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A PRACTICAL GUIDANCE TO THE DISCOURSE ANALYSIS OF COURTS. CASE OF *DANILEŢ v. ROMANIA* (judgement of February 20, 2024, application no. 16915/21)

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ABSTRACT

An excellent opportunity for bringing to the scene the pragmatic parameters of communication and their enormous judicial effect is the judgement DANILEŢ v. ROMANIA (application no. 16915/21), issued by the European Court of Human Right (ECHR), regarding the freedom of expression - Article 10 of The European Human Rights Convention. The most important argument to attentively look at this case is represented by the different interpretative opinions generated since the beginning.

KEYWORDS: Pragmatics, linguistics, law, ECHR, Art. 10

INTRODUCTION

Multiple perspectives on studying the diversified use of language allow also addressing, in the same analysis keys, the legal language. It has thus been noticed that magistrates use, in the courtroom, in their interaction with litigants, a range of types of language strategies involving different types of humour – vernacular language, banter, colloquialisms, quips, sarcasm (Hobbs 2007, Ibrahim and Nambiar 2011, Malphurs 2010, Roach Anleau, Mack 2018). However, these strategies are lectured from a stylistic point of view, but most often pursue concrete goals that facilitate the work of judging (Huang et al. 2015).

In the study *Judicial Humour and Inter-Professional Relations in the Courtroom*, focused on the analysis of several dialogues between the judge and the lay-participants in the courtroom, Sharyn Roach Anleu and Kathy Mack (2018: 168) find that humour - except some situations when *the judicial humour can be a versatile, though incomplete, way of managing work flow and inter-professional relations in a busy courtroom* - is both a practical means of managing time, of moving from one cause to another, of ease tension, but also a normative parameter of maintaining judicial authority by restoring professional limits, of subtly and politely affirming the hierarchical status, of reinvigorating collegial relations and of distributing tasks:

”Humour has the effect of enabling the judicial officer to use authority without appearing overly authoritarian and so avoid provoking resistance from professional participants. Successful judicial humour reaffirms inter-professional task boundaries, especially those between the judiciary and the legal profession, and reinforces status hierarchies. Although judicial officers may appear to possess the highest status and greatest authority, closer investigation of situations when they use humour reveals more complex and subtle patterns of hierarchy, authority and control.”

As the above study notes, there is even an extreme type of humour – the use of sarcastic wit and humour that humiliates or embarrasses courtroom participants but provokes laughter in others (Friedman 2012; Marder 2009, 2012; McKown 2015 in Anleu, Mack 2018).

In a parallel paperwork, *Humour in the Swedish Court: Managing Emotions, Status and Power*, Stina Bergman Blix and Åsa Wettergren are interested in ways in which the typical seriousness of Swedish courts can be ignored, in particular where judges allow their authority to be temporarily attenuated (*humour is used by judges to attenuate their own power temporarily* – 2018: 204), the complex relationship between emotions and rationality, the role humour plays in alleviating fatigue and reducing the impact of stressing hearings.

All these forms of humour involving *dense layers of meaning* (Fine 1984) are observed both outside the courtroom, in the interaction between professionals, and in the context of the hearing.

At the same time, a long series of studies in sociology, psychology, philosophy, computer science and linguistics analyses irony, singularly or alongside sarcasm, not only as a form of humour, but distinctly, as a communication strategy, in relation to ironic thinking, with emphasis on the link between language irony and situational irony, differentiating an expressive level, stylistic figures and syntactic constructions, with emphasis on the cognitive processes that give rise to ironic forms (Athanasiadou, Colston 2017).

Discourse supposes also forms of incongruity. Simply put, language use reminds us that the meaning of a message does not always reveals what the speaker says, his intention, because the speaker does not always intend to convey what he says (*ironic language is a salient reminder that speakers of all languages do not always mean what they say* - Skalicky 2023).

In order to understand the meaning of a message, such as an ironical or an allusive message, a magistrate or every specialized hearer must identify all forms of incongruity which exist in a conversation. For instance, in emphasizing the incongruity implied by the ironic mechanism, the semantic-pragmatic approaches established a gradation of the forms of irony: opposition, contradiction, contrast, contraindication (Athanasiadou, Colston 2017). In cognitive linguistics, however, irony has been treated as a mechanism of mental spaces (Kihara 2005) or as a cognitive operation (Ruiz de Mendoza, Galera 2014).

I. DRAWING THE FRAMEWORK OF INTERPRETATION

I.a. Who is the speaker? / Who is the applicant?

Speech is not limited to textual construction, it implies, in addition to text, *actors* (speaker and addressee), *context, intention,* and *effect*. The first and the most important element of the speech is the speaker himself.

The judgement *DANILEŢ v. ROMANIA* refers to a Romanian magistrate, former member of the (Romanian) Superior Council of Magistracy, Vasilică-Cristi Danileț.

The ECHR judgment mentioned that ”*at the time of the facts, the applicant was a judge at the County Court of Cluj. He was known for his active participation in debates on democracy, the rule of law and justice and enjoyed a high profile at national level as a former member of the Supreme Council of the Judiciary (‘the SCM’), former Vice-President of a court, former adviser to the Minister of Justice, founding member of two non-governmental organisations operating in the field of democracy and justice and author of several legal articles*” (para. 4).

According to the public CV, the applicant is not only a judge (or an ordinary judge), but also an expert, a member of European Judges and Prosecutors Association / Association des Magistrats de l`Union Européenne, an active and hard-working teacher, an appreciated public figure who carried out civil activities, taking into account the diploma, prizes and awards he received, including an award for ‘Most Engaged in Community Projects’ at the People for People Gala, 13 November 2014 and a diploma of appreciation for contributions to pre-university legal education, Legal Gala, 21 January 2016.

With a PhD in Criminal Procedure, Cristi Danileț was a collaborator at the Master's degree program at Titu Maiorescu University, Bucharest and a collaborator in the postgraduate programme at Babeș-Bolyai University, Cluj-Napoca, course ‘Anti-corruption in public policies’ (https://cristidanilet.wordpress.com/about/).

Since 2011, he has developed a national programme on legal education for schoolchildren and high school students and he wrote many studies and books on independence of justice, impartiality of judges, judicial integrity, deontology of magistrates, judicial anticorruption; juvenile justice, alternative means of dispute resolution (stuhttps://cristidanilet.wordpress.com/about/). It is important to add that he also created not any organisation, but a NGO named ”VeDem Just – Voci pentru democrație și justiție” (VeDem Just – Voices for Democracy and Justice) and initiated a lot of projects, still active, having the purpose to prepare the children and teenagers to understand the law and the judicial system, to speak up for a free and democratic society.

During the uncertain and grey times of the interval 2017-2019, when important changes were brought to the “Justice Laws” and when *„for an independent justice and a functional rule of law, certain magistrates chose to be daily targets of slander and libel in the media loyal to the political rulers of the time, ceaseless public or private threats, investigations by the Judicial Inspection and the new Special Section, while others, especially those holding decision-making position, either locked themselves in their offices or settled with the political establishment”* (Tapalagă et al. 2020: VII), Cristi Danileț was himself a voice of his colleagues, mandated by more than 1100 judges (more than the votes that eight of nine members of the present Superior Counsil of the Magistracy received) to represent them at Brussel. In the European Parliament, he was the one of five judges who meet Mr. Antonio Tajani, the President of the European Parliament and Mr. Diego Canga Fano, Head of Cabinet in order to discuss the most important subject for the entire Romanian Magistracy – The Rule of Law.

I.b. The messages

The next element of interpretation is the *text* of the *message* or the discourse itself. The ECHR judgment contains the messages that Cristi Danileț published on his Facebook page on 9 January 2019 (para 5) and on 10 January 2019 (para 6), the last one with a hyperlink leading to a press article entitled 'The wake-up call from a prosecutor. Nowadays, living in Romania is a huge risk. The red line was crossed with regard to justice':

Romanian

[1]„Poate că cineva remarcă totuși succesiunea atacurilor, destructurărilor și decredibilizărilor la adresa următoarelor instituții: Direcția Generală de Informații și Protecție Internă, Serviciul Român de Informații, Serviciul de Protecție și Pază, Poliția, Direcția Națională Anticorupție, Jandarmeria, Parchetul de pe lângă Înalta Curte de Casație și Justiție, Înalta Curte de Casație și Justiție, Armata. Nu par întâmplătoare după declararea sus și tare a «abuzurilor instituțiilor de forță». Știm cu toții ce ar însemna lipsirea de eficiență sau, mai rău, preluarea controlului politic asupra acestor instituții: servicii, poliție, justiție, armată? Și, apropo de Armată: oare s-a aplecat cineva asupra dispozițiilor art. 118 alin. (1) din Constituție potrivit cărora «Armata este subordonată exclusiv voinței poporului pentru garantarea [...] democrației constituționale»? Ce ar fi dacă într-o zi am vedea armata pe stradă păzind... democrația, că tot am văzut azi că e in scădere coeficientul?! Nu v-ar surprinde să realizați ca ar fi constituțional!? Eu cred că nu vedem pădurea din cauza copacilor [...]."

[2] „Iată, ăsta procuror cu sânge în instalație: vorbește deschis despre infractori periculoși în libertate, despre ideile proaste ale guvernanților în modificarea legilor justiției, despre linșajele împotriva magistraților!"

English

[1] "Someone may have noticed the succession of attacks, the disorganization and the decredibilization of institutions such as the General Directorate of Information and Internal Protection, the Romanian Intelligence Service, the police, the National Anti-Corruption Directorate, the gendarmerie, the Public Prosecutor's Office at the High Court of Cassation and Justice, the High Court of Cassation and Justice, the army. [The attacks in question] did not appear by chance after "the abuses committed by the institutions of power". Do we know what inefficiency means, even worse would be the resumption of political control by the institutions [in question]: the services, the police, the judiciary, the army? And, with regard to the army, has anyone had the opportunity to reflect on Article 118(1) of the Constitution, which provides that 'the army shall be exclusively subordinate to the will of the people in order to guarantee ... constitutional democracy'? What would happen if one day we saw the army on the street to defend...democracy, because today we see that the number of support is decreasing? Would you be surprised to realize that this solution would be (...) in accordance with the Constitution!? In my opinion, it is the tree that hides the forest ...'

[2] 'Here is a prosecutor with blood in his veins: He speaks openly about the release of dangerous prisoners, the bad ideas of our rulers regarding legislative reforms, and the lynchings of magistrates!

At first glance, it could not be ignored the lexical level. A Romanian user can usually identify that each of the messages contains one vernacular (not vulgar) language structure:

1. a nu vedea pădurea din cauza copacilor „not see the forest for the trees" is a very known idiom also in English.
2. [procuror] cu sânge în instalație „[prosecutor] with blood in his veins", literally „[prosecutor] with blood in installation/equipment" meaning „courageous" is also a everyday idiom, used also as a title for a blood donation campaign (https://ebsradio.ro/stiri/daca-ai-sange-in-instalatie-doneaza-campanie-a-unui-tanar-clujean-care-stie-ce-inseamna-sa-ai-nevoie-de-transfuzie-sanguina/).

From this point of view, it would be important to us to understand which are „a series of statements made in colourful language", mentioned in the dissident opinion common to the judges Kucsko-Stadlmayer, Eicke and Bormann (para 5). What would be a „colorful language"? As noticed in present Introduction, a language that implies different registers of expression, including a everyday, non-specialized, common language as in the messages above, is widely used in European courts.

Koen Lemmens, the author of the article *Judges on social media: freedom of expression versus duty of judicial restraint – lessons from Danilet v. Romania,* opines that *it appears to be a lot more complicated to decide whether in a given situation judges expressed themselves appropriately,* even the majority seems *to agree that judges have to respect a certain decorum in their expressions.*

Even admit that the author has no knowledge of the Romanian language and stressed that the dissident opinion was *focused on the tone of voice* (sic!) *and the language in which the messages were formulated, not on their contents* (https://strasbourgobservers.com/2024/06/07/judges-on-social-media-freedom-of-expression-versus-duty-of-judicial-restraint-lessons-from-danilet-v-romania/), he has a point:

„I must admit that the quotes in the judgment, referring to the applicant's statements on Facebook, are very hard to "understand". Without good knowledge of the Romanian political context and without any command of the Romanian language, the connotation of its sayings and expressions, it is very difficult to assess whether the limits of professional discretion or decency have been overstepped. For the dissenters, this is a reason to adopt a deferential approach and to question whether it is for an international court to substitute the domestic courts' appreciation with its own. Be that as it may, this case certainly illustrates that it might be an excellent idea for future applicants to sufficiently explain the linguistic and contextual specificities of their statements to the Strasbourg Court."

It is evidence in pragmatic that the meaning could not be found or re-constructed outside the context or the various contexts of the message. Nevertheless, for the same arguments, the judges who state on the violation or non-violation of the Article 10 of European Convention of Human Rights with some enormous implication on the ECHR case-law should clearly explain the reasons for what they consider one meaning of a message instead of another. The Romanian judge either does not take into consideration to explain, as a native Romanian speaker, besides context, the meaning, the register and the style of the messages.

At second glance, the grammatical level is also very relevant: the speaker uses some modal elements that express not evidentiality, but potentiality: the modal verb *a putea* „can/may" (**Poate** că cineva remarcă … - literally translation ″Maybe someone remarks…") or the verbal mode for conditionality, expressing a hypothesis: Ce **ar fi** dacă într-o zi **am vedea** armata pe stradă păzind... democrația, că tot am văzut azi că e in scădere coeficientul?! Nu v**-ar surprinde** să realizați ca **ar fi constituțional**!? (What would happen if one day we saw the army on the street to defend...democracy, because today we see that the number of support is decreasing? Would you be surprised to realize that this solution would be (...) in accordance with the Constitution!?). All these grammatical elements are markers of attenuation (Guțu Romalo et al. 2022: 1129-1132).

The rhetorical style is recognized by the Disciplinary Section, but it does not appear that the domestic judges give any attention to it. Although the majority of the Disciplinary Section does not draw the reasons, they state that ″the message that the applicant wanted to convey was clear and easy to understand by those who had read and commented on it" (para 18).

For a specialist in linguistics, semiotics or hermeneutics, discourse analysis or pragmatic studies is a common ground that the semantic level of a text does not always convey the real meaning of the message: irony or rhetorical style, for instance, supposes incongruity, the speaker does not mean what he says.

Kreuz put it simply that ″detecting sarcasm is not always easy" and ″in written language, verbal irony and sarcasm are frequently misinterpreted because an ironist can use the rich repertoire of vocal and gesture", especially on social media where there is a *context collapse*. This is the reason why the autocratic regimes ban the sarcasm:

„Autocratic regimes with a low tolerance for dissent have found nonliteral forms of criticism to be particularly problematic" (Kreuz 2020: 125).

Could be the messages the applicant wrote ironical? There are some markers of allusion and irony onto the first message such as the signs [**?!**] and [**…**], but as the MIT specialist also observed, ″one difficulty that NLP researchers have encountered is that humans aren't all good at agreeing with each other about whether a particular post is ironic" (Kreuz 2020: 184). The hypothetical and ironic situation that the speaker describes (the army on the street to … defend democracy) could also be interpreted as a non-desirable situation.

The last, but not the least is the pragmatic level: the effect, i.e. the reaction of the institutions named in the first message. Did the General Directorate of Information and Internal Protection, the Romanian Intelligence Service, the police, the National Anti-Corruption Directorate, the Gendarmerie, the Public Prosecutor's Office at the High Court of Cassation and Justice, the High Court of Cassation and Justice, the Army react, have a minimal reaction? In a polarized or fractured society, the reaction of a part of private media could be exaggerated, theatrical, diverse, even guided by some peculiar interest, but a formal reaction should be relevant. Moreover, the opposite reaction of the media is not even mentioned. The High Court stopped to a few (five) negative reactions in the media without any reference to the positive reactions. In fact, the judgement of the domestic Court does not provide a real and measurable effect, any official answer of the mentioned authorities.

I.c. The multiple contexts: the historical/temporal frame, the linguistic frame, the spatial/virtual frame. Cultural frame or intertextuality

Adam (2008: 61) points out that discourse supposes being placed in a unique context of enunciation-interaction and imminent interdiscursivity (a reflection of the intertextuality proper to a group memory) in correlation with gender categories.

One of the most important, as it has a systematic and integrative representation, belongs to E. Coşeriu, for whom "the context is one of the four types of frameworks that he distinguishes in speech, alongside the *situation, region* and *universe of discourse*" (in Munteanu 2012: 267). This distinction requires clarifying with priority the concept of *frame* - used also in semantics by Ch. J. Fillmore - by reference to the concrete manifestation of language as an activity (Coșeriu 2009: 201). The framework is understood as a circumstance of linguistic activity, which 'guides any discourse, giving it meaning' and which has the possibility even to determine **the level of truth of the statements** (Coșeriu 2009: 221).

The situation is a spatial-temporary determination, created by the mere fact that one '**speaks' at a given time and place**. The situational frame is also built by language, being the one that recognizes itself by using or sub-understanding the deictic elements of time (such as adverbs *now, then, today*, etc. or verbal times), place (adverbs and prepositions with orientation function *here, there, near, far*, etc.) or person (me/us – you/you), in all mediated or unmediated updates.

The applicant does not speak at the moment of the trial or of the judgements, the applicant spoke in the frame of the year 2019, when the laws of judiciary were being modifying, when the civil society stepped out into the streets for an independent judiciary, when *„certain magistrates chose to be daily targets of slander and libel in the media loyal to the political rulers of the time", „ for an independent justice and a functional rule of law".*

By reference to the manner in which the language manifests itself in the *topos*, Coșeriu identifies another type of frame – the *region*, which can be subdivided into three other distinct microframes, the *area, the domain* and *the environment*. The region refers, in fact, to a space, but a fluid space, because the appearance of the linguistic sign exercises its limits in multiple signalling systems (written, spoken). Thus, the area confirms a linguistic tradition, it is 'the region in which the sign is known and constantly used'. The area has a limit on the horizon of the speakers, it is 'the region in which the object is known as an element of the vital horizon of the speakers or of an organic space to experience or culture', while the environment is 'a socially or culturally established region', such as such as family, school, professional communities" (Coșeriu 2009: 223).

There is no doubt that the elements of both messages are part of the horizon of the applicant as a participant of a cultural space, a universe of discourse shared with virtual fiends, Romanian language users, on the social media. But the universe of discourse is a 'universal system of meanings' that gives meaning to a discourse, such as literature, a particular science, philosophy, law, etc. The context of speech represented for Coşeriu 'all the reality surrounding a sign, a verbal act or a discourse, as the "science" of the interlocutors, as a physical presence and as an activity' (Coşeriu 2009: 319-320). Cristinel Munteanu (2012: 268) reproduces and presents the three types of context to which Coşeriu refers: idiomatic, verbal and extraverbal: 'The idiomatic context consists of 'language itself, as the "fund" of speech', because, although in speech a part of the language is concretely manifested, 'this part means (has meaning) in relation to the whole language, with all the idiomatic "science" of the speakers' (ibid.: 320). The verbal context is 'the speech itself as the "frame" of each of its parts'. It can be unmediated (consisting of the signs immediately before or after the sign considered) or mediated, encompassing, if necessary, the entire discourse (in this case being called thematic context). If one considers what is actually said, then the verbal context is positive. The context is negative if something <u>is intentionally omitted, but is allowed to be understood by insinuation, allusion or exaggeration</u> (ibid.: 320-321). The extra-verbal context consists of 'all non-linguistic circumstances which are directly perceived by the speakers' (ibid.: 321-322).

The domestic judgements do not provide previous messages or even the next messages linked to the ones in discussion, placed in the same discourse history, a minimal interaction with the "public" (the Facebook followers) in order to identify the immediate context of the texts.

E. Coşeriu also considered that this type of context is of several types: physical, empirical, natural, practical, historical and cultural." The physical context is the place of real and immediate deixis (which refers to the person present in a place and time, encoded by *me, you, here, there, today*, etc.), which the speakers have the possibility to visually identify, and the empirical one is the one that the speakers know, although they are not in their visual range (for example, they see the room and the objects in the room they are in, such as the courtroom, but they know that beyond a room there is a room, a gate, the street, etc.). Historical circumstances, particular (limited to familiar, close figures) or universal (entered into the consciousness of a large audience), constitute the historical

context. Similarly, everything that belongs to the spiritual, cultural tradition of a community represents the cultural context, which is a type of historical context (Coşeriu 2009: 227-228).

The applicant himself named the larger cultural context when he referred to the meaning of his first messages: he *referred to the historical events that took place during the 1989 Revolution* (para 13). He also reveals the unmediated discourse in the historical context: *He stated that this was neither a warning nor an invitation to disregard the law, but merely a reminder of the relevant legal provisions* (para 13).

Nevertheless, the majority of Romanian and a minority of ECHR judges did not consider the applicant's explanations linked to the different types of contexts. Surprisingly, they neither refer to a minimal or any context: historical, linguistic, cultural, unmediated, mediated, etc. Therefore, this manner of reasoning abandons exactly the meaning of the messages (which is different from the meaning of the linguistic signs) and it comes up as groundless and very questionable.

In pragmatic, *contextualism* goes beyond the usual notion of context: the interpretation of the **sentence in use**, although based on the linguistic meaning, is not reduced to it. It starts from the semantics and follows the interpretation of the sentence through mechanisms of inference that have as specific premises the meaning of linguistic signs and a certain number of data, linguistic or not, leading to a certain number of conclusions. The context is precisely the set of these premises. Thus, for Sperber and Wilson, the context is not given, but built with each sentence (Ionescu-Ruxăndoiu 2003: 62, Reboul, Moeschler 2010: 45). It goes beyond the encyclopedic information that the hearer has about the world, also involving perceptual data and information extracted from previous statements. Without context, neither the force of a speech can be determined, nor can the effect of the verbal action.

I.d. Who is the addressee? Is the addressee a hearer?

In the framework of communication, regarding the persons who received a message, Goffman (1976) has distinguished between the *ratified participants* and *non-ratified participants*. This means that a hearer is not always an addressee (Ionescu-Ruxăndoiu et al. 2023: 111), because an addressee is „any of immediate **intended** recipients of the speaker's communication” (Levinson 1983, SIL), a ratified participant. A hearer could be a non-ratified participant, meaning that the message is structured in one context to specific participants, not for everyone who actually ”hears” the message.

In fact, the Romanian judge Cristi Danileț, as every other speaker in the field of communication, considered only the ratified participants, his friends/followers on social media or the large public, who is a not-specialized addressee, a non-professional of the law. It is the message itself, structured in everyday language, that reveals his intention.

The non-ratified participants are, in Goffman's framework, exactly the judges who state in his case. They are hearers who must re-establish the context in order to extract the meaning of the messages. Only after the meaning is set they should be able to decide if there were any disciplinary misconduct.

Also in Goffman's framework, it would be extremely important to take into account the status or the positioning strategy of the non-ratified participants: did they share the same ideas or opinions with the applicant in the context of the years 2017-2019 regarding the important changes brought to the “Justice Laws”? Did they consider coherently every linked message that the speaker/applicant wrote for his public?

I.e. What does the applicant intend to say? The collision of intentions

”Hermeneutics is the theory of interpretation. It is the theory that everything is a matter of interpretation” (Caputo 2018: 4). *Volens nolens*, a judge must do a ”judicial hermeneutics”, must interpret the linguistic signs that codify the law. This is the essence of his work (Gioroceanu 2023). Moreover, the magistrates should understand not only the vernacular/everyday language, but also, they should know how to restore/re-construct the meaning of a linguistic message linked to the intention of a speaker.

In semiotics, the intention had a trichotomous conceptualization. In order to outline a semiotic process of reception related to interpretation, Umberto Eco (2005) capitalized on the meanings of intention found in hermeneutics, which oppose the interpretation in the research sense of an *intentio auctoris*, the interpretation as investigation of an *intentio operis* and the interpretation as imposition of an *intentio lectoris*. It should be noted at the outset that, unlike the understanding of intention as an intentional state, as it appears for J.R. Searle, and which should be attributed only to a mind, since only the mind could be oriented towards something, to Eco and his followers this has a different meaning.

Intentio operis, meaning ‘the intention of the text’ is not, however, in terms of pragmatics, a true intention: once encoded and externalised, thrown into the world, the intentional state of the author (the author’s intention) becomes ‘world’. The text, detached from its author, is ‘world’, but it continues to preserve the intention of the

speaker. Subsequently, in relation to the text that has become world, which can be decoded into different interpretation strategies, different other intentional states can be formed.

A very brief presentation of the already classical semiotic view of interpretation shows that it has set in opposition two search programs in the text: on the one hand, the search in the text for what the author wanted to say and, on the other hand, the search for what the text says, regardless of the intentions of its author. Within the latter, the text allows for different approaches, namely the search for what it says 'in relation to its own contextual coherence and to the situation of the signification systems to which it relates' and the search for 'what the hearer finds in it in relation to its own signification systems and/or in relation to its own arbitrary desires, impulses or criteria' (Eco 1996: 25). It is obvious that this quest belongs to a mind that leans towards the text and, depending on its skills or knowledge, can adopt several attitudes towards it, including that of "adjustment" to the text.

Some important questions continue to bring into present the Daniel Friedrich Schleiermacher's view: ”The question that unites all these interpretive separate theories is how do I understand anything spoken or written by someone else? I hear a string of words, but when I pay attention, I suddenly grasp not only the meaning of each word but also what the speaker means to convey to me. What is the mysterious process by which a hearer suddenly understands what someone else is saying? How is it that I seem to be able to connect to the mind of another human being and do so even across the barriers of time and language.” (Zimmermann 2015: 25)

There are different theories that approach the interpretation of the text, searching for a better understanding of someone else's mind (Zimmermann 2015). These theories achieve new instruments that try to explain the process of getting the meaning: *history* as a frame of interpretation (Dilthey, Husserl), frame (Fillmore 1982, 2001), *entorno* (Coșeriu), language (Gadamer 2001: 599), concepts, cultural background, practice (Heidegger 1994). The theories see the interpreter as a negotiator (Gadamer 2001) or a code breaker (Derrida 1986, cf. Caputo 2018: 117).

The ECHR judgement *DANILEȚ v. ROMANIA* refers to the intention of the speaker, who reveals not only his main intention, but the cultural, historical and linguistic context:

He explained that **the first message was part of the debate** that the appointment of the Army Chief of Staff had sparked and was **intended to draw readers' attention to a very important topic**. He added that, as provided for in the Constitution, **the army also fulfilled the role of guarantor of democracy and that consequently having an army leader appointed on political grounds was liable to have repercussions on the lives of citizens**. He thus referred to the **historical events** that took place during the 1989 revolution. He stated that this was neither a warning nor an invitation to disregard the law, but merely a reminder of the relevant legal provisions. He added that the message had nothing to do with his judicial activity, but that he was at the heart of his concerns as a citizen. **According to him, the fact that some journalists disregarded the message he wanted to convey was not attributable to him and citizens were free to submit comments on his Facebook page.** As regards the second message, the applicant confirmed that he was an advocate **for judicial independence** and that he supported any initiative in this regard. According to him, under freedom of expression, he was free to post messages on his Facebook page, since he did not comment on pending court cases or court decisions or attack other judges. Finally, he requested the hearing of several persons (magistrates, journalists, students, professors) who knew him and who could testify about his professional probity and the image of justice. The Judicial Inspectorate heard five judges and a registrar and rejected the applicant's other requests for evidence. The majority of those interviewed described him as an honest judge, very active in the field of legal education for young people and with fair personal public positions. (para 13)

The majority of the Disciplinary Section took into consideration only the texts of the messages and some explanations of the speaker. At this point it should be emphasized that the [domestic] judgements are also texts and, like any other text, contain the intention of the author, meaning members who constitute the panel. According to their ”own signification systems and/or in relation to its own arbitrary desires, impulses or criteria” (Eco 1996: 25) or their own considered *entorno*, frame or context, they stressed the *inadequate and indecent expressions* and *the manner*:

The Disciplinary Section considered that, although the style used was rhetorical, the message that the applicant wanted to convey was clear and easy to understand by those who had read and commented on it. They were therefore not value judgments, but mere **defamatory allegations, without arguments, capable of calling into question the credibility of the State institutions**. Thus, the purpose of the applicant's approach was not to initiate a debate on matters of public interest or of major importance for the judicial system. The disciplinary section

added that the fact that he had chosen a social network to make the statements at issue reinforced the applicant's wish to disclose his messages to all those who had access to his Facebook page. **This was, moreover, confirmed by the statements made by the person concerned before the judicial inspection (see paragraph 13 above)**. The Disciplinary Section took the view that the line of defence chosen by the applicant, in particular that of emphasizing his position as a private citizen, could not exclude his disciplinary liability since judges had to exercise moderation and prudence in the exercise of their freedom of expression both in the performance of their duties and in their private life in order to avoid a negative public perception of the impartiality, independence and prestige of the judiciary. **It considered that the manner in which the applicant had chosen to address the issue of the extension of the term of office of the Chief of the Military Staff and to comment on the interview with the Prosecutor C.S. was such as to upset the fair balance between his right to freedom of expression and the legitimate interest of a democratic State in ensuring that the civil service complied with the aims set out in the second paragraph of Article 10 of the Convention**. Consequently, the Disciplinary Section held that the applicant's opinions, expressed publicly and outside his professional remit, and the way in which the events in question were described, **using inadequate and indecent expressions**, were contrary to the dignity of his post and undermined the impartiality and good image of justice. (para 18)

On the contrary, three members state differently:

Stressing the non-existence of the disciplinary fault found against the applicant, three of the nine members of the Disciplinary Section issued a dissenting opinion in which they explained that the applicant had expressed, in his first message, a personal opinion on a topical issue at the material time, namely the question of the judicial suspension of the extension of the term of office of the Chief of Staff of the Army, a suspension initially upheld by the Court of Appeal and subsequently rejected by the High Court of Cassation and Justice ('the High Court'). The three judges in question considered that prohibiting judges *de plano* from commenting critically on matters of general interest was tantamount to excessively limiting their freedom of expression. As regards the second message at issue, they considered that, by publishing a comment following the article concerning the prosecutor C.S. (an article which, moreover, had given rise to debates on a forum organised for magistrates), the applicant had committed no disciplinary misconduct and that no harm had been done to the honour and good image of the judiciary. In any event, as was apparent from the testimonies gathered by the judicial inspection, the person concerned was a very active person on social networks, who showed an interest in civil society issues, was involved in the legal education of young people, and whose publications had generated only a neutral image in the eyes of his fellow judges (see paragraphs 12 13 *in fine* above). The three minority judges added that the various interpretations given by the media to the applicant's messages were not attributable to him and that the mere fact that he had expressed a personal opinion on a matter of public interest, without any reference to the court where he held office or to the magistrates, could not lead to the conclusion that the person concerned had infringed the obligation to reserve. (para 20)

The context and the intention of the speaker are once more ignored by the High Court: the judgement states (without any doubt or any discourse analysis) on the meaning of the messages, referring to selective constructions („the army going on the street") and to a process that the magistrate could not control – "the messages in question had been the subject of press articles". The judgement did not take into consideration that the image of the army going out on the street is a very powerful image in Romanian recent history – the image of the Romanian Revolution (Deletant 2022), observed and commented by many historicists, and that this reference represents an indirect way to convey meaning, involving intertextuality and contrast:

More specifically, according to the High Court, the **applicant had suggested that State institutions should be controlled by politicians** and had thus referred to the possibility of the **army 'going out on the street'**; this was tantamount to saying, as the Disciplinary Section had found, that the person concerned had exceeded the limits of freedom of expression. The High Court noted that, contrary to the applicant's contention that his messages had not had a significant resonance in the media (see paragraph 21 above), the Disciplinary Section had found that the messages in question had been the subject of press articles published in five of the most well-known media outlets and that they were likely to arouse in readers a link with historical events. (para 25)

II. ESTABLISHING THE PURPOSE OF INTERPRETATION – freedom of expression versus duty of judicial restraint

Because of the messages in question, in the interpretation of the Disciplinary Section and of the High Court, the applicant was punished. The punishment that the Disciplinary Section applied to the judge/the speaker was maintained by the High Court:

The High Court then upheld the findings made by the Disciplinary Section concerning the applicant's indirect intention and the way in which he had accepted the risk, by publishing his two messages, of undermining the good image of justice and recalled that the concepts of 'honour', 'professional probity' and 'good image of justice' were 'complex and dynamic and [they] could not be subject to a specific limitation or regulation'. It noted that, according to the Disciplinary Section, it was therefore impossible to examine those three concepts by means of testimonies or opinion polls, as the applicant wished. The conduct in this case contrary to the required conduct of a magistrate had to be examined in the light of international documents, laws or recommendations. The High Court further noted that the Disciplinary Section had legally examined all relevant criteria (the direct consequences of the facts, the undermining of the good image and prestige of justice, the conduct of the applicant, the failure to comply with statutory obligations, and the use of language that exceeded the limits of decency and probity) before imposing the sanction at issue on the applicant. In so far as the applicant's improper conduct had been revealed in a negative manner in the media and he had become an opinion-former, it was impossible to impose a less severe penalty on him. (para 26).

It is no doubt for the domestic or European courts that judges are subject to a duty of restraint in exercising the freedom of expressions, an obligation laid down in many regulation, such as the Bangalore Principles on Judicial Conduct (United Nations Office on Drugs and Crime, Vienna, 2019), the guidelines on the use of social media by magistrates, established by the Global Network for the Integrity of Justice (United Nations Office on Drugs and Crime), published in January 2019, the Recommendation CM/Rec (2010)12 of the Committee of Ministers to member States on judges: independence, efficiency and responsibilities, adopted on 17 November 2010 at the 1098th meeting of the Ministers' Deputies, the Report on the freedom of expression of judges, adopted by the Venice Commission at its 103rd plenary session (19-20 June 2015).

In other human rights jurisdiction, the freedom of expression is also attentively considered. For instance, in the case of *Lopez Lone et al. versus Honduras* (judgement of October 5, 2015) the Inter-American Court of Human Rights states:

Thus, there may be situation in which a judge, as a citizen who is a member of society, considers that he or she has a moral duty to speak out.In this regard, expert witness Leandro Despouy pointed out that it may constitute an obligation for judges to speak out "in a context in which democracy is being impaired, because they are the public officials – specifically the judicial agents – who are the guardians of the basic rights, in the face of abuses of power by other public officials or other power groups." Furthermore, expert witness Martin Federico Böhmer asserted that, during a coup d'état, judges "are obliged to support and ensure that the population knows that they support the constitutional system." He also emphasized that "[i]f one can call any opinion nonpartisan, it is the opinion emitted by the citizens of a constitutional democracy when they strongly assert their loyalty to this." Similarly, expert witness Perfecto Andrés Ibáñez indicated that, even for judges, "it is a legal obligation, a civic duty, to oppose [coups d'état]. (para 173)

Pursuing the same idea, there is an entire ECHR case-law focused on the freedom of expression, that prevails in some situations on the duty of restrain: the Court named the cases in the paragraphs of the judgment. But more importantly, the first step of every judicial analysis is to understand *in bona fide* the linguistic messages assumed by a judge. The European Court of Human Right questioned the reasons of the domestic courts referring wisely to some important lexical and contextual elements, as well as to the intention of the applicant, and provided an independent [discourse] analysis:

67. The national courts, while citing the case-law of the Court, confined themselves to an assessment of the manner in which the applicant had expressed himself, without transposing the expressions used by him into the broader context which was theirs, namely that of a debate on questions of general interest (see paragraphs 16-19 and 23-26 -above; see also, *mutatis mutandis, Mesić v. Croatia, No.* 19362/18, § 89, 5 May 2022). That said, the Court does not lose sight of the fact that certain phrases used by the applicant, a judge in office, may appear *prima facie* questionable, having regard, in particular, to their general nature – the idea of political 'control' of several State institutions (see paragraphs 5 (e) 6 above) – and having regard to the duty of restraint to which the person concerned was subject (see the case-law cited in paragraph 55 above).

68. As regards the first message at issue, the Court notes that it rather contained criticism of the political influences allegedly suffered by certain institutions, in this case the police, the judiciary and the army. The applicant referred to the constitutional provisions which provided that the army was subject to the will of the

people (see paragraph 27 above) and wondered about the risks of any political control of that institution. While using rhetorical questions, he invited his readers to imagine the army one day acting against the will of the people, citing as a pretext the desire to defend democracy; In his view, this was a mere detail which concealed a more serious problem (see paragraph 5 above).

69. Contrary to the Government's argument (see paragraph 45 above), the Court therefore considers that, put in context (see paragraphs 70-71 below), the applicant's comments amount to value judgments according to which constitutional democracy was in danger if political control of public institutions were resumed. Those statements, which do not lend themselves to a demonstration of their accuracy (*Morice*, cited above, § 126), therefore concern questions of general interest relating to the separation of powers and the need to preserve the independence of the institutions of a democratic State.

70. As regards the question whether the 'factual basis' on which those value judgments were based was sufficient, the Court notes that the disciplinary bodies which prosecuted the applicant did not dispute the applicant's argument that there was an important debate within civil society on the question of the extension of the term of office of the Chief of the Military Staff (see paragraphs 16-19 and 23-25 above), a procedure which appears to have been the subject of a judicial case (see paragraph 20 -above).

71. Moreover, before the judicial inspection, the person concerned justified his remarks by invoking the danger that the appointment of an army leader might represent, which would be based on political criteria, and gave as an example the events that took place during the 1989 revolution (see paragraph 13 above); the High Court held that the messages at issue were such as to arouse in readers a link with historical events (see paragraph 24 *in fine* above). On this point, the Court refers to the general circumstances surrounding the murderous repression, carried out with the assistance of the army, of the demonstrations of December 1989 which had broken out against the former totalitarian regime, as summarised in *Association '21 December 1989' and Others v. Romania* (Nos 33810/07 and 18817/08, §§ 12-18, 24 May 2011) and notes that the applicant made a reference to historical issues, a context in which, in principle, the passage of time increases the scope of freedom of expression enjoyed by participants in a debate on such issues (see, *mutatis mutandis*, *Smolorz v. Poland*, No17446/07, § 38, 16 October 2012 and the references cited therein).

72. As regards the second message at issue, the Court observes that the applicant had posted on his Facebook page a hyperlink leading to a press article published on a news site, containing the interview of the C.S. prosecutor on the management of criminal cases by the public prosecutor's office and on the difficulties encountered by the prosecutors in dealing with the cases assigned to them. The posting of that hyperlink was accompanied by a comment written by the applicant, which praised the courage of the prosecutor in question in that he dared to speak openly about the release of dangerous detainees, the initiatives, which he considered wrong, to amend the laws on the organisation of the judicial system and the lynchings of magistrates (see paragraph 6 above).

73. The Court notes that the applicant's message indicated an adherence to the content of the article in question and, in particular, to the ideas expressed by the prosecutor C.S., this being confirmed, moreover, by the position defended by the applicant during the disciplinary investigation (see paragraph 11 -above; see, *a contrario*, *Magyar Jeti Zrt*, cited above, §§ 78-79).

74. That said, in the Court's view, while adhering to the ideas expressed by the C.S. Prosecutor in his interview, the applicant wished to participate in a debate on problems faced by Romanian judges at the material time. The existence of that debate, among a number of Romanian judges, on the possible consequences of successive amendments to the laws on the organisation of the judiciary as regards judicial independence is, moreover, confirmed by the third party intervener, the Romanian Judges' Forum (see paragraph 44 above), as well as by the Venice Commission (see paragraph 35 above) and by the European Commission (see paragraph 38 above), and has not been disputed by the disciplinary bodies (see paragraphs 16-19 and 23-26 above). It should be pointed out that in such cases the Court attaches considerable weight to the internal context in which the contentious assertions are made (see the case-law cited in the paragraph 58 above).

75. Therefore, the Court considers that the applicant's position clearly formed part of a debate on questions of general interest, as regards legislative reforms affecting the judicial system (see, *mutatis mutandis, Żurek,* cited above, § 224, *Kozan v. Turkey,* No16695/19, § 64,[1] March 2022, *Miroslava Todorova v. Bulgaria,* No40072/13, § 175, 19 October 2021, *Kövesi,* cited above, § 207, and *Baka,* cited above, § 171; see also, to that effect, paragraph 102 of the report on freedom of expression, association and peaceful assembly by judges and prosecutors, cited in the paragraph 30 above, paragraph 19 of the annex to the Recommendation of the Committee of Ministers to Member States on judges, cited in the paragraph 33 above, and paragraphs 1 to 3 of Opinion No[25] of the CCJE, cited in the paragraph 37 above). Consequently, the Court is of the opinion, both in relation to that second message and in relation to the first, that any interference with the exercise of the freedom to provide or receive information should have been subject to strict control, the discretion of the authorities of the defendant State

being reduced in such a case (see the case-law cited in paragraph 54-above). In its view, the Romanian courts did not take due account of those factors.

The Court, in majority opinion, concluded that ”the Romanian courts have not provided **relevant and sufficient reasons** to justify the alleged interference with the applicant's right to freedom of expression, and that there has therefore been a violation of Article 10 of the Convention” (para 83).

As far as a Romanian language user or a linguist concern, the European Court did more, developed a very important discourse analysis by referring to some definitory elements of discourse required to grasp the meaning of messages, in order to verify the violation of Article 10 of the Convention.

CONCLUSIONS

The judgment *DANILEȚ v. ROMANIA* will become final under the conditions laid down in Article 44 § 2 of the Convention, being now referred to the Grand Chambre. The consequences are vital, not only from a juridical perspective that implies the application of Article 10 of the Convention of Human Rights and the punishment that a judge might suffer under the national jurisdiction, but also from a non-judicial perspective. We are finally going to find out if the domestical judge should provide [sufficient] reasons in order to show up the meaning of a message criticized as inadequate or even vulgar, if the linguistic levels of an everyday text are relevant, if the intention of a judge/speaker matters, if it is not forbidden for a judge to use irony or rhetoric style, if the various contexts/frames or the non-specialized language are obligatory elements of the judicial analysis.

The final judgement will also decide whether, in important moments for democracy, a judge should speak or ”hold his peace” forever.

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