

The Right to Strike in Romania: Between Freedom of Expression and Democracy

Abstract

This study aims at analysing the right of judges to make strike, requests and comments on their status, including the social policy regarding service pensions. The analysis takes into account the freedom of expression of judges in the relationship with the Government and the Parliament in matters of interest for the justice system and their obligation to show restraint in their behaviour in order to avoid compromising their independence and impartiality.

KEYWORDS: democracy, right to strike, magistrates, freedom of expression

1 | Introduction

The freedom of expression is a fundamental right of Romanian-European citizens, expressly declared by the Constitution (Art. 30). According to the fundamental law, the freedom of expression of thoughts, opinions or beliefs and the freedom of creation of any kind, through live speech, writing, images, sounds or other means of public communication, are inviolable.

In the same register of fundamental rights, the Romanian Constitution (Art. 43) also establishes the right to strike for employees in order to defend their professional, economic and social interests. Law 367/2022 on social

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dialogue establishes the conditions and limits for the exercise of this right, as well as the guarantees necessary to ensure essential services for society. Thus, the law defines a strike as the voluntary and collective cessation of work by employees/workers. The strike against the social and economic policy of the Government is defined as the voluntary and collective cessation of work by employees/workers as a result of the effects of social or economic policies that lead to the reduction of some rights provided by the collective labor contracts/agreements applicable on the date of adoption of the respective policies.

Restrictions on the right to strike are established for certain professional categories, thus protecting the public interest. By law, the exercise of the right to strike has been limited for the following professional categories: prosecutors, judges, military personnel and personnel with special status within the Ministry of National Defense, the Ministry of Internal Affairs, the Ministry of Justice and from the institutions and structures under their subordination or coordination. That includes the National Penitentiary Administration, the Romanian Intelligence Service, the Foreign Intelligence Service, the Special Telecommunications Service and the personnel employed by the stationed foreign armed forces.

Regarding the exercise of the two fundamental rights, with their legal limitations, the natural question arises, whether the Romanian legislator's measure to limit the exercise of the magistrates' right to strike is consistent with the social reality in which this professional category understands to exercise its right to free expression.

The Romanian magistrates, on several occasions, chose to protest against the legislative intentions, by refusing to judge all the cases pending in the courts and granting new trial terms. As the refusal to judge essentially represents a voluntary and collective cessation of work, through which the magistrates exerted pressure on the Romanian legislator not to change their conditions for obtaining a service pension, the protest itself circumscribes the notion of a strike. Nevertheless, the magistrates, although they did not judge the cases pending in the courts in which they carried out their activity, were remunerated and benefited from all the rights that have their source in the performance of work. However, those who declared a strike in compliance with the legal provisions, such as the teachers, suffered the consequences of the voluntary and collective termination of work, their employment contracts being suspended and salaries not being paid for the entire period of the strike.

Thus, the natural question arises whether the protest of Romanian magistrates, declared by them to be a form of freedom of expression, does not, in reality, represent a strike, a form of protest prohibited by law for this professional category. We are going to answer this question in the present study.

2 | Restrictions on the Right to Free Expression of Magistrates

When analyzing the right to free expression, we must consider, in addition to the constitutional provisions those of art. 10 of the European Convention on Human Rights according to which:

1. Everyone has the right to freedom of expression. This right includes freedom of opinion and the freedom to receive or communicate information or ideas without the interference of public authorities and regardless of borders [...].
2. The exercise of these freedoms, which entails duties and responsibilities, may be subject to formalities, conditions, restrictions or sanctions provided for by law, which constitute necessary measures, in a democratic society, [...] for the protection of the reputation or the rights of others [...]

The guide published on 31 December 2020 by the European Court of Human Rights, “the most effective international human rights tribunal in the world,”^[1] regarding art. 10 of the European Convention on Human Rights includes provisions relating to the special status of actors in the field of justice and their freedom of expression in the context of judicial proceedings. It states that the general principles applicable to the freedom of expression of judges are summarized in points 162-167 of the Baka judgment against Hungary (MC). The special mission of the judiciary in society imposes on judges a duty of discretion [Morice v. France (MC), point 128]. However, the latter pursues a certain goal: the word of the

¹ Adam Wiśniewski, „Europejski Trybunał Praw Człowieka trybunałem konstytucyjnym Europy?” *Prawo i Więź*, No. 4 (2020): 320.

magistrate, unlike that of the lawyer, is considered the expression of an objective assessment that engages not only the one who expresses himself, but also, through him, the entire institution of justice (*ibid.*, point 168). The Court, exercising its control, must take into account the fact that, when the freedom of expression of public officials is at stake, the “duties and responsibilities” referred to in art. 10 § 2 are of particular importance, which justifies granting a certain margin of appreciation to the national authorities to decide whether the imputed interference is proportionate to the above-mentioned purpose [*Baka v. Hungary* (MC), § 162; *Vogt v. Germany*, § 53; *Guja v. Moldova* (MC), point 70; *Albayrak v. Turkey*, § 41].

Given the prominent position of the judiciary among state institutions in a democratic society, considering that a judge must still be perceived as a bearer of values, professionally prepared to realize them in social life, while at the same time fulfilling a role as a servant towards man and society,^[2] this approach also applies to the freedom of expression of judges in the exercise of their duties, even if the magistrates are not part of the administration in the strict sense [*Albayrak v. Turkey*, § 42; *Pitkevich v. Russia* (dec.)].

Freedom of expression is one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of each person. It follows that exceptions to this freedom must be strictly construed, and the need for any restrictions must be convincingly established.

In the case of magistrates, their right to free expression has a number of significant restrictions. Nevertheless, the Romanian magistrates publicly expressed, even during the court sessions, their opinions regarding the Government’s social policy, in the name of “judicial independence” and “protection of the rule of law.” The form of expression consisted of a protest by the magistrates, materialised in the refusal to judge and in granting new trial terms against the will of the trial participants, invoking the principle of judicial independence. Was this protest correct, moral, ethical or legal?

To identify a legal framework for the Romanian magistrates’ protest, regarding the pension law draft, it is necessary to present and analyze the principle of the independence of the judiciary. Through the Declaration on judicial ethics, adopted by the General Assembly of the European Network of Judicial Councils, during the meeting in London, 2-4 June

² Stanisław Leszek Stadniczeńko, “Office, Dignity, Authority, Conscience of the Judge... of the Republic of Poland” *Prawo i Więź*, No. 6 (2024): 871.

2010, it was emphasized that “independence is the right of every citizen in a democratic society to benefit from a justice which is independent of the legislative and executive power and which protects the freedoms and rights of citizens in a state of law.” Also, “it is up to each judge to respect and work in order to maintain the independence of the judiciary, both in terms of individual and institutional aspects.”

The magistrate’s right to free expression has a limit, namely the citizen’s right to independent justice, equidistant from politics, balanced and vertical. Also, a judge’s freedom of expression is limited by the protection of the reputation or rights of other fellow magistrates.

In the “Bangalore Principles of Judicial Conduct” it is stated that they are intended to establish standards for the ethical conduct of judges. These principles “start from the premise that judges are responsible for their conduct towards institutions specifically created to ensure compliance with judicial norms, institutions that are themselves independent and impartial.”

Also, Art. 4 of Law no. 303/2022 regarding the status of judges and prosecutors^[3] provides that

Judges and prosecutors are obliged, through their entire activity, to ensure the supremacy of the law, to respect the rights and freedoms of individuals, as well as their equality before the law and to ensure a non-discriminatory legal treatment to all participants in judicial proceedings, regardless of their quality, to comply with the Code of Ethics of judges and prosecutors and to participate in continuous professional training.

Consequently, magistrates must demonstrate morality and enjoy a good reputation. Morality resides mainly in a philosophy of “communication” with other people. Kant separates morality from any pursuit of happiness: “Morality is therefore not, properly speaking, the doctrine that teaches us how to be happy, but how we ought to be worthy of happiness” (*Critique of Practical Reason*, 1788). The only moral feeling is respect: “This is the true motive of pure practical reason. It is nothing but the pure moral law itself, in so far as it makes us feel the sublimity of our own supersensible existence. Also, it is the pure moral law in so far as it subjectively produces respect for people’s superior decision [...] respect for the moral law dictates the formula of a «categorical imperative»”. This is true for people who are at the same time conscious of their sensible existence and of the

³ Published in Romanian Official Journal, Part I no. 1102 of 16 November 2022.

dependence which results for them regarding their nature, pathologically affected: “They act according to the saying which at the same time can itself become a universal law” (*The Foundation of the Metaphysics of Morals*, 1783). Everyone carries within themselves the moral law and must, therefore, be an object of respect:

For rational beings are all subjects of the law according to which no one must ever treat himself and treat others simply as means, but always at the same time as ends in themselves.

Therefore, regardless of their opinions, magistrates must carry out their work with professionalism and balance, and their political beliefs must not be reflected in the decisions taken. Yes, they are free to express their opinions, but this right of magistrates has several limitations and restrictions.

The Charter of Fundamental Rights of the European Union regulates, in Art. 11, freedom of expression and information. The first paragraph of this Article provides:

Every person has the right to freedom of expression. This right includes freedom of opinion and freedom to receive or impart information or ideas without interference by public authorities and regardless of frontiers.

CCJE Opinion No. 25 (2022) on the freedom of expression of judges,^[4] was developed on the basis of previous opinions of the CCJE, the Magna Carta of the CCJE Judges (2010) and the relevant instruments of the Council of Europe, in particular the European Charter on the Statute of Judges (1998) and the recommendation of the Committee of Ministers CM/Rec(2010)12 on judges: Independence, Efficiency and Responsibilities, Report of the European Commission for Democracy through Law (Venice Commission) on the freedom of expression of judges (CDLAD(2015)018).

The opinion takes into account the UN Basic Principles on the Independence of the Judiciary, the Bangalore Principles of Judicial Conduct and the Report of the UN Special Rapporteur on the Independence of Judges and Lawyers, which also concerns the exercise of freedom of expression

⁴ Advisory Council of European Judges (CCJE), CCJE Opinion No. 25 (2022) on the Freedom of Expression of the Judges, Strasbourg, 2 December 2022. <http://www.forumuljudecatorilor.ro/wp-content/uploads/Avizul-CCJE-nr.-25-2022-privind-libertatea-de-exprimare-a-judecatorilor.pdf>. [accessed: 5.8.2025].

by judges. Also, the opinion is based on the jurisprudence of the European Court of Human Rights and takes into account the answers of CCJE members to the questionnaire on the freedom of expression of judges.

The opinion deals with the freedom of expression of judges and discusses the main issues regarding judicial expression. It addresses the legal and ethical obligation of a judge to rule to protect the rule of law and democracy domestically, but also at the European and international level. It examines judicial expression on matters of interest to the judiciary as well as controversial topics of public interest and examines the reserve duty of judges.

The reserve obligation is definitive as a reserve duty imposed on the judge either by the judicial authority itself or by the legislator. Judicial reserve includes the notion of judicial discretion, reserve or moderation.

From the point of view of the magistrates, the reserve obligation imposed on them cannot suppress the freedom of thought and expression, but it nevertheless prohibits any scandalous critical expressions, likely to undermine the trust and respect that their office should inspire in litigants.^[5]

Magistrates must express their opinions in a prudent, measured manner, because the obligation of impartiality they are bound by must satisfy the demands of the public service whose functionality they ensure. The sanctions applied in case of deviation from these principles must be weighted, however, in order not to produce a discouraging effect on those who would like to participate in the public debate on the effectiveness of judicial institutions.^[6]

The principle of separation of powers supports the freedom of expression of judges, if a matter of public interest, such as the functioning of the justice system, is at issue. The rule of law ensures the equality of all (citizens or state actors) before the law. Its effectiveness depends in part on public confidence in the independence and authority of the judiciary. The separation of powers presupposes both judicial independence and the freedom of expression of judges, resulting in a tension between the objective of preventing judges from behaving like politicians and, at the same

⁵ Conclusion of Professor Elena Simina Tănăsescu, member of the Superior Council of the Magistracy, expressed during the conference “Freedom of expression of magistrates. Limits and vulnerabilities”, on 30 November 2009. <https://www.forumuljudecatorilor.ro/index.php/archives/608>. [accessed: 5.8.2025].

⁶ See opinions expressed during the debates within the conference “Freedom of expression of magistrates. Limits and vulnerabilities” on 30 November 2019. <http://www.forumuljudecatorilor.ro/index.php/archives/608>. [accessed: 5.8.2025].

time, that of supporting the freedom of expression of judges as evidence of judicial independence.

The CCJE takes a broad view on the personal scope of the right to freedom of expression of judges as an individual right. Accordingly, a judge enjoys the right to freedom of expression like any other citizen. The right to free expression of judges extends to personal opinions expressed in connection with the exercise of their office and gives judges the right to make statements outside court as well as in court, both in public and in private, and to engage in public debate and in social life in general.

In their official capacity, judges have an important role in society as guarantors of the rule of law and justice. The very essence of the judicial profession is the ability to look at the subjects of litigation in an objective and impartial manner. It is equally important that judges are seen to have this ability. This is because they need the public's confidence in their independence and impartiality to be successful in carrying out their duties and maintaining the judiciary's authority to resolve legal disputes or to determine a person's guilt or innocence following a criminal charge.

It follows that judges must affirm these values through their behavior. Therefore, it is legitimate for the state to impose on judges a reserve obligation to pay due attention to their role in society.

Limitation of freedom of expression always requires substantiated justification. In the jurisprudence of the European Court of Human Rights (ECHR), an interference is considered necessary in a democratic society when it responds to a "pressing social need" and is "proportional to the legitimate aim."

The proportionality of a measure requires that it be the least restrictive measure. It follows that a balance must be struck between a particular judge's fundamental right to freedom of expression and a democratic society's legitimate interest in preserving public confidence in the judicial system. When an interference is assessed, the proportionality of the sanction or other measures should also be examined. Sanctions should not have an inhibitory effect on the exercise of freedom of expression by other judges, that is, they should not prevent other judges from exercising it in relation to the administration of justice and the judicial system.

In all public interest statements, judges should express themselves with caution, moderation in tone, balance and respect. They should refrain from discriminatory statements, politics, philosophical or religious proselytizing or militancy.

3 | The Romanian Magistrates' Protest Between the Right to Free Expression and the Right to Strike

Did the protest of Romanian magistrates, launched in June 2023, consisting in the refusal to judge the cases pending before the courts and to grant new trial terms, meet the constitutive elements of a strike or a protest as a form of freedom of expression?

Dissatisfied with the project on service pensions, magistrates in several courts and prosecutor's offices protested, postponing indefinitely all but urgent cases. The initiative of the protest actions started from the Superior Council of the Magistracy (CSM), which sent a notice urging the magistrates to rebel against the provisions of the draft law. Thus, sixteen Courts of Appeal in the country, led by the one in Bucharest, entered this form of protest. Several prosecutor's offices and courts were added to them, including DNA and DIICOT.

During the protest, only the following categories of cases were tried:

- in civil matters: presidential ordinance, protective measures, provisional suspension of execution, international child abductions, placements, adoptions, public custody, declarations as undesirable, protection orders;
- in criminal matters: cases in which defendants are under the jurisdiction of preventive measures, cases under the competence of the judge of rights and freedoms, cases in the matter of the execution of the sentence (first instance and appeals), verification of insurance measures.

The position expressed by the magistrates in the General Assemblies regarding the draft law on special pensions and supported by the Superior Council of the Magistracy was that the situation is of particular gravity and fundamentally damages the independence of the judiciary and the status of the magistrates, with direct consequences on the act of justice. The following constituted arguments for starting the protests, by postponing the judgment of the cases:

- the status of the judge is not his privilege, but it is the right of society to have an independent and impartial justice. The independence of the judge cannot be the object of political negotiation, and an

inconsiderate professional body will no longer offer the society those guarantees of independence, which are so necessary;

- the judges' pension, a service pension and not a special pension, as was stated in the public space, has been enshrined in the national legislation since 1997, and the legislator has not offered any reasonable argument to eliminate it. It was designed precisely to strengthen the status of the judge and the guarantees of independence that he must offer;
- the elimination of this component of the judge's independence is in disagreement with the constant jurisprudence of the Constitutional Court. The Court decided that the elimination of this pension for judges is contrary to the current requirements, which important international documents directly express regarding the rights of judges, considering the importance of the role them in defense of the rule of law;
- the amendments to the justice laws adopted in December 2022 represented a PNRR achieved milestone. The PNRR expressly ruled that judges' pensions are not included in the category to be amended.

The government and parliament were accused of "lack of transparency, predictability" and "disloyal behavior" in relation to the proposals to amend the law on the status of magistrates. It was stated by the magistrates that the legislator did not take into account "the inhuman volume of work, among judges, aggravated by the massive departures from the judicial system. That happened in the context of the incoherence and lack of transparency of the legislative power, the chronic undersizing of personnel schemes, not adapted for years to the huge volume of cases, the incompatibilities and prohibitions of the profession" at the time of drafting the legislative proposal.

The CSM claimed that it did not oppose to the reform of the service pension system, but that "normative solutions must be found to give efficiency to this process, respecting the independence of the judiciary and the jurisprudence of the Constitutional Court in the matter." The demands of the magistrates aimed at "regulating a real method of phasing the increase in the retirement age, over a reasonable period of time, so as not to create discriminatory situations between professionals with similar seniority in the judicial system, but with a different biological age." In addition, it was requested that the legislative solution also provide for the possibility

of early retirement of magistrates, similar to the solution that is regulated in the public pension system.

The point of view of the executive, expressed through the voice of the Minister of Justice, was that “it respects the magistrates’ right to free expression, but it starts from the premise that dialogue is the solution to solving any problem of the judicial system, not protest.”

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Judges have the right to make requests and comments regarding their status, their working conditions, as well as any other questions related to their professional interests. Judges’ associations play a prominent role in this matter. Judges should also exercise restraint to avoid compromising their impartiality or independence. In addition, public statements made in relation to the government regarding matters of interest to the judiciary should not appear as lobbying the government or as indicating how a judge would decide if certain situations came before the court. A judge

of higher rank must be especially cautious in this regard because of his prominent position”.

4 | Regulation of the Exercise of the Right to Strike in Romania

According to Art. 28 of the Charter of Fundamental Rights of the European Union,^[7] workers and employers or their organizations have the right, in accordance with Union law and national laws and practices, to negotiate and conclude collective agreements at the appropriate levels and to have recourse, in case of conflicts of interest, to collective actions to defend their interests, including strikes.^[8]

In Romania, a strike can only be triggered during a collective labor conflict, during the negotiation period of a collective labor contract. The strike is illegal when it was triggered for reasons other than those expressly provided for by the law.

The Romanian legislator limited the exercise of the right to strike both from a temporal point of view, being limited to specific operations, and from the point of view of the categories of employees who can declare a strike, as a means of protest to defend their economic and professional interests.

The strike can only be declared if the possibilities of resolving the collective labor conflict have been exhausted beforehand through the mandatory procedures provided by this law, only after the warning strike has been carried out and if the moment of its initiation has been brought to

⁷ The Charter of Fundamental Rights of the European Union is a document adopted by the European Commission, the European Parliament and the Council of the European Union on 7 December 2000, at the Nice European Council. It contains civil and political rights, as well as economic, social and cultural rights and benefits from the same legal value as the European Union treaties. The Charter acquired binding legal force with the entry into force of the Treaty of Lisbon, in December 2009, it now has a legal force equal to that of the EU treaties, published in OJ C 202, 7.6.2016, pp. 389-405.

⁸ For a detailed analysis of the right to strike as a human right see Milena Kloczkowska, “The Right to Strike as a Human Right” *Prawo i Więź*, No. 4 (2024): 259-281.

the attention of the employers by the organizers with at least 2 working days before. The term is 5 days in the case of health and social assistance units, telecommunications, radio and public television, in the units of the national energy system, operative units from the nuclear sectors, in the units of railway transport, in the units that ensure transport in community and the sanitation of localities, as well as the supply of gas, electricity, water and heat to the population. In the latter units, the strike is allowed on the condition that at least one third of the normal activity, spread over the entire duration of the day, is ensured, which does not endanger the life and health of the population and/or the safe operation of the facilities.

The decision to declare a strike is taken by the trade union organizations entitled to negotiate the collective labor contract and which triggered the collective labor conflict, therefore, the right to strike cannot be separated from the concept of freedom of association in unions.^[9] For employees/workers of units where unions are not organized, the decision to declare a strike is taken by the representatives of the employees/workers, with the written consent of at least one fourth of the number of employees/workers of the unit.

The decision to declare a strike is communicated in writing to the employer/employer's organization, as well as to the territorial labor inspectorate or the ministry responsible for social dialogue, as the case may be.

Strikes can be warning strikes, solidarity strikes and proper strikes. The strike is organized by the union organizations that triggered the collective conflict or by the representatives of the employees/workers, as the case may be, who will determine its duration. The organizers of the strike represent the strikers, throughout the duration of the strike, in relations with the employers, including before the courts, in cases where the termination of the strike is requested.

If the employer considers that the strike has been declared or is taking place in violation of the law, they will be able to address the court in whose jurisdiction the unit where the strike was declared is located with a request for the court to terminate the strike. The court sets a deadline for resolving the strike termination request, which cannot be longer than two working days from the date of its registration, and orders the parties to be summoned. The court examines the request for the termination of the strike and urgently pronounces a decision by which, as the case may be,

⁹ See also Aleksandra Bocheńska, "Kilka uwag o prawie do strajku" *Prawo i Wiąż*, No. 2 (2023): 136.

it rejects the employer's request or accepts the request and orders the termination of the strike as illegal. Court decisions are only subject to appeal. The tribunal and the court of appeal settle the request or, as the case may be, the appeal, according to the procedure provided for the settlement of collective labor disputes. If it orders the termination of the strike as illegal, the court, at the request of the interested parties, may oblige the organizers of the strike and the employees/workers participating in the illegal strike to pay compensation.

In considering the normative aspects that regulate the exercise of the right to strike in Romania, it follows that the protest of the magistrates, in the form chosen by them, constituted a true strike, which did not comply with the requirements to be considered legal.

5 | Conclusions

At the end of CCJE Opinion nNo. 25 (2022) regarding the freedom of expression of judges, a series of recommendations are formulated, among which we mention:

1. A judge enjoys the right to freedom of expression like any other citizen. In addition to this individual right of the judge, there is a requirement for the free participation of judges in debates of public interest, especially regarding matters related to the judicial system, a requirement imposed by the principles of democracy, separation of powers in the state and pluralism.
2. In situations where democracy, the separation of powers in the state or the rule of law are threatened, judges must be firm and have the obligation to express themselves in defense of the independence of the judicial system, the constitutional order and the restoration of democracy, both at the national level, as well as international. This includes views and opinions on matters that are politically sensitive and extends to both the internal and external independence of individual judges and the judiciary in general. Judges speaking on behalf of a judicial council, professional association or other representative body of the judicial system enjoy a greater freedom of appreciation in this respect.

3. Apart from associations of judges, judicial councils or any other independent body, judges individually have the ethical duty to explain to the public the judicial system, its functioning and its values. By increasing understanding, transparency and helping to avoid erroneous public representations, judges can contribute to promoting and maintaining public confidence in judicial activity.

In the Guide on the jurisprudence of the European Convention on Human Rights,^[10] Mass Protests – prepared by the Registry of the European Court of Human Rights, it is stated that protests constitute a form of expression of opinion, in the sense of Art. 10 of the ECHR.

However, analyzing the international, European and national normative provisions, it follows that the magistrates' protest, from the summer of 2023, constituted a form of strike, not permitted by domestic law for this professional category, and its consequences were harmful, affecting public confidence in the independence of the judiciary, in the force of law, in democracy and in the separation of powers in the state.

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¹⁰ Guide on the case-law – Social rights. [accessed: 4.8.2025].



