expression that is in the public interest, for example opinions on the functioning of the judiciary.[59] It attaches particular importance to the position of

[55] *Baka*, *supra* n. 1, paras. 162-165. *Cf.* ECtHR (GC) 27 June 2017, No. 931/13, *Satakunnan Markkinapörssi Oy and Satamedia Oy* v *Finland*, paras. 125-126. *See also* ECtHR, *Guide on Article 10 of the European Convention on Human Rights* (Registry of the ECtHR 2022), https://www.echr.coe.int/Documents/Guide_Art_10_ENG.pdf, visited 9 June 2023.

[56] UN Bangalore Principles of Judicial Conduct, adopted by the Judicial Group on Strengthening Judicial Integrity, November 2002, para 4.6.

[57] ECtHR (GC) 23 April 2015, No. 29369/10, *Morice* v *France*, para. 129.

[58] *Baka*, *supra* n. 1, para. 164; ECtHR (GC) 28 October 1999, No. 28396/95, *Wille, supra* n. 54, para. 64; ECtHR 5 August 2020, No. 3594/19, *Kövesi* v *Romania*, para. 201; ECtHR 26 February 2009, No. 29492/05, *Kudeshkina* v *Russia*, para 93; ECtHR 9 July 2013, No. 51160/06, *Di Giovanni* v *Italy*, para. 80.

[59] *Wille*, *supra* n. 54, para. 67, Baka, *supra* n. 1, para. 165.

the judge and the context of the statements.[60] National authorities have a certain margin of appreciation when striking a proper balance between the freedom of expression of judges and preserving the independent and impartial image of the judiciary.[61] However, the Court vigilantly monitors how such balance was struck in each concrete case, after taking into account the potential 'chilling effect'[62] and all other relevant circumstances. If national authorities fail to conduct this balancing exercise in line with the Convention standards, a violation of Article 10 may follow.[63] Due to the increased concern over judicial independence, each interference with the freedom of expression of judges merits special attention from the Court.[64]

In recent years, the rule of law crisis has arguably led the court to strengthen its protection of the freedom of expression of judges. Judges are now treated as a special category of civil servants that do not owe loyalty to their employer, but to the rule of law.[65] The Court was willing to narrow the margin of appreciation of states in certain cases.[66] It has extended the scope of the freedom of expression of judges to the category of 'official speech'[67] and shifted the burden of proof in favour of applicant judges.[68] Nevertheless, the need to boost human rights standards to protect judges remains. The concept of 'chilling effect' has the potential to do just that.[69] That is why this argument is particularly worth exploring in these times of constitutional backsliding.

The court's application of the 'chilling effect' argument in the judicial free speech case law

The article will now focus on the application of the 'chilling effect' argument in the Court's case law concerning the freedom of expression of judges. The analysis

[60] *Baka, supra* n. 1, para. 166.

[61] Ibid., para. 162; ECtHR 31 January 2008, No. 38406/97, *Albayrak* v *Turkey*, para. 42; ECtHR 15 October 2020, No. 965/12, *Guz* v *Poland*, para. 84.

[62] *Kudeshkina, supra* n. 58, para. 90; *Baka*, *supra* n. 1, para. 167.

[63] ECtHR 30 June 2020, No. 58512/16, *Cimperšek* v *Slovenia*; paras. 66-69; ECtHR 9 March 2021, No. 76521/12, *Eminağaoğlu* v *Turkey*, para. 148.

[64] E.g. *Baka*, *supra* n. 1, para. 165.

[65] In ECtHR 9 March 2021, No. 1571/07, *Bilgen* v *Turkey*, para. 79, the Court emphasised that judges are loyal to the rule of law and democracy and not to the holders of state power. This was reiterated in ECtHR (GC) 15 March 2022, No. 43572/18, *Grzęda* v *Poland*, para. 264.

[66] *Baka*, *supra* n. 1, para. 171; *Kövesi, supra* n. 58, para 207; ECtHR 19 October 2021, No. 40072/13, *Miroslava Todorova* v *Bulgaria*, para. 175.

[67] *See* Dijkstra, *supra* n. 9; *Baka*, *supra* n. 1, ECtHR 11 December 2018, No. 26238/10; *Brisc* v *Romania*, *Kövesi, supra* n. 58.

[68] *Baka*, *supra* n. 1, para. 149–151; *Kövesi, supra* n. 58, para 189.

[69] *See* Pech, *supra* n. 8.

https://doi.org/10.1017/S1574019623000093 Published online by Cambridge University Press

will serve three purposes. First, it will map the characteristics of the 'chilling effect' argument arising from the jurisprudence. Second, it will seek to uncover the explanatory potential of the chilling effect by shedding new light on the Court's general principles applicable to judicial speech. In other words, the article relies on the Court's case law to argue that certain general principles reflect the Court's concern for the 'chilling effect'. Third, the analysis will critically evaluate the application of the 'chilling effect' argument from the perspective of the 'chilling effect' theory to determine whether and to what extent the Court's understanding of the 'chilling effect' diverges from the theoretical account.

The freedom of expression of judges generally merits the full protection of the Court, even to the detriment of the authority of the judiciary

The analysis starts with *Wille* v *Liechtenstein*,[70] a case in which the Court heard an Article 10 complaint of a judge for the first time.[71] The Court embraced the 'chilling effect' argument without hesitation even though this was only the Court's third and the Grand Chamber's second judgment where the Court mentioned the 'chilling effect' doctrine.[72] The case revolved around a private letter that the Prince of Liechtenstein had sent to the applicant – the President of the Liechtenstein Administrative Court. In the letter, the prince criticised the applicant's publicly expressed opinion about the interpretation of the constitution, and announced that, due to the applicants' views, he would not reappoint him to the incumbent post. The Court ruled that:

> The right of the applicant to exercise his freedom of expression was interfered with once the Prince, criticising the contents of the applicant's speech, announced the intention to sanction the applicant because he had freely expressed his opinion. The announcement by the Prince of his intention not to reappoint the applicant to a public post constituted a reprimand for the previous exercise by the applicant of his right to freedom of expression and, moreover, had a 'chilling effect' on the exercise by the applicant of his freedom of expression, as it was likely to discourage him from making statements of that kind in the future.[73]

[70] *Wille*, *supra* n. 54.

[71] Before *Wille*, the European Commission for Human Rights found no violation of the freedom of expression of a judge who had distributed political leaflets concerning the 1980 riot in Zurich: EComHR 7 May 1984, No. 10279/83, *E.* v *Switzerland*.

[72] In ECtHR (GC) 27 March 1996, No. 17488/90, *Goodwin* v *the United Kingdom* – a grand chamber judgment concerning the protection of journalistic sources – the Court explicitly mentioned and applied the 'chilling effect' concept for the first time. In ECtHR 8 July 1986, No. 9815/82, *Lingens* v *Austria*, para. 44, the 'chilling effect' was not explicitly mentioned, but was at the heart of the Court's reasoning. *See also* ECtHR 8 October 1991, No. 14644/89, *Times Newspapers Ltd. and Neil* v *the United Kingdom*.

[73] *Wille*, *supra* n. 54, para. 50.

Wille and the subsequent case law show that the Court has never had any doubts about using the 'chilling effect' argument in relation to judicial speech. For now, there is no elaborated view among either judges or academics that would counter the application of the 'chilling effect' doctrine in relation to judicial speech. Only in *Kudeshkina* v *Russia*[74] was the opinion voiced, by the dissenting judges Kovler and Steiner, that the Court's reliance on the 'chilling effect' doctrine struck an improper balance between the freedom of expression of judges and the need to safeguard the authority of the judiciary.

The protection of the authority of the courts is indeed a valid concern. Why should the freedom of expression of judges merit special protection to the detriment of the authority of the courts, which can be regarded as the bedrock of public trust in and the social legitimacy of the judiciary – prerequisites for the independent functioning of the justice system and thus the protection of our fundamental rights? The answer is not straightforward. One of the premises upon which the 'chilling effect' theory rests is that speech is positive and should be encouraged. Does this apply equally to judicial speech? Should judicial speech be encouraged? In principle, we argue that the answer is yes. That is why the 'chilling effect' argument has found such a prominent place in the Court's jurisprudence concerning judicial free speech in the first place. Judges are public intellectuals who possess unique knowledge about the functioning of the legal system. It would be a great loss for society if they always remained silent. However, to preserve their impartiality, independence and public trust in the judiciary, the Court has ruled many times that they should express their opinions with restraint, discretion, propriety, and moderation. In most cases, it is in principle not a question of whether judges are free to express their opinions; it is rather a question of *how* they should express such.[75] Arguably, the fact that the Court has been applying the 'chilling effect' doctrine without hesitation points to the conclusion that judicial opinion is valuable in the eyes of the Court and should be encouraged as long as it is expressed in a dignified manner. However, the 'chilling effect' is only one of the considerations in proportionality balancing and does not automatically lead to a violation of Article 10 of the Convention. There are cases where the Court ruled that the measure in question entailed a 'chilling effect', but it found no violation of Article 10.[76] In such cases, it was arguably the manner in which the judge expressed his or her opinion and not the substance thereof that tilted the scales in favour of the competing interests: judicial independence and impartiality and public trust in the judiciary. Such a conclusion is consistent with the 'chilling effect' theory. More speech is in principle positive, as long as it does not cause

[74] *Kudeshkina*, *supra* n. 58.
[75] *See supra* fn. 58.
[76] E.g. *Panioglu, supra* n. 29. *See*, *mutatis mutandis*, *Nordisk Film & Tv A/S*, *supra* n. 29.

https://doi.org/10.1017/S1574019623000093 Published online by Cambridge University Press

more harm than good to society. In cases where judicial speech is harmful, it should be limited. In such cases, the public good arising from the suppression of harmful speech is greater than the public harm stemming from the potential 'chilling effect' on valuable speech that such limitation would entail.

Sources of the 'chilling effect': regulation and different sanctions, even the lightest

Under the Convention, regulation alone is hardly ever enough to generate a 'chilling effect'.[77] The Court considers the ambiguity of the legislation in the first step of the analysis, as one of the elements of the requirement that the interference be prescribed by law. Contracting states generally have no difficulty complying with this requirement, as the Court's standard is relatively low. In *Panioglu* v *Romania*, a judge wrote an article in which she drew parallels between communist oppression and the rise of the President of the Supreme Court of Romania, who had served as a state prosecutor in the era of communism. Despite the fact that the targeted Supreme Court President had undergone a vetting procedure, Mrs Panioglu suggested that 'Comrade Prosecutor', as she called the President in her article, was a part of the ruling structure and questioned the President's belief in democratic values, albeit without pointing to concrete facts proving inadequate behaviour. In response, the judges' section of the High Council of the Magistracy opened a code of conduct procedure, in which the applicant was found to have overstepped the limits of freedom of expression in breach of her duty to respect the moral and professional integrity of her colleagues. The decision was permanently included in the applicant's professional file and can thus be taken into consideration if she applies for promotion. Before the European Court of Human Rights, the applicant pleaded that the domestic legislation, which provided the legal basis for the decisions of domestic authorities, was 'unclear and unforeseeable'. In 2019, a few years after Mrs Panioglu lodged her application with the Court, the Romanian Court of Cassation ruled in a similar case that the provision in question was unlawful because it was indeed unclear and lacked precision. Nevertheless, the European Court found that it 'was formulated sufficiently clearly in order to fulfil the requirements of precision and foreseeability under Article 10 § 2 of the Convention'.[78] In *Kozan* v *Turkey*,[79] the applicant was reprimanded for sharing a press article critical of Turkish judicial authorities in a private Facebook group that brought together primarily

[77]Fathaigh, *supra* n. 7, p. 358, mentions three cases: ECtHR (GC) 14 September 2010, No. 38224/03, *Sanoma Uitgevers B.V.* v *the Netherlands*; ECtHR 13 September 2018, Nos. 58170/13, 62322/14 and 24960/15, *Big Brother Watch and Others* v *the United Kingdom*; and ECtHR 25 October 2011, No. 27520/07, *Altuğ Taner Akçam* v *Turkey*.

[78]*Panioglu, supra* n. 29, paras. 54, 79 and 107.

[79]ECtHR 1 March 2022, No. 16695/19, *Kozan* v *Turkey*.

https://doi.org/10.1017/S1574019623000093 Published online by Cambridge University Press

judicial professionals, as well as academics, law graduates, and law students. He claimed that the provision, on which the reprimand was based, was too vague and too broad, something that the Venice Commission had already noted in its opinion of 28 March 2011.[80] Nevertheless, the Court ruled that the essential question was whether the measure was necessary in a democratic society and simply continued with an examination of the legitimate aim under the assumption that the interference was prescribed by law.[81] In the same vein, the Court avoided the question of foreseeability in *Eminağaoğlu* v *Turkey*.[82]

The Court's reserved attitude towards the vagueness of the national legislation should be understood through the prism of its institutional role. It is not a constitutional court. It primarily monitors whether states apply national law in line with the Convention in concrete cases. It is therefore for domestic courts, especially constitutional courts, to safeguard legal certainty and thus contain the 'chilling effect' by insisting on a reasonable level of precision. Nevertheless, even when looking at the ambiguity of a legal provision from a purely national perspective, it may not be the most important 'chilling factor'.[83] Much depends on how the provision is applied in practice. If practice is scarce or nonexistent, one must also take into account the strictness of the more general judicial accountability culture in the country.[84] The Court's approach, which pays little attention to legislative enactment, is therefore in line with the 'chilling effect' theory.

Even intuitively, the application of sanctions and other punitive measures seems to create a greater 'chilling effect' than the mere existence of legislation. The Court has therefore rightly put more emphasis on these other sources of the 'chilling effect'. It has defined sanctions and other punitive measures in a very flexible manner. The Court does not understand sanctions merely as penalties that have a direct negative bearing on one's judicial career, such as disciplinary penalties. In other words, it is not only sticks, but also the denial of carrots that may create the 'chilling effect'. This is proven by *Panioglu*, where the potential sanction was non-promotion, and *Wille*, where it took the form of a threat of the refusal of reappointment.

In addition to the nature of the sanctions, a related question is their intensity. Here, the Court is not concerned with the actual subjective 'chill', but rather with the objective intensity that the measure has to attain to entail a 'chilling effect'. The Court has already held that even the most lenient disciplinary penalty, namely a reprimand or a warning, can have a 'chilling effect'.[85] In *Panioglu* v *Romania*, the

[80]Ibid., para. 32.

[81]Ibid., paras. 53-57.

[82]*Eminağaoğlu*, *supra* n. 63, para. 130.

[83]Penney, *supra* n. 6, p. 1504. J.W. Penney, 'Internet Surveillance, Regulation, and Chilling Effects Online: A Comparative Case Study', 6 *Internet Policy Review* (2017).

[84]Schauer, *supra* n. 6, p. 696.

[85]*Kozan, supra* n. 79, para. 68; *Guz*, *supra* n. 61, paras. 95-96.

https://doi.org/10.1017/S1574019623000093 Published online by Cambridge University Press

Court came to the same conclusion, even though the case concerned 'only' a code-of-conduct procedure where no disciplinary sanction could be imposed. The intensity threshold therefore seems to be very low. This is yet another sign that the Court seems to be very sensitive towards the freedom of expression of judges.

Moreover, the threat of a sanction can create a 'chilling effect', even if no sanction is eventually imposed. As the previously quoted passage from *Wille* indicates, the Court did not find that the measure interfering with freedom of expression and having a 'chilling effect' was the fact that the applicant was not reappointed to the post of President of the Liechtenstein Administrative Court; rather it was the mere announcement that this would happen after the end of his four-year term. This case shows that the Court is willing to recognise that the measure constituting an interference with Article 10 of the Convention (in this case, a private letter) may not have any immediate legal consequences for the applicant. In this sense, *Wille* is telling as it forces our analysis of the 'chilling effect' to go beyond imminent repercussions for the professional career of the judge in question. In other words, a 'chilling effect' can result from a threat that has never been carried out. A similar conclusion can be drawn from *Panioglu* v *Romania*. The Court explicitly recognised 'that [the code-of-conduct proceedings] did not entail any concrete and imminent loss of judicial office or any pecuniary penalty for her'. Nevertheless, it concluded that, due to the negative influence on the prospect of promotion, 'the decision in the code-of-conduct proceedings may have had a certain "chilling effect" on the exercise of the applicant's freedom of expression'.[86] In other words, the decision in the code of conduct proceedings, which threatens promotion, may entail a 'chilling effect'. Even the eventual promotion of the applicant could not obviate *ex post facto* the 'chilling effect' of such a threat since the damage to freedom of expression had already been done. Accordingly, the lack of practical negative consequences for the applicant's professional career is not decisive. Moreover, the applicant is not required to either prove such repercussions or substantiate the existence of the 'chilling effect'.[87] This is consistent with the 'chilling effect' theory, which suggests that the 'chilling effect' is very difficult to prove.

In a similar vein, the mere initiation of a disciplinary or other judicial accountability procedure, even though no sanction is eventually imposed, may have a 'chilling effect',[88] as it essentially constitutes the threat of a sanction. In

[86] *Panioglu, supra* n. 29, paras. 120, 123.

[87] In ECtHR (GC) 17 December 2004, No. 33348/96 *Cumpănă and Mazăre* v *Romania,* paras. 114, 118, the Court recognised the 'chilling effect' as evident, despite there not being 'any significant practical consequences for the applicants'. For more examples, *see* Fathaigh, *supra* n. 7, p. 364–366.

[88] ECtHR 29 June 2004, No. 62584/00, *Harabin* v *Slovakia*. This is also confirmed by Pech, *supra* n. 8, p. 26, 29 and Bárd, who refers to ECJ (GC) 23 November 2021, Case C-564/19, *IS (Illégalité de l'ordonnance de renvoi)*: P. Bárd, 'In Courts We Trust, or Should We? Judicial Independence as the Precondition for the Effectiveness of EU Law', 27 *European Law Journal* (2022) p. 1.

Harabin v *Slovakia*,[89] the European Court of Human Rights was willing to recognise that the government's proposal to remove the applicant from office had a potential 'chilling effect', even though the 'chilling effect' was limited in duration, as the motion did not succeed in the Slovak parliament and the applicant remained President of the Supreme Court until the expiry of his five-year term.

However, a recent case seems to suggest that not every accountability procedure has the potential to chill judicial speech, at least to the legally relevant extent. In *M.D. and others* v *Spain*,[90] the Court heard a complaint of 20 judges from Catalonia, who prepared and signed a legal opinion in favour of the right of the Catalan people to exercise their right to self-determination under the Spanish constitution and international law. In response, the civil servants trade union filed a disciplinary complaint and a disciplinary procedure before the Spanish General Council of the Judiciary was initiated. The Court found no violation of Article 10 and no 'chilling effect'. It relied on the specific circumstances of the case, namely that the Spanish legislation obliged the General Council to conduct disciplinary proceedings if the complaint comes from a legitimate third party; that no sanction was imposed; and that the General Council had closed all the disciplinary proceedings by concluding that the signing of the manifesto was a legitimate exercise of freedom of expression.[91]

The Court's approach in this case is problematic for three reasons. First, it suggests that no 'chilling effect' arises when the person who is behind the threat – in this case the disciplinary complaint – is a private party. As the theory warns,[92] and the Court has ruled in other contexts,[93] the 'chilling effect' may originate not only in state actions, but also in private actions. In cases of private actions, the state has a positive obligation to shield individuals against such 'private' 'chilling effect'.[94] In *M.D. and Others*, the Court completely disregarded such obligation. Second, the case can have negative implications for future cases. States could invoke *M.D. and Others* to the detriment of applicant judges who suffered from a 'private' 'chilling effect'. Finally, the decision sends a wrong signal to constitutionally backsliding states. It seems to suggest that the Court is willing to tolerate a system where the disciplinary machinery can be triggered by 'legitimate third parties'. This may invite more harassment of judges by private

[89] *Harabin*, *supra* n. 88.

[90] ECtHR 28 June 2022, No. 36584/17, *M.D. and others* v *Spain.*

[91] Ibid., paras. 83–91.

[92] Youn, *supra* n. 6; Penney, *supra* n. 6, p. 1475-1477.

[93] ECtHR 10 January 2019, Nos. 65286/13 and 57270/14, *Khadija Ismayilova* v *Azerbaijan*, paras. 159, 160.

[94] Ibid.

parties. The Court's decision should therefore be limited to the specific circumstances of the concrete case and the Spanish context.

As this subsection suggests, the sources of the 'chilling effect' may take various forms, and may have light or even no tangible consequences. The 'chilling effect' may originate in public or private actions. Such an approach reflects a well-established principle of the Court according to which an interference with freedom of expression does not need to take the form of a penalty, but should be defined broadly as any 'formality', 'condition', or 'restriction'.[95]

The personal scope of the 'chilling effect': the potential to affect not only the targeted judge, but also other judges, prosecutors, and civil servants

The 'chilling effect' affects both the person directly targeted as well as other individuals in a similar position. This is a recurring theme that is consistent with the 'chilling effect' theory, and permeates the 'chilling effect' argument throughout the Court's case law, irrespective of whether the applicant is a journalist, activist, teacher, or judge. What is important and novel in the context of judicial speech is that the Court explicitly recognised that retaliation for the public expression of an opinion of a prosecutor may have a 'chilling effect' regarding both prosecutors and judges and vice versa.[96] In fact, the affected group may extend beyond the legal profession of the punished person. In *Guja* v *Moldova*, a case concerning a whistle-blowing prosecutor, the Court concluded that dismissing the applicant for leaking official documents to the press could create a 'chilling effect' not only on state prosecutors, but on all 'employees from the Prosecutor's Office'.[97] Moreover, the Court recognised that media coverage may extend the 'chilling effect' even further to other civil servants and employees.[98]

The Court seems to have adopted a flexible characterisation of *individuals in a similar position*, who are victims of the 'chilling effect'. This is laudable. However, the Court lacks consistency in this respect. If the Court wants to assign an accurate weight to the 'chilling effect', it should design an approach to better defining the personal scope of the 'chilling effect'. As the case law currently stands, it seems that the Court has paid very little attention to this aspect. In some cases, the scope is limited to the applicant.[99] In other cases, it extends to other judges, [100] and in some to other judicial professions. The different personal scope of the 'chilling effect' is fine as long as cases

[95]ECtHR (GC) 7 December 1976, No. 5493/72, *Handyside* v *the United Kingdom*, para. 49; *Wille*, *supra* n. 54, para. 43; *Baka*, *supra* n. 1, para. 140.

[96]*Kövesi*, *supra* n. 58, para. 209; *Miroslava Todorova*, *supra* n. 66, para. 176.

[97]ECtHR (GC) 12 February 2008, No. 14277/04, *Guja* v *Moldova*, para. 95.

[98]Ibid.

[99]*Wille*, *supra* n. 54, para. 50

[100]E.g. *Baka*, *supra* n. 1, para. 173.

https://doi.org/10.1017/S1574019623000093 Published online by Cambridge University Press

are different. However, there are differences in scope even in cases that are arguably very similar.[101]

Measures taken against prominent judges amplify the 'chilling effect'

The position of the applicant within the judicial system is one of the circumstances that the Court regularly takes into consideration in Article 10 cases.[102] The higher the position of the judge, the more responsibility it entails – with greater power comes greater responsibility. On the one hand, this requires a heightened level of discretion in the public discourse of judges in higher positions,[103] as their reckless exercise of freedom of expression can compromise public trust in the judiciary more than an identical attitude in 'ordinary' judges. This could suggest less tolerance by the Court of the views of leading judges and thus lower protection under Article 10. On the other hand, the Court has been reiterating since *Wille* that an interference with the freedom of expression of a judge in a high position calls for close scrutiny,[104] which would suggest an elevated level of protection under Article 10. The question therefore arises whether a more prominent position of a judge heightens or diminishes the level of protection under Article 10. Recently, in *Żurek*, the Court seems to have answered this question. It held that prominent judges did indeed enjoy greater protection under Article 10.[105] Dissenting Judge Wojtyczek questioned this approach from the perspective of the principle of equality, a fundamental Convention value. The Court's unequivocal wording in *Żurek* begs the question of the justification of such a privileged status of prominent judges.

One justification would be that high-ranking judges must be afforded greater protection as they assume powers over the careers of their colleagues. That is why in Poland and Hungary one of the first measures paving the way for the political capture of the judiciary was to dismiss court presidents. However, the Court seems to be willing to recognise greater protection not only to judges with extensive competence within the third branch of power, such as court presidents and members of the judicial self-governing bodies.[106] Miroslava Todorova, for

[101] For example, the cases *Baka*, *supra* n. 1 and *Kövesi*, *supra* n. 58 are similar in many aspects. However, the Court limited the personal scope in *Baka* only to other judges and court presidents (para. 173), whereas in *Kövesi* the Court held that the 'chilling effect' must have affected not only the applicant but also other prosecutors and judges (para. 209).

[102] *See*, e.g., *Kövesi, supra* n. 58; *Baka*, *supra* n. 1, para. 166; and *Miroslava Todorova, supra* n. 66, paras. 173-177.

[103] *Wille*, *supra* n. 54, para. 64; *Eminağaoğlu, supra* n. 63, paras. 135, 139.

[104] *Wille*, *supra* n. 54, para. 64.

[105] *Żurek*, *supra* n. 3, para. 222.

[106] As was the case in, for example, *Kövesi*, *supra* n. 58; *Baka*, *supra* n. 1; and *Wille*, *supra* n. 54.

https://doi.org/10.1017/S1574019623000093 Published online by Cambridge University Press

example, was a first instance penal judge in Sofia, Bulgaria, and the head of the judicial association. She did not have any position of power in the self-governing structures. Nevertheless, the Court underlined the significance of her position as one of the elements of its review of proportionality throughout its reasoning.[107] Therefore, the higher protection of prominent judges must have a different justification. A more plausible explanation is that in cases involving prominent judges the Court is led by the concern that the 'chilling effect' is greater when a prominent judge is punished for expressing his or her views. This common-sense conclusion can also be drawn from *Żurek*, where the Court stressed that judge Żurek 'is one of the most emblematic representatives of the judicial community', before concluding that the measures taken against him 'undoubtedly had a "chilling effect"'.[108] Greater protection of judges holding prominent positions is therefore not some kind of privilege of the judicial elite, but is profoundly justified due to such preventing the negative consequences of the 'chilling effect'. The greater the visibility of the sanctioned judge, the greater the number of people that become familiar with the sanction and, thus, the greater the 'chilling effect'.[109] Such an approach is consistent with the 'chilling effect' theory. According to Penney, the 'chilling effect' is greater in cases where people are exposed to a personalised threat, compared to cases where people are not aware of a threat or such threat seems distant.[110] The sanctioning of a well-known judge increases the perceived proximity of the threat and arguably works similarly to sending a personalised threat to all the judges in the given country.

The 'chilling effect' and the subsidiarity principle

The Court assigns a central role to the procedural aspect of Article 10 in determining whether the interference with freedom of expression was justified. In other words, the Court meticulously scrutinises whether the national authorities have reviewed the measure according to the Convention's free speech standards. If not, this could be the sole reason for finding a violation of Article 10.[111] The central reason for such an approach is the subsidiarity principle, which has recently gained even more prominence within the Convention system.[112]

[107] *Miroslava Todorova*, *supra* n. 66, paras. 173-177.

[108] *Żurek*, *supra* n. 3, para. 227.

[109] *See*, *mutatis mutandis*, ECtHR (GC) 15 November 2018, Nos. 29580/12, 36847/12, 11252/13, 12317/13, and 43746/14, *Navalnyy* v *Russia*, para. 152.

[110] Penney, *supra* n. 6, p. 1501, 1509.

[111] *Cimperšek, supra* n. 63, paras. 66-69; *Eminağaoğlu, supra* n. 63, para. 148.

[112] Adoption of Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 2013.

https://doi.org/10.1017/S1574019623000093 Published online by Cambridge University Press

However, in addition to subsidiarity, compliance with procedural obligations has important consequences for discourse on the 'chilling effect'. According to theory, one of the factors determining the strength of the 'chilling effect' is the uncertainty of speakers as to whether their right to free speech will be protected in possible court proceeding. The procedural obligations imposed by the Court push national authorities to apply the Convention standards, and thus diminish the uncertainty and as a result the strength of the 'chilling effect'. The Court's emphasis on the procedural obligations thus has the potential to weaken the 'chilling effect'. This is even more so since the Court obliges states to pay attention to the potential 'chilling effect' when limiting freedom of expression. As made clear in *Miroslava Todorova* v *Bulgaria*, ignoring the 'chilling effect' at the national level is itself a sign that national courts have failed to comply with the Court's free speech standards. As such, it is an aggravating factor for the state regarding its procedural obligations.[113]

While we absolutely welcome the Court's approach on this point, we would like to point out the fact that the Court itself sometimes turns a blind eye to the 'chilling effect'. We identified quite a few cases in which, for unknown reasons, the 'chilling effect' argument did not appear in the Court's reasoning.[114] We therefore argue that more consistency on the part of the Court would increase the legitimacy of its requirement that national authorities pay attention to the 'chilling effect'.

Another element connected to the subsidiarity principle concerns the implementation of the Court's judgments. In *Kudeshkina (No. 2)* v *Russia*,[115] the Court held that without the proper implementation of its judgment in *Kudeshkina* v *Russia*,[116] where the Court found a violation of the freedom of expression of a judge who criticised the judicial structures in Russia, the 'chilling effect' would persist. The continued non-implementation of the judgments of the Court is therefore prolonging the 'chilling effect'.

Conclusion

Despite the proliferation of the Court's case law regarding the freedom of expression of judges in recent years, the Strasbourg jurisprudence still has to cover many scenarios. Therefore, this paper offered only a limited account of the characteristics of

[113] *Miroslava Todorova, supra* n. 66, para. 177.

[114] *Di Giovanni, supra* n. 58; *Albayrak, supra* n. 61; *Brisc, supra* n. 67; ECtHR 8 October 2020, No. 41752/09, *Goryaynova* v *Ukraine*.

[115] ECtHR 17 February 2015, No. 28727/11, *Kudeshkina* v *Russia (No. 2)*, para. 78.

[116] *Kudeshkina, supra* n. 58.

https://doi.org/10.1017/S1574019623000093 Published online by Cambridge University Press

the 'chilling effect' on judicial speech. Nevertheless, the article sheds new light on one of the most important constitutional rights of judges. By linking the freedom of expression of judges and the 'chilling effect' doctrine, it offers valuable insights for the Court's future work. Many cases concerning judicial free speech are currently pending before the Court.[117] It is therefore crucial that the Court recognises the 'chilling effect' on judicial speech in the first place. Then, in the process of balancing competing interests, the Court should assign proper weight to the 'chilling effect' argument. This is indeed a challenging task, but one that the Court may accomplish armed with a better understanding of the 'chilling effect' doctrine, which this article seeks to provide. The Court should avoid a narrow characterisation of the 'chilling effect', as occurred in *M.D. and Others v Spain*, where the Court seemed to have confined it to state actions. It should also be sensitive to the fact that the 'chilling effect' might not only affect judges, but also prosecutors and all those who oppose deleterious (judicial) reforms. Outside the context of deliberate constitutional backsliding, this article reminds domestic decision-makers to be alert to the 'chilling effect'. This is important not only to avoid their decisions beingquashed or ultimately found to be contrary to the Convention by the Court, but also due to the value of judicial expression for ensuring a democratic society. Finally, yet importantly, this article can be regarded as the first step in a broader and deeper interdisciplinary research quest to determine whether and when judges or other individuals feel free to express their opinions, or if their speech is barred by fear, turning their constitutionally guaranteed freedom into actual feardom.[118]

Mohor Fajdiga is teaching assistant and PhD candidate at the Faculty of Law, University of Ljubljana, Slovenia.

Saša Zagorc is Professor of Constitutional Law at the Faculty of Law, University of Ljubljana, Slovenia.

[117]ECtHR, No. 20592/21, *Bakaradze* v *Georgia* (communicated in October 2021); ECtHR, No. 63029/19, *Sarisu Pehlivan* v *Turkey* (communicated in November 2019); ECtHR, No. 26360/19, *Manole* v *Moldova* (communicated in June 2020); ECtHR, No. 46238/20, *Morawiec* v *Poland* (communicated in July 2022); ECtHR, No. 27444/22, *Gąciarek* v *Poland* (communicated 10 July 2022); ECtHR, No. 6904/22, *Wrobel* v *Poland* (communicated in April 2022); ECtHR, No. 51751/20, *Tuleya* v *Poland* (No. 2) (communicated in July 2021); and ECtHR, No. 21181/19, *Tuleya* v *Poland* (communicated in September 2020). The Court has decided that all cases relating to judicial reforms in Poland are to be treated as urgent (category I) (ECtHR (Press Unit), 'Poland – Press Country Profile', p. 8, https://www.echr.coe.int/Documents/CP_Poland_ENG.pdf, visited 9 June 2023).

[118]'The state of having freedom, but being afraid of expressing it' (*Urban Dictionary*: 'Feardom'), https://www.urbandictionary.com/define.php?term=feardom, visited 9 June 2023; 'The state of living in fear or being subject to laws and policies based on fear' (*Wordspy*: 'Feardom'), https://wordspy.com/words/feardom/, visited 9 June 2023.

https://doi.org/10.1017/S1574019623000093 Published online by Cambridge University Press

Acknowledgements. This research would not be possible without TRIIAL 2 (TRust, Independence, Impartiality and Accountability of Legal professionals under the EU Charter – part 2) Project that is founded by the EU under the Justice Programme (Grant agreement no. 101089737). This paper was also prepared within ARRS founded project Judicial Selection under Scrutiny: Judicial Independence, Lawfulness and Merit (No. J5-4583). We would like to thank Madalina Moraru for useful feedback on the first draft of the paper and the anonymous reviewers and editors for their insightful and constructive comments.