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What Kind of Judge Does the ECtHR Protect? The *Danileț v. Romania [MC]* Decision and the Two Models for Judges

1. Introduction: a case that is not just about freedom of expression

The case of *Danileț v. Romania* [GC], heard by the Grand Chamber on December 15, 2025, was naturally perceived as concerning the freedom of expression of a judge who had been disciplined for his posts on a social media platform². Indeed, this is how it was presented in the Court's official press release³. The case was examined under Article 10 of the Convention, and this interpretation is inevitable. However, it does not fully encompass the significance of the judgment.

Beyond the classic issue of the relationship between freedom of expression and the duty of restraint, the judgment brings to the forefront a deeper question concerning the very legitimacy of the judicial function. Essentially, the case forces a choice between two distinct ways of understanding the judge's authority. According to the first, this authority is preserved through discretion or even absence from the public sphere. According to the second, it may remain compatible, under certain circumstances, with measured public interventions, when justice, its independence, or the constitutional framework for the exercise of the judicial function are at stake. These two approaches appear not only in the doctrinal debate but are evident even in the structure of the ruling, in the concurring opinions, and in the separate opinion.

The stakes of the case thus go beyond the individual dispute. The relevant question is not whether the judge enjoys freedom of expression, for this is already part of the Convention's heritage. The real question is another: what kind of judge does the Convention effectively protect? A judge whose legitimacy rests on visible restraint or an active judge engaged in the public sphere?

The thesis of this article is that the *Danileț v. Romania* [GC] decision does not exalt a militant judge nor does it weaken the duty of restraint. It confirms, however, that the conventional order protects a model of judge whose legitimacy is not reduced to institutional silence. In this logic, reserve can no longer be understood as an almost automatic prohibition on public interventions, but rather as a requirement for moderation, assessed contextually and

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² ECtHR, *Danileț v. Romania* [GC], Application No. 16915/21, Decision of December 15, 2025, available at <https://hudoc.echr.coe.int/eng?i=001-247839>. All links in this article were accessible at the time of submission to the editorial office.

³ ECtHR Press Release 297 (2025), "Violation of judge's right to freedom of expression on account of sanction for Facebook posts of public interest," December 15, 2025, available at <https://hudoc.echr.coe.int/eng-press?i=003-8410006-11897331>.

compatible, in certain situations, with the public defense of judicial independence and the rule of law.

In the following pages, we will show that the decision brings to light two competing models of the judicial function, that these models have recognizable theoretical roots in Western legal culture, and that the Grand Chamber's decision is part of a broader European evolution regarding the public status of the judge in a constitutional democracy.

2. The Decision as a Confrontation Between Two Models of Judicial Legitimacy

2.1 The Facts

The applicant, a judge at the time of the events, was subject to disciplinary sanctions for two posts published on his personal Facebook page, which was accessible to the public. The first concerned political control of the military within a broader context of attempts to control all state institutions amid institutional tensions. The second referred to the difficulties faced by the Public Prosecutor's Office and was accompanied by an idiomatic expression deemed inappropriate by the national authorities. The Grand Chamber, by a vote of ten to seven, found a violation of the right to freedom of expression.

2.2 The Majority's Rationale

In examining the case, the Grand Chamber proceeded from the premise that the applicant's statements fell within the scope of Article 10 of the Convention and that the disciplinary sanction imposed for them constituted an interference with the exercise of his freedom of expression. The Court's analysis therefore focused not on the existence of the interference, but on its justification under the Convention.

To assess whether the interference was necessary in a democratic society, the Court took into account the applicant's status, the content of the messages, the public context in which they were formulated, the subject matter to which they referred, the form of expression, and the concrete effects that the national authorities attributed to the applicant's conduct⁴. Applying these criteria, the Grand Chamber held that both messages concerned matters of public interest. It also emphasized that, when democracy or the rule of law are seriously threatened, judges may state their opinion on such matters and that such interventions, in principle, enjoy a high level of protection. At the same time, the Court found that the national authorities had not provided relevant and sufficient reasons to demonstrate that the applicant's messages had concretely affected the proper functioning of the judiciary, the dignity of the office, or public confidence in the judicial system.

The majority's reasoning does not remove the duty of discretion, nor does it assert that a judge enjoys freedom of expression comparable to that of any participant in public debate. What follows, more precisely, is that the duty of discretion cannot, in and of itself, justify a disciplinary sanction. It must be considered in relation to the nature of the speech, the context in which it was made, and the existence of actual consequences for the values that the authorities claim to protect.

2.3 The Concurring Opinions

The concurring opinions place a greater emphasis on the institutional dimension of the case. From this perspective, the issue is not only a judge's individual right to express

⁴ ECtHR, *Danileț v. Romania* [GC], *op. cit.*, paragraphs 146–152, 176, 183.

themselves, but also the effect that sanctioning them may have on the judiciary as a whole. An insufficiently justified disciplinary reaction in response to statements regarding the judiciary or its constitutional framework can have a chilling effect that affects the internal independence of the judicial system.

In this manner, the concurring opinions emphasize that the duty of discretion cannot be interpreted as a general obligation to refrain from any public intervention. It is true that a judge cannot be required to become a political actor, but neither can they be expected to accept that any statement regarding the judiciary, its independence, or the institutional conditions under which they exercise their function is, by definition, suspect or incompatible with their status.

2.4 The Separate Opinion

The separate opinion expresses a stricter understanding of judicial authority and the conditions under which it can be maintained. Without denying, in principle, the applicability of Article 10 to judges, it is more inclined to grant national authorities a wider margin of appreciation when assessing the meaning of the expressions used, their public impact, and their compatibility with the requirements of the judicial office. Underlying this position is the idea that the authority of the judge must be protected through a high standard of self-restraint, discretion, and distance from modes of discourse likely to be perceived as polemical, inappropriate, or too close to public conflict.

The emphasis thus shifts from protecting the judge's expression to the symbolic protection of the office. In this logic, the main risk is not the inhibition of the magistrate's legitimate discourse, but the erosion of the image of sobriety and neutrality that the judicial authority must project in the public sphere.

2.5 The Nature of the Disagreement at Issue

From the comparison between the majority opinion, the concurring opinions, and the separate opinion, it follows that the disagreement in this case concerns not only the application of Article 10, but also the understanding of the relationship between the duty of discretion, the authority of the office, and the public presence of the judge. An analysis of these two approaches will be developed in the following section.

3. Two Models of Judicial Legitimacy for the Contemporary Judge

The case of *Danileț v. Romania* [GC] highlights two competing models of the judicial office. They do not describe real judges in a pure state, nor should they be understood as exhaustive typologies, but rather as useful analytical tools for capturing two distinct ways of conceiving the relationship between a judge's independence, authority, and public presence.

In one model, legitimacy is built through absence: the judge is credible because he does not expose himself or become involved in public conflict; his authority derives from what he refuses to become. In the other, legitimacy is built through discernment: the judge is credible because he knows not only when to remain silent, but also when silence itself would amount to institutional abandonment. The first model expresses an ethic of abstinence; the second, an ethic of moderation.

3.1 The Civic Judge

The model of the civic judge views the magistrate as the bearer of an institutional responsibility that is not limited to the rendering of judgments. It does not start from the idea of an undifferentiated expansion of the individual freedom of expression, but from a certain understanding of the concept of judicial independence. In this view, independence does not merely denote a set of external guarantees of the office, but also the judge's capacity to defend, through means compatible with his status, the framework within which the act of adjudication remains possible.

This gives rise to the distinction between independence as a state and independence as a practice. The former concerns the external guarantees of the office: irremovability, institutional autonomy, and the separation of powers. The latter concerns the way in which the judge understands, embraces, and defends them when they come under pressure. The two dimensions should not be confused. A system may maintain substantial formal guarantees and yet produce a judiciary that is excessively cautious or inhibited, unable to react when these guarantees are eroded.

From this perspective, the judge's public interventions are not, in themselves, outside the scope of the office. They can become one of the judge's legitimate forms of expression when they concern justice, its independence, or the constitutional conditions for the exercise of the judicial office. The model of the civic judge does not legitimize political activism, nor does it confuse judicial authority with public visibility. On the contrary, it entails stricter requirements than the simple freedom of an ordinary participant in public debate. The judge cannot turn the invocation of the rule of law into a pretext for polemics, partisan identification, or entering into an actual political confrontation. Precisely for this reason, the model cannot function without firm requirements regarding restraint, language, and contextualization.

The model of the civic judge is not without risks, and these must be unequivocally acknowledged. The first is the risk of slipping from legitimate institutional intervention into political judicial activism. The line between the judge who defends the structural conditions of justice and the judge who enters into a political confrontation is not always easy to draw.

The second risk concerns unequal exposure. If public intervention becomes a legitimate tool of the judicial office, it will not be exercised uniformly. Some judges will be more visible and better integrated into the public sphere than others. Instead of a shared professional culture, this could lead to a marked differentiation between judges who speak publicly with the authority of their office and those who remain withdrawn from the public sphere, with effects that are difficult to predict on the perception of impartiality and on internal cohesion.

The third risk concerns institutional language. Used indiscriminately, the concept of the rule of law can end up justifying very different interventions, perhaps even supporting opposing positions held by members of the same judiciary. This is where the requirements of the model come from: not every public statement of a judge is legitimate, but only that which remains faithful to the judge's role and the gravity of that role.

3.2 The Reserved Judge

The model of the reserved judge views the magistrate as the custodian of a fragile authority, one that is difficult to build and can be lost quickly. Unlike political authority, which is renewed through voting, the judge's authority depends largely on the perception of impartiality. Once compromised, this perception is difficult to restore and, at times, can be

only partially restored. For this reason, the obligation of reserve does not appear here as a mere rule of conduct, but as a structural condition of the office's legitimacy.

In this view, reserve fulfills a function of institutional protection. Silence does not merely play a defensive role. It preserves the gravity of the office, maintains the distance between judicial deliberation and public dispute, and reduces the risk that the litigant will encounter in court a magistrate already symbolically associated with a particular camp or a polemical stance. The judge's subjective intent is not decisive. Even when the judge pursues a legitimate goal, his or her public statements may affect the appearance of independence and neutrality in the eyes of a reasonable observer.

The model of the reserved judge thus captures an important institutional truth. A sober magistrate is harder to manipulate, less exposed to hasty reactions, and less vulnerable to being tainted by the reflexes of public confrontation. Following this logic, judicial authority is expressed primarily through the act of adjudication, not through public visibility. Therefore, the model protects, on the one hand, the appearance of impartiality and prevents the judge from becoming a public figure who risks exhausting their authority outside the exercise of judicial power⁵, and on the other hand, it protects public confidence in the judicial system as a whole.

The limits of this model, however, become apparent when the duty of discretion is interpreted so broadly that it becomes an almost universal norm of professional passivity. In such an understanding, the duty of discretion may cease to be a protective tool and instead become a mechanism of conformity. There is no longer a need for harsh prohibitions; it is sufficient for the magistrate to know that any public intervention may subsequently be characterized as imprudence, excess, or a blow to the prestige of the judiciary. In such a climate, conformism ceases to be merely an individual weakness and becomes an institutional reflex.

There is also a deeper risk stemming from the fact that silence is not neutral in all circumstances. Thus, as long as reserve prevents partisanship, it certainly serves justice. But when it is invoked to exclude almost any reaction to pressures or dysfunctions affecting the independence of the judicial system, its function is reversed: in such a situation, silence no longer defends impartiality but risks turning into institutional stillness. The issue, therefore, is not the usefulness of the duty of discretion, which this model correctly captures, but the threshold at which it ceases to be a virtue and begins to hinder the defense of the office.

The existence of fearful magistrates and a docile judiciary is, without a doubt, incompatible with the rule of law

3.3. The Distinction Between the Two Models

The difference between the reserved judge and the civic judge does not lie in the fact that one would accept the duty of reserve while the other would reject it.

In the reserved judge model, silence constitutes the preferred form of protection of judicial authority. In the civic judge model, the same obligation remains essential, but it cannot be transformed into an almost automatic prohibition on public intervention. In the first case, the major risk is the public exposure of the magistrate; in the second, the major risk arises when a legitimate requirement for prudence leads to institutional inhibition.

⁵ ECtHR, *Wille v. Liechtenstein* [GC], Application No. 28396/95, Decision of October 28, 1999.

In this light, the opposition between the two models is not one between reserve and lack of reserve, but between two ways of understanding fidelity to the judicial office. One links this fidelity primarily to restraint. The other links it to the discernment required to identify the circumstances in which silence defends the office and those in which it begins to weaken its institutional protection. The difference between the two models does not, therefore, concern the utility of the duty of reserve, which both recognize, but rather the threshold at which it ceases to be a virtue and becomes an obstacle.

4. The Western Genealogy of Judicial Typologies

Judicial typologies do not describe real judges in their pure form, but rather theoretical models useful for understanding the various relationships between law, interpretation, and the authority of the judicial office. Their purpose in this article is not purely historical or descriptive. They serve to provide a more precise framework for the two models of judicial legitimacy that the *Danileț v. Romania* [MC] decision brings to light. In this view, the case should not be read merely as a dispute concerning a magistrate's freedom of expression, but also as a point of reactivation of an older tension within Western legal culture: that between the judge who derives his legitimacy primarily from detachment and the judge whose legitimacy is built through interpretive discernment and institutional responsibility.

4.1 The Judge as the “Mouthpiece of the Law”

The starting point of the European tradition remains the legalist model. In its classical formulation, this means that the judge does not create the meaning of the norm, but rather transmits it. Montesquieu's assertion, according to which the judge is merely “the mouthpiece of the law”⁶, describes not only a technique for applying the norm but also an institutional ideal of impersonality – the authentic judge is one who intervenes personally as little as possible in the act of adjudication, his role being reduced to the strict application of the law. In this framework, the judge's legitimacy depends on fidelity to the text: his decision must be based strictly on the law, with moral evaluations or political philosophies excluded from his reasoning⁷. The will of the judge is subordinate to the will of the legislature as reflected in the law. In this view, the judge's impersonality is seen as a guarantee, and the expression of his individuality as a risk.

This model has exerted a lasting influence not only on judicial technique but also on the ethics of the office. If the judge is legitimate to the extent that he or she withdraws into the norm, then restraint becomes more than a rule of conduct: it becomes an expression of the very condition of the judiciary. His authority derives precisely from what he refuses to add to the text, from his distance from his own preferences, and from the strictest possible separation from public conflict. Within this framework, the figure of the reserved judge finds its oldest and most coherent lineage.

The limits of the model, however, become apparent when the law no longer offers solutions that are fully determined by a simple reading of the text. In difficult cases, the meaning of the norm is not available as a ready-made content, but must be established through legal reasoning, a choice among various interpretations, and justification. At this point, strict legalism can no longer fully describe the judicial process, and the judge's

⁶ Charles-Louis de Secondat, Baron de Montesquieu, *De l'esprit des lois*, Book XI, Chapter VI, translated as *Despre spiritul legilor*, Editura Științifică, Bucharest, 1964, vol. I, p. 203.

⁷ Brian Leiter, “Legal Formalism and Legal Realism: What Is the Issue?”, *Legal Theory*, vol. 16, no. 2, 2010, pp. 111–133, DOI: 10.1017/S1352325210000121.

interpretive role becomes inevitable⁸. Legal realism and contemporary theories have expressed this idea in various forms. Essentially, when the law itself does not provide a clear solution, the judge cannot simply apply the law. He must choose, interpret, justify, and prioritize. From this perspective, it becomes increasingly difficult to argue that judicial legitimacy is based exclusively on impersonality and detachment⁹.

4.2 The Judge-Interpreter and the Judge-Guardian

This shift is powerfully articulated by Ronald Dworkin. The figure of Hercules describes the ideal judge capable of reconstructing the law as a coherent principled practice and of identifying, in difficult cases, the solution that best fits the legal material and justifies it in the best light¹⁰. The core of the model lies not in the character's superhuman nature, but in the idea that the judge's legitimacy is not exhausted by formal fidelity to the norm. It includes the ability to interpretatively justify the solution in relation to the body of legal practice. In this logic, the judge is no longer merely the impersonal executor of a prior normative will, but the responsible interpreter of a law that must be made coherent in its application.

For Aharon Barak, the emphasis shifts from the methodology of interpretation to the role of the judge in a democracy. The judge is not merely the enforcer of legal norms, but also the protector of the balance between legality, rights, and the democratic order¹¹. Such a viewpoint does not transform the magistrate into a political actor, but can neither conceive of the judge as a structurally passive presence when the very constitutional framework of the functioning of the law is being undermined. In this light, the connection to *Danileț v. Romania* [GC] becomes direct: the judge who intervenes publicly, with restraint, to defend the independence of the judiciary and the constitutional order is not stepping outside their role, but rather exercises one of the most profound dimensions of the office. This is, in fact, one of the ideas that emerges from the way the majority understands the judge's role in a constitutional democracy.

Of course, these typologies should not be taken as absolute. They do not offer exhaustive models, nor can they be mechanically transferred between different legal systems.¹² Their utility, however, is real: they reveal the existence of long-standing and ongoing debates regarding the opposition between a judge legitimized primarily through restraint and a judge legitimized through interpretive or institutional discernment. From this perspective, the disagreement evident in *Danileț* is not contingent. It reproduces, in a contemporary form, an age-old tension between two ways of understanding the authority to judge.

4.3 Ost's Typology

⁸ Neil MacCormick, *Legal Reasoning and Legal Theory*, Clarendon Press, Oxford, 1978, pp. 195–200.

⁹ Oliver Wendell Holmes Jr., "The Path of the Law," *Harvard Law Review*, vol. X, no. 8, 1897, p. 461; Benjamin N. Cardozo, *The Nature of the Judicial Process*, Yale University Press, New Haven, Sixth Printing, March 1928, pp. 32–42 (Lecture III: "The Method of Sociology. The Judge as a Legislator") pp. 36; Richard A. Posner, *How Judges Think*, Harvard University Press, Cambridge, Massachusetts, 2008, chap. 1, pp. 19–32 (discussion of Holmes vs. legalism).

¹⁰ Ronald Dworkin, "Hard Cases," in *Taking Rights Seriously*, Bloomsbury Publishing, London, 1977, reprinted 2013, pp. 132–159; idem, *Law's Empire*, Harvard University Press, Cambridge, Massachusetts, 1986, pp. 225–250.

¹¹ Aharon Barak, *The Judge in a Democracy*, Princeton University Press, Princeton, 2006, pp. 122–155.

¹² Bernhard Schlink, "Hercules in Germany?," *International Journal of Constitutional Law*, vol. 1, no. 4, 2003, pp. 610–620; Cass R. Sunstein, *One Case at a Time. Judicial Minimalism on the Supreme Court*, Harvard University Press, Cambridge, Massachusetts, 1999, pp. 105–144; Ran Hirschl, *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism*, Harvard University Press, Cambridge, Massachusetts, 2004, pp. 31–49 (Chapter 2: "The Political Origins of Constitutionalization").

For the present study, François Ost's typology is more useful than the simple opposition between legalism and interpretivism. In his rumination, Ost constructs three figures: Jupiter, Hercules, and Hermes¹³. Jupiter is the figure of the judge attached to a hierarchical, stable, and closed law, in which the norm descends vertically and must be applied faithfully. Hercules is the judge-interpretor, capable of restoring the unity of law through a coherent principled construction. Hermes is the judge who mediates between different sources, principles, and normative levels, within a pluralistic legal system open to dialogue between courts.

This framework is particularly relevant to European human rights law. The Convention operates in a multilevel space, with dialogue between national and supranational courts, evolving case law, and a distinctly contextual approach. Such a law system does not structurally require a judge reduced to impersonality and subsumption, but one capable of mediating between texts, principles, contexts, and normative levels. From this perspective, proximity to the figure of Hermes is more instructive than fidelity to a rigid Jupiterian model. Herein lies, perhaps, one of the most important keys to understanding the subtle shift that *Danileț v. Romania* [MC] expresses: not the abandonment of restraint, but the increasingly visible incompatibility between a contextual conventional law and the image of the judge reduced to institutional silence.

4.4 The Majority and Minority in the *Danileț Case* within the Typological Framework

Viewed through this lens, the majority opinion in *Danileț v. Romania* [MC] falls closer to a blend of the Hercules and Hermes models. Not because it explicitly adopts Dworkin's theory or Ost's typology, but because it rejects the reduction of the judicial office to impersonality and subsumption. As evident from the reasoning, the majority gives weight to context, justification, the public interest, and the judge's role within a normative framework broader than the isolated letter of the law. In this logic, the judge may intervene publicly in certain circumstances, on certain issues, and within certain limits, without such intervention being automatically treated as incompatible with the office. In the terms of the typology proposed in the previous section, this is the position closest to that of the civic judge.

The minority view aligns more closely with the Jupiter–legalism–formalism line. It views the judicial office through the lens of clear rules, the protection of the institution through visible restraint, and heightened caution regarding any public exposure likely to affect the appearance of neutrality. From this perspective, the judge's public interventions appear more as a structural risk than as a legitimate resource. This position also is neither incoherent nor does it express indifference toward judicial independence. Rather, it expresses a different understanding of how this independence is defended: through visible withdrawal, and not through public discernment. In the terms of this study, it is the position closest to the figure of the reserved judge.

For this reason, the utility of this section is not merely ornamental. It shows that the *Danileț v. Romania* [GC] decision does not simply pit against one another two solutions regarding Article 10, but rather reactivates, in a subtle and legally effective manner, two competing traditions of judicial legitimacy. The originality of the case does not lie in creating them, but in the fact that it makes them visible again in contemporary European law and compels legal scholarship to name, organize, and evaluate them.

¹³ François Ost, "Jupiter, Hercule ou Hermes. Quel modèle pour un droit post-moderne?", *Journal des Procès*, No. 179, 1990, pp. 14–20, at <https://bib.kuleuven.be/rbib/collectie/archieven/journproc/1990-179.pdf> and No. 180, 1990, pp. 19–25, at <https://bib.kuleuven.be/rbib/collectie/archieven/journproc/1990-180.pdf>.

5. Standards of Judges' Freedom of Expression: Settling and Consolidation

The typological analysis in the preceding sections must be linked to the international and European instruments that gradually paved the way for the *Danileț v. Romania* [GC] decision to become possible. These texts do not have the same legal force nor the same normative density. Viewed together, however, they indicate a convergent trend: judicial independence is understood less and less as a privilege of the magistrate and more and more as an institutional guarantee of the rule of law, and the judge's freedom of expression is treated, within certain limits, as part of this framework.

5.1 International Texts

The first important reference is the *Universal Declaration on the Independence of Justice*, adopted in Montreal in 1983.¹⁴ Although it is not binding, it articulates early on, in a systematic manner, the idea that judicial independence concerns not only the status of the judge but the very functioning of the rule of law. In this regard, the content of paragraph 2.01 is relevant, where the three roles of the judge are listed: "a) to administer the law impartially between citizen and citizen, and between citizen and state; b) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and c) to ensure that all peoples are able to live securely under the rule of law." The judge thus appears not only as the holder of a dispute-resolution office, but also as a participant in safeguarding the legal framework within which such disputes can be adjudicated. It would take however another four decades for the drafters' intent to become legally binding.

A more precise formulation of judicial independence then appears in the UN *Basic Principles on the Independence of the Judiciary*¹⁵. Their importance lies not so much in their formal legal force as in the clarity of a principle that would become established: judicial independence must be guaranteed by the state, enshrined in domestic law, and exercised in such a way that judges can decide cases freely, impartially, and without undue influence. At the same time, it is explicitly provided that judges, like other citizens, have the right to freedom of expression, of religion, of association, and of assembly, provided that, in exercising these rights, they always conduct themselves in a manner that preserves the dignity of the office, impartiality, and the independence of the judiciary. Thus, even at this level, the idea emerges that a judge must neither be silenced nor relieved of the duty of discretion.

The same logic is found in the *Bangalore Principles of Judicial Conduct*¹⁶. These treat discretion in the public sphere not as a mere external limitation on freedom of expression, but as a requirement inherent to the impartiality, integrity, and dignity of the judicial office. A judge must avoid conduct that is likely to compromise, in the eyes of a reasonable observer, the appearance of independence and neutrality, even when his or her actual impartiality is not affected.

5.2 The Council of Europe: From Affirming Freedom to Defining Its Limits

¹⁴ *Universal Declaration on the Independence of Justice*, adopted unanimously at the final plenary session of the First World Conference on the Independence of Justice, Montreal (Quebec, Canada), June 10, 1983.

¹⁵ *Basic Principles on the Independence of the Judiciary*, adopted at the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 1985, endorsed by UN General Assembly Resolutions 40/32 and 40/146. See, in particular, Principles 1, 2, and 8.

¹⁶ *The Bangalore Principles of Judicial Conduct*, set forth in the annex to Resolution No. 2003/43 of the UN Commission on Human Rights. These principles were adopted under the auspices of the United Nations in 2001 by the Judicial Group on Strengthening Judicial Integrity, and revised at the 2002 roundtable of chief justices. See sections 2.2 and 2 on the application of the principle defining value 2, "Impartiality."

In the European context, the first official instruments addressing the status of judges are *Recommendation No. R(94)12 of the Committee of Ministers on the independence, efficiency, and role of judges*¹⁷, and the *European Charter on the Statute for Judges*¹⁸. It is significant that neither of these instruments contains an explicit provision on judges' freedom of expression. This absence is not accidental: it reflects a stage at which the emphasis still falls almost exclusively on independence as protection against external interference, rather than on the public dimension of the judge's role.

A shift in focus occurred with *Recommendation No. (2010)12 on judges: independence, efficiency and responsibilities*¹⁹. Here, the independence of the judiciary is directly linked to public trust in the justice system, and this shift also raises the issue of judges' public statements. The document proposes the establishment of court spokespersons, allows judges to join professional associations that defend their status and the rule of law, but at the same time requires restraint in relations with the media. It is not yet a standard for judges' institutional public expression, but it is already more than mere prescribed silence. Thus, the idea emerges that reserve does not exhaust the relationship between the judicial office and the public sphere.

5.3 The Decisive Contribution of the CCJE

At the Council of Europe level, the turning point is *Opinion No. 25 (2022) of the Consultative Council of European Judges on the Freedom of Expression of Judges*²⁰. The issue is addressed here at the intersection of four requirements: the judge's right to express themselves, the public's right to be informed, the right to an independent and impartial court, and the need to maintain public confidence in the judiciary. For the first time at the European level, it is explicitly stated that judges may have not only the right but also a legal and ethical duty to speak out to protect the rule of law and democracy.

At this point, the European standard no longer treats a judge's freedom of expression as a mere exceptional tolerance. It becomes part of a broader institutional reflection on how judicial independence is defended in a constitutional democracy under pressure.

5.4 The Case Law of the European Court of Human Rights

Prior to *Danileț v. Romania* [GC], the Court's case law already offered converging guidelines. The *Wille* case showed that the mere holding of a public office does not, in and of itself, justify the suppression of freedom of expression regarding a legal opinion. The *Kudeshkina* case showed that sanctioning a judge for statements regarding pressure on the judiciary raises serious issues under Article 10. The *Baka* case extended protection to situations where public expression regarding judicial reform entails serious institutional consequences, and the Court also emphasized the chilling effect on the entire judiciary. In the

¹⁷ Committee of Ministers of the Council of Europe, *Recommendation No. R(94)12 on the independence, efficiency, and role of judges*, adopted on October 13, 1994. It was replaced by CM/Rec(2010)12.

¹⁸ Adopted by the participants in the multilateral meeting on the statute for judges in Europe, organized by the Council of Europe from July 8 to 10, 1998.

¹⁹ Committee of Ministers of the Council of Europe, *Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities*, adopted on November 17, 2010. See, in particular, paras. 19 and 25.

²⁰ CCJE, *Opinion No. 25 (2022)*, op. cit. See, in particular, para. VI.

same vein, the *Żurek* case confirmed the enhanced protection for judges who publicly denounce threats to judicial independence²¹.

These cases do not yet constitute a single model, but they converge on the same idea: judicial discourse on the functioning of justice and the rule of law enjoys serious conventional protection, and sanctioning it requires rigorous justification.

The novelty of the *Danileț v. Romania* [GC] decision must be precisely articulated. It does not invent judges' freedom of expression nor does it retroactively rewrite European judicial ethics. What it does is to consolidate, at the Grand Chamber level, a standard established by international soft law, Council of Europe instruments, and previous case law. The decision does not settle for the abstract idea that a judge may speak. It more clearly imposes the requirement that the national authorities that sanctioned the judge must demonstrate, in concrete terms, that the speech in question exceeded permissible limits and why sanctioning it was necessary in a democratic society. Herein lies the relevant shift: the abstract invocation of the duty of discretion is no longer sufficient.

At the same time, the ruling clarifies an aspect that remained partially ambiguous in previous case law: the intensity of protection does not depend on the judge's formal rank within the judicial hierarchy. A judge from a lower court, without a representative function, who expresses views on matters concerning the constitutional order and the independence of the judiciary, benefits, in principle, from the same type of Convention-based protection.

Thus, through *Danileț v. Romania* [GC], there is a shift from settling to consolidation. What had previously appeared as a scattered orientation or gradual consolidation takes the form of a firmer conventional standard: it is not the judge's mere public intervention that must be presumed problematic, instead the necessity of sanctioning it must be rigorously demonstrated.

6. The Judge-as-Institution and the Judge-as-Human²². The Hermeneutic Dimension of the Decision

The typology developed in the preceding chapters describes two modes of legitimizing the judicial office, but does not fully answer the question that the *Danileț v. Romania* [MC] decision raises anew: to what extent can the person of the judge be removed from the act of adjudication? The hermeneutic perspective is useful precisely because it shows why the figure of the judge reduced to a mere office remains, in the end, a useful normative construct, but not a faithful description of the actual act of adjudication.

6.1 Understanding, Interpretation, Application

The starting point remains Georg Gadamer's observation that understanding, interpretation, and application are not three distinct and successive operations, but aspects of

²¹ ECtHR, *Wille v. Liechtenstein* [GC], op. cit.; *Kudeshkina v. Russia*, Application No. 29492/05, decision of February 26, 2009; *Baka v. Hungary* [GC], Application No. 20261/12, decision of June 23, 2016; *Żurek v. Poland*, application no. 39650/18, decision of June 16, 2022.

²² By "judge-as-institution" we mean the judge reduced to his institutional role, to his position within the system, and to the image of an impersonal application of the law. The term "judge-as-human" evokes not only vulnerability or empathy, but something more precise: judgment is carried out by a professional conscience that understands, interprets, and decides from within a legal tradition and accumulated practical experience - a horizon of pre-understanding that cannot be reset by a procedural decision or disciplinary rule. The *Danileț v. Romania* [GC] decision becomes clearer from this perspective as well.

the same process²³. When it comes to the law, the judge does not first extract a fully fixed meaning from the text, only to then transfer it, neutrally, to the facts. The meaning of the norm is formed in the very act of application, through the encounter between the text, case law, and the concrete situation.

This does not mean that the judge creates law arbitrarily. It simply means that the objectivity of the judgment is not the result of a mechanical operation, but of an interpretation governed by the language of law, methods of argumentation, and the requirement of justification. From this perspective, the figure of the completely impersonal judge can serve at most as an ideal of restraint, but not as a realistic description of the act of judging.²⁴ If the application of the norm inevitably involves the participation of the interpreter, fidelity to the office cannot be reduced to the complete erasure of the judge's person. Such a requirement may have disciplinary utility in certain contexts, but it does not adequately describe how adjudication actually occurs. In Oldfather's terms, we do not understand justice if we persist in the myth of the superhuman judge; a realistic theory of judicial behavior must include psychological, social, and institutional influences²⁵.

6.2 Legal Reasoning as Practical Reasoning

The same idea appears, using different words, in Neil MacCormick's work. In straightforward cases, deductive reasoning may suffice. In difficult cases, however, the mere application of the norm does not, on its own, produce the result: the relevance of the facts is debatable, competing principles come into conflict, and the solution must be justified²⁶. In such situations, the judge does not merely invoke the law, but must explain why he or she prefers one interpretation over another, why certain facts are deemed relevant while others are deemed not, and why a particular line of argument must prevail.

In this light, the reasoning of the Grand Chamber in *Danileț v. Romania* [GC] becomes clearer. The Court does not stop at merely noting the existence of domestic rules regarding the duty of discretion. It demands a demonstration of why the sanction was necessary, what legitimate interest it actually protected, and how the applicant's speech concretely affected impartiality or public confidence in the judiciary. In other words, the decision to sanction a judge for positions taken in public cannot be based on the logic of a mechanically applied prohibition, but rather on the logic of a carefully considered practical justification.

6.3 Integrity of the Judicial Office

This framework can also be formulated in terms of the integrity of the judicial office. The issue is not merely whether the judge complies with a rule of conduct, but whether the way in which he or she understands and applies that rule remains faithful to the institutional meaning of the office. From this perspective, the question raised by *Danileț v. Romania* [MC] concerns not only the conflict between freedom of expression and the duty of discretion, but also the principle that must govern the treatment of a judge who speaks out publicly when the independence of the judiciary and the democratic framework of its operation are affected.

The majority's reasoning can be understood, in this regard, as follows: a judge's public interventions, when they remain within institutional and non-partisan limits, do not break continuity with the office, but rather express it in a challenging form that is nonetheless

²³ Hans-Georg Gadamer, *Truth and Method*, 3rd rev. ed., Continuum, New York, 2006, pp. 305–309.

²⁴ *Ibid.*, pp. 356–360.

²⁵ Chad M. Oldfather, "Judges as Humans: Interdisciplinary Research and the Problems of Institutional Design," *Hofstra Law Review*, vol. 36, no. 1, 2007, pp. 125–147.

²⁶ Neil MacCormick, *op. cit.*, pp. 65–82, 265–289.

compatible with its requirements. Sanctioning such conduct, in the absence of a concrete and rigorous justification, does not necessarily mean protecting the impartiality or authority of the judiciary; on the contrary, it may undermine the conditions that make impartiality possible.

From this perspective, the duty of reserve cannot be understood as a rule for the complete neutralization of the judge as a person. It remains a structural requirement of the judicial office, but its application cannot be based on the fiction that the judge is merely the impersonal bearer of the law. Reserve does not disappear, but nor can it be conceived as a mere mechanism for excluding any public intervention. Its meaning depends on the context in which it is invoked and on the concrete relationship between silence, prudence, and the institutional protection of justice.

6.4 A Romanian Confirmation: The Judge's Conviction and the Impossibility of Resetting It

In the Romanian context, the hermeneutic argument receives relevant confirmation in the case law of the Constitutional Court. In Decision No. 22/2018, examining the issue of the exclusion of illegal evidence, the Court observed that the formation of the judge's conviction is a cognitive process that cannot be mechanically annulled through a simple legal operation of exclusion²⁷. The judge is not a device that can be procedurally reset; he remains the bearer of an already formed understanding, which must be legally disciplined, not fictitiously negated.

This observation goes beyond the scope of criminal proceedings. It confirms, at the constitutional level, that judgment is exercised by a living professional conscience, not by a mechanism for transferring meaning from text to solution. Viewed together, Gadamer's thesis on the unity of understanding, interpretation, and application, MacCormick's framework on practical argumentation in difficult cases, and this Romanian constitutional confirmation converge on the same point: the person of the judge is not an accident of the office, but a condition for it. If this inevitable hermeneutic residue is denied, the law is not strengthened, but rather we slide toward the fiction of a system that functions without real judges.²⁸

6.5 The Judge as a Responsible Interpreter

The conclusion is not that the judge is free from constraints, nor that the duty of discretion has become secondary. The conclusion is more limited and precise: fidelity to the office cannot be reduced to complete depersonalization, because the act of judging structurally presupposes an understanding that cannot be mechanical. This perspective highlights the deeper meaning of the *Danileț v. Romania* [MC] decision: it does not suspend the judge's statutory obligations, nor does it legitimize unlimited discursive freedom. What it corrects is an overly narrow view of the judicial office. The judge is not merely an enforcer of norms, but a responsible interpreter within a constitutional order that cannot be defended through automatisms.

7. Consequences and Perspectives: Toward a New Understanding of the Judicial Office in Europe

²⁷ CCR, *Decision No. 22 of January 18, 2018*, published in the Official Gazette of Romania, Part I, No. 177 of February 26, 2018, paras. 19–22.

²⁸ Oldfather, *idem*.

7.1 What the *Danileț v. Romania* [GC] case changes about the European legal culture

A Grand Chamber decision does not merely produce effects in the case it resolves. It can alter, sometimes subtly, the framework within which national systems understand the Convention standard. The *Danileț v. Romania* [GC] case brings about such a shift regarding the relationship between the public status of the judge and the institutional conditions for the functioning of democratic justice.

The change is not revolutionary in substance. As I have shown, it was prepared by a slow accumulation of international instruments, European standards, and converging case law. The importance of the decision, however, lies in the legal form this evolution takes: what until now functioned primarily as guidance or gradual consolidation becomes a clearer conventional standard for controlling state interference.

This recalibration also has a formative dimension. The professional training of European judges has been built, for the most part, around self-restraint, cautious language, and avoiding exposure. All of these remain important. However, they are no longer sufficient to fully describe the conditions of the judicial office in a constitutional democracy under pressure. The case of *Danileț v. Romania* [GC] does not impose an ethic of visibility, but rather one of public discernment: the ability to distinguish between the moment when silence protects the institution and the moment when that same silence leaves it defenseless.

7.2 The Future of the Duty of Reserve

One of the most important consequences of the ruling concerns the meaning of the duty of reserve. For a long time, this duty functioned as a legitimate technique of professional integrity: it prevented the judicial office from becoming entangled in polemics, self-promotion, and the logic of ideological disputes. In this form, reserve protected not only the judge's actual impartiality but also the appearance of impartiality, without which the judiciary cannot claim public trust.

The difficulty arises when an institutional protection mechanism is transformed into a general doctrine of silence. At that point, the judge is no longer required to exercise restraint, but rather to be nearly invisible; he is no longer required to avoid partisanship, but to avoid any reflective participation in the constitutional order within which he operates. Such an interpretation no longer serves the office it claims to defend.

That is why the future of the duty of reserve depends on the ability to free it from its own rigidity. It is not a matter of abandoning this duty, but of understanding it better. Today, we must distinguish between partisanship and institutional criticism, between self-promotion and taking a stand in defense of judicial independence, between polemics and measured warnings. From this perspective, the duty of reserve shifts from the realm of prohibition to that of moderation. It does not silence the judge's voice, but it imposes form and limits upon it. It does not exclude judicial civic engagement, but it disciplines it. The judge may be present in the public sphere, but this presence must remain compatible with the gravity of the office and the fragility of the institutional balance.

7.3 The Judge of the Future and the Technological Challenge

The question that defines our time is what remains irreducibly human in the act of judging. It doesn't only concern the freedom of expression of magistrates. It also concerns the broader transformation of European justice under the pressure of standardization, quantification, governance by indicators, and automated assistance technologies.

The risk is not merely technical. It is first and foremost conceptual. The more justice is conceived in terms of uniformity, measurable performance, and the reduction of uncertainty, the stronger the temptation becomes to imagine the judge as an operator within a sophisticated system of normative processing: predictable, controllable, and as undisruptive as possible. A justice system organized exclusively in this manner may become faster and more orderly, but it is not certain that it would preserve the requirements inherent in the act of judging.

This is because, as we have seen, judgment involves more than selecting a solution compatible with the text. It entails assessing a balance, understanding a human situation, and grasping the relationship between legality and equity, between the rigor of the norm and its effect on a concrete life. In all of this there remains a residue of meaning, of the human, that a purely technical operation cannot capture. The judge remains indispensable not through mere emotional humanity, but through the ability to transform the norm into responsible judgment.

This observation does not imply a rejection of modernization, but rather a refusal to accept the confusion between assistance and substitution. Technological tools can assist us in research, in organizing information, in ensuring the consistency of judicial practice, and in analyzing a vast volume of data. As these tools become more sophisticated, however, we must identify those areas that cannot be relinquished without altering the very essence of the act of justice. The recent *CEPEJ Guidelines on the Use of Generative Artificial Intelligence for Courts* emphasize precisely this point: the use of such systems raises issues of judicial independence, procedural integrity, justification, and cognitive dependence, and their results cannot replace human responsibility for decisions²⁹. In the same vein, the *Council of Europe Framework Convention on Artificial Intelligence* requires that activities throughout the life cycle of AI systems remain compatible with human rights, democracy, and the rule of law³⁰. The European *AI Act* classifies certain systems intended for the administration of justice as high-risk systems and mandates effective human oversight for them³¹. There is a normative convergence among the three sources indicated: the technical result cannot replace human responsibility for the decision.

Vulnerability to substitution is first conceptual and only then technological: the easiest to replace is the judge whom the legal order already sees as a repetitive enforcer of the norm. However, *Danileț v. Romania* [GC] – which is, of course, not a ruling on artificial intelligence – indirectly expresses resistance to a similar logic: the reduction of the judge to a compliance operator. The contextual standard imposed by the Grand Chamber, the requirement for concrete justifications, and the assessment of the systemic effects of the sanction on the judiciary point in the opposite direction from empty standardization.

7.4 Conclusion: not a new freedom, but a new obligation

The most important lesson drawn from *Danileț v. Romania* [GC] does not primarily concern the rights of the judge, but rather the conditions of the judicial office in a constitutional democracy. The decision does not enshrine unlimited freedom and does not eliminate the duty of restraint. However, in essence, it rejects the model of a judge stripped of a voice, of discernment, and of institutional accountability.

²⁹ European Commission for the Efficiency of Justice (CEPEJ), *Guidelines on the Use of Generative Artificial Intelligence for Courts*, CEPEJ(2025)18Final, Strasbourg, December 19, 2025, adopted at the 45th plenary meeting of the CEPEJ (Strasbourg, December 4–5, 2025).

³⁰ Council of Europe, *Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law*, CETS No. 225, opened for signatures on September 5, 2024.

³¹ Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024, laying down harmonized rules on artificial intelligence (*AI Act*), in particular preamble (61) and Article 14.

The tension is no longer merely between expression and restraint. It concerns two possible directions for the judicial office. In one, the judge remains a human presence, responsible, aware of his or her limits, and capable of adjudicating in a shared world. In the other, he or she increasingly resembles an institutional operator: correct, efficient, standardized, and, precisely for that reason, easier to replace in the future.

For this reason, *Danileț v. Romania* [GC] should not be read as the final episode of a disciplinary controversy, but as the beginning of a broader European debate on the internal resilience of democratic justice. If such a justice system cannot function without judges capable of understanding the world in which they adjudicate and of defending, with restraint, the conditions of their office when these are threatened, then the ruling marks not only the resolution of a case but also the emergence of a new obligation.

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