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## **CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE)**

**CCJE Opinion No. 25 (2022)**  
**on freedom of expression of judges**

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## **I. Introduction**

1. In accordance with the mandate given to it by the Committee of Ministers, the Consultative Council of European Judges (CCJE) has prepared this Opinion on freedom of expression of judges.
2. The Opinion has been prepared on the basis of previous CCJE Opinions, the CCJE Magna Carta of Judges (2010) and relevant instruments of the Council of Europe, in particular the European Charter on the Statute for Judges (1998) and Recommendation of the Committee of Ministers CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities, the Report of the European Commission for Democracy through Law (Venice Commission) on the Freedom of Expression of Judges (CDLAD(2015)018). It also takes into account the UN Basic Principles on the Independence of the Judiciary, the Bangalore Principles of Judicial Conduct and the Report of the UN Special Rapporteur on the independence of judges and lawyers, which also deals with the exercise of freedom of expression by judges<sup>1</sup>. In addition, the Non-Binding Guidelines on the Use of Social Media by Judges of the United Nations Office on Drugs and Crime (UNODC) and the reports by the European Network of Councils for the Judiciary (ENCJ) are considered. Finally, the Opinion relies on the case law of the European Court of Human Rights (ECtHR).
3. The Opinion also takes account of the replies of CCJE members to the questionnaire on freedom of expression of judges, and of the summary of these replies and the preliminary draft prepared by the expert appointed by the Council of Europe, Ms Jannika Jahn.

## **II. Scope and objective of the Opinion**

4. The Opinion deals with freedom of expression of judges and discusses the main aspects of judicial expression. It addresses the legal and ethical duty of a judge to speak out in order to safeguard the rule of law and democracy at the domestic, but also at the European and international level. The Opinion considers judicial expression that addresses matters of concern for the judiciary, as well as controversial topics of public interest, and examines the judicial restraint that must be exercised. It covers judicial expression both inside and outside court. The Opinion intends to give general guidance to judges and a broad framework for an ongoing discussion on which parameters to consider when they exercise their right to freedom of expression. This Opinion does not seek to define a minimum scope of freedom of expression of judges.
5. For the purposes of the Opinion, the requirement of judicial restraint is therefore defined as a duty of restraint imposed on the judge either by the judiciary itself or by the legislator. For legal parameters, the Opinion relies on the case law of the European Court of Human Rights (ECtHR). For the views on ethical guidelines and recommendations expressed in this Opinion, the CCJE relies on its findings. Judicial (self-)restraint includes the notion of judicial discretion, reserve or moderation.
6. In addressing freedom of expression of an individual judge, the Opinion takes into account the partly competing and partly complementary interests involved. They include the individual judge's right to freedom of expression; the public's right to be informed

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<sup>1</sup> Report of the UN Special Rapporteur on the independence of judges and lawyers, 29 April 2019, A/HRC/41/48.

about matters of public interest; the right to a fair trial, including an impartial and independent tribunal; and the presumption of innocence. The Opinion also reflects upon the principles underpinning these rights. The principle of separation of powers undergirds the free speech of judges, if a matter of public interest, such as the functioning of the justice system, is concerned. The rule of law ensures the equality of all (whether citizens or state actors) before the law. Its effectiveness depends in part on public trust in the independence and authority of the judiciary. Separation of powers requires both judicial independence and freedom of expression of judges, which results in a tension between the aim of preventing judges from behaving like politicians and, at the same time, supporting their freedom of expression as evidence of judicial independence.

7. The Opinion also covers judges speaking or writing on behalf of judicial associations, courts or the council for the judiciary. It does not extend to retired judges because they enjoy the same right to freedom of expression as all other persons, except for confidential information acquired in the performance of their duties.
8. In circumstances where the public may not always clearly distinguish between a judge acting in a private or professional capacity, the Opinion considers statements made by judges from the perspective of their being holders of public office.
9. The Opinion does not address questions concerning judges' reasoning in their judgments, as this is the performance of a judicial duty and not an exercise of an individual right.
10. For the purposes of this Opinion, the term media encompasses print, broadcast and online media, including audio and video-streaming services<sup>2</sup>.

### **III. Overview of country regulations and practice**

11. The responses of CCJE members to the questionnaire for the preparation of the present Opinion<sup>3</sup> give an overview of the current state of member state regulations and practices.
12. Member States of the Council of Europe guarantee to judges the right to freedom of expression. The scope of protection varies among member States. In many states, it covers extrajudicial statements of opinion made in private or in public in connection with judges' professional capacity, as well as extrajudicial statements made on behalf of the interests of the judiciary. In some countries, judges are immune from suit for anything said in court unless *mala fides* is established.
13. Judges' freedom of expression is limited for the purposes of upholding the confidentiality of proceedings, internal judicial matters and the procedural rights of the parties to the proceedings. In all member States, judges are prohibited from disclosing confidential information acquired in the course of their duties that is relevant for pending proceedings and that might infringe the rights of the parties to the proceedings. They are bound by professional secrecy with regard to their deliberations.

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<sup>2</sup> The CCJE adopts the definition of media as set out in Appendix I to Recommendation CM/Rec(2022)11 of the Committee of Ministers on principles for media and communication governance, para 4.

<sup>3</sup> See at <https://www.coe.int/en/web/ccje/opinion-25-on-the-freedom-of-expression-of-judges>.

14. In the great majority of member States, judges are subject to a legal and/or ethical duty<sup>4</sup> of restraint that aims to preserve judicial independence and impartiality and public confidence in it as well as the proper administration and dignity of the judiciary. Rules on statements of opinion made by judges vary among the member States.
15. As a general rule or practice, most member States prohibit or call on judges to refrain from commenting on their own and other judges' pending or ongoing proceedings. Some member States extend this rule to decided cases, including those of other judges. However, some make an exception for the discussion of case law as part of judges' academic work, as a law teacher or in a professional environment. In many States, judges are subject to the ethical or conventional obligation not to reply to public criticism of their cases.
16. The extent to which judges may participate in public discussions concerning issues of political or social concern, the law, the judiciary or the administration of justice, and express their views on these issues in the media, varies among the member States. The same holds for the right of judges to have a political mandate or to take part in political demonstrations.
17. In some countries, judges are generally required to refrain from engaging in controversial political debates, including, among others, publicly rebuking other state organs in a hostile manner or interfering in party politics by supporting or criticising particular parties or politicians. In other member States, judges have to make sure that they avoid giving the impression of a firmly held position on a particular issue. A couple of member States allow judges to comment publicly on legislative proposals or the law in general, in particular when an association of judges makes these comments. Even if permitted, member States report that judges rarely make public statements on political matters.
18. In most member States, judges may comment on issues concerning the judiciary, its proper administration and independence or the separation of powers, provided that their critique is based on facts and arguments and that the internal workings of the judiciary are not disclosed. In some member States, public expression under certain circumstances is interpreted as an ethical duty, especially as a response to political attacks on the judiciary. To this end, judges of higher courts are sometimes given greater latitude for freedom of expression. However, in some countries, such behaviour has led to public criticism. It is therefore not uncommon that judges have to exhaust internal mechanisms, if available within the judiciary, before going public or to remain silent when the judiciary intends to issue a formal institutional opinion.
19. Public criticism of fellow judges or the judiciary has been a source of concern. Criticising other judges or other actors in the justice system, such as the prosecutor or defence counsel, is regarded as unethical or a violation of long-standing convention in some member States, especially when expressed in a disrespectful, demeaning and insulting tone or if it conveys a generally negative image of the entire judiciary.
20. In the majority of member States that responded to the questionnaire, judges must not be members of political parties or undertake any political activity, because that is seen as undermining the independence of the judiciary or as negatively affecting public trust

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<sup>4</sup> To be precise, such limitations are contained in the constitution, statutory provisions, codes of conduct, codes of ethics or long-standing judicial conventions.

in the judiciary. In some cases, the constitutional or statutory rule of incompatibility explicitly extends to the membership in legislative or executive bodies at the European, national or local level. As far as considered incompatible with their judicial office, some countries allow judges to hold political mandates if they go on leave. Of those, some member States subject judges to the ethical duty to preserve the reputation of the judiciary. Some countries allow a judge to engage in political activity in parallel with their judicial office. In that case, they require judges to avoid their political activity interfering with their impartial performance of judicial duties. In several countries, judges are subject to prohibitions against participating in public assemblies, in particular when they are of a political nature.

21. Social media use is a topic of current concern. In several member States, there is an increasing use of social media by judges. However, few codes of conduct provide specific practical guidance in this regard. If they do, they apply the general duty of judicial restraint or call for caution to avoid an infringement of the independence, impartiality or public confidence in the judiciary.
22. Few member States observe an increase in legal or ethical restrictions on judicial freedom of expression. Conversely, in several member States, judicial restraint has been relaxed, which has led to an increased public engagement of judges, especially in social media. Overall, many member States see the need for a discussion on judicial ethics, with the determination of appropriate content and limits of free expression of judges as an important task.
23. Some cases have been reported where judges suffered disciplinary sanctions due to a statement they made. For instance, in-court statements during proceedings that cast doubts on the judge's impartiality, such as racist remarks, have led to disciplinary proceedings. Before imposing a disciplinary measure, the disciplinary authority of most member States considers the nature and severity of the restriction on freedom of expression, including elements such as the specific position of the judge, the content and manner of the statement and the context in which it was made as well as the nature and severity of the disciplinary measure that the authority intends to impose. The removal of a judge may take place only as a last resort.

#### **IV. General principles**

24. As enshrined in Article 10 ECHR, everyone has the right to freedom of expression. This right includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
25. Freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every person<sup>5</sup>. It follows that exceptions to this freedom must be construed strictly and the need for any restrictions must be established convincingly<sup>6</sup>.

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<sup>5</sup> See ECtHR *Handyside v. the United Kingdom*, 07.12.1976, Appl. no. 5493/72, § 49.

<sup>6</sup> See ECtHR *Stoll v. Switzerland* [GC], 10.12.2007, Appl. no. 69698/01 § 101, reiterated in *Morice v. France* [GC], 23.04.2015, Appl. no. 29369/10, § 124.

26. The CCJE takes a broad view on the personal scope of the right to freedom of expression of judges as an individual right<sup>7</sup>. Accordingly, a judge enjoys the right to freedom of expression like any other citizen. The right to free expression of judges extends to personal opinions expressed in connection with the exercise of their office and entitles judges to make statements out of court as well as in court, both in public and in private, and to engage in public debates and in social life in general.
27. However, the institutional and governmental nature of the judicial office gives an ambivalent character to the freedom of expression of an individual judge. Statements of judges may have an impact on the public image of the justice system, as the public may generally perceive them not only as subjective but also as objective assessments and ascribe them to the entire institution.
28. In their official function, judges have a prominent role in society as guarantors of the rule of law and justice<sup>8</sup>. The very essence of being a judge is the ability to view the subjects of disputes in an objective and impartial manner. It is equally important for judges to be seen as having this ability<sup>9</sup>. This is because they need the public's trust in their independence and impartiality in order to be successful in carrying out their duties<sup>10</sup> and in preserving the authority of the judiciary to resolve legal disputes or to determine a person's guilt or innocence on a criminal charge<sup>11</sup>. It follows that judges have to affirm these values through their conduct<sup>12</sup>. It is therefore legitimate for the state to impose on judges a duty of restraint that pays due regard to their role in society<sup>13</sup>.
29. Given the above-mentioned premises, the "duties and responsibilities" referred to in Article 10(2) of the European Convention on Human Rights (ECHR) assume a special significance for statements of judges<sup>14</sup>. For legal restrictions on judges' freedom of expression, this Article provides that these must be prescribed by law and are necessary in a democratic legal order for serving a legitimate purpose. Legitimate aims, as defined in the Article, include preserving the authority and impartiality of the judiciary and the

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<sup>7</sup> Cf. ECtHR *Baka v. Hungary* [GC], 23.06.2016, Appl. no. 20261/12; *Wille v. Liechtenstein* [GC], 28.10.1999, Appl. no. 28396/95, § 62. According to the ECtHR, the pure discharge of judicial duties, i.e. statements made in connection with administrative tasks, is not covered by freedom of expression under Article 10 of the ECHR, cf. *Harabin v. Slovakia*, 20.11.2012, Appl. no. 58688/11 § 151.

<sup>8</sup> See the CCJE Magna Carta, para 1; see also ECtHR *Baka v. Hungary* [GC], 23.06.2016, Appl. no. 20261/12, § 164.

<sup>9</sup> Cf. ECtHR *Castillo Algar v. Spain*, 28.10.1998, Appl. no. 28194/95, § 45; and the famous words per Chief Justice Lord Hewart: "Justice must not merely be done but must also be seen to be done", *R. v. Sussex Justices, ex parte McCarthy*, (1924) 1 K.B. 256 at 259.

<sup>10</sup> As also recognised by the ECtHR, see *Baka v. Hungary* [GC], 23.06.2016, Appl. no. 20261/12, § 164; *Kudeshkina v. Russia*, 26.2.2009, Appl. no. 29492/05, § 86, *Morice v. France* [GC], 23.04.2015, Appl. no. 29369/10, § 128-130; *Kyprianou v. Cyprus* [GC], 15.12.2005, Appl. no. 73797/01, § 172.

<sup>11</sup> ECtHR *Morice v. France* [GC], 23.04.2015, Appl. no. 29369/10, § 129; *Di Giovanni v. Italy*, 9.7.2103, Appl. no. 51160/06, § 71.

<sup>12</sup> Cf. Recommendation of the Committee of Ministers CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities, para 21 and para 69 of the explanatory memorandum. See also The Bangalore Principles of Judicial Conduct, paras 1.6, 2.2, 2.4, 3.2, 4.6 ; Basic Principles on the Independence of the Judiciary, principle 8; Art. 4.3 European Charter on the Statute for Judges; International Association of Judges, The Universal Charter of the Judge (1999, updated 2017), Arts. 3-5, 6-2.

<sup>13</sup>; Cf. Venice Commission report on the Freedom of Expression of Judges, CDLAD(2015)018, paras 80–81; ECtHR, see *Baka v. Hungary* [GC], 23.06.2016, Appl. no. 20261/12, § 162, also for the margin of appreciation afforded to states.

<sup>14</sup> Cf. ECtHR *Baka v. Hungary* [GC], 23.06.2016, Appl. no. 20261/12, § 162.

protection of the confidentiality of proceedings. Further, the rights of others, such as the guarantee of the presumption of innocence, serve as legitimate aims for restricting freedom of expression. In the absence of a legitimate aim, a restriction of a judge's right to free expression may appear as an illegitimate retaliation against the judge for unwanted criticism<sup>15</sup>. In most member States, ethical restraints on free speech of judges are geared towards similar purposes<sup>16</sup>.

30. The restriction of free speech requires justification. In the case law of the European Court of Human Rights (ECtHR), an interference is deemed necessary in a democratic society when it responds to a "pressing social need" and is "proportionate to the legitimate aim pursued"<sup>17</sup>. Proportionality of a measure requires that it is the least restrictive measure<sup>18</sup>.
31. It follows that a balance must be struck between the fundamental right of an individual judge to freedom of expression and the legitimate interest of a democratic society to preserve public confidence in the judiciary<sup>19</sup>. The Bangalore Principles formulate two fundamental considerations in this respect. The first is whether the judge's involvement could reasonably undermine confidence in his/her impartiality. The second is whether such involvement may unnecessarily expose the judge to political attacks or be inconsistent with the dignity of judicial office. If either is the case, the judge should avoid such involvement<sup>20</sup>. The question to be asked is therefore, whether in a particular social context and in the eyes of a reasonable and informed observer, the judge has engaged in an activity, which could objectively compromise his/her independence or impartiality<sup>21</sup>. Important criteria to be considered are the wording of the statement and circumstances, context and overall background against which a statement was made, including the position of the relevant judge<sup>22</sup>.
32. In arriving at a reasonable balance, the degree to which judges may and should be involved in society requires an adequate consideration<sup>23</sup>. It should be taken into account that public statements by a judge may contribute to the protection of the rule of law and the separation of powers.
33. Corrective measures, such as a judge's recusal or voluntary withdrawal, should be preferred to a general preventive infringement of judges' freedom of expression aimed at avoiding such situations.

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<sup>15</sup> See ECtHR *Miroslava Todorova v. Bulgaria*, 19.10.2021, Appl. no. 40072/13.

<sup>16</sup> Like the Bangalore Principles, some of them refer to the dignity of the judicial office instead of the authority of the judiciary, para 4.6 of the Bangalore Principles. For confidentiality, see para 4.10 of the Bangalore Principles.

<sup>17</sup> See, for example, ECtHR *Baka v. Hungary* [GC], 23.06.2016, Appl. no. 20261/12, para 158.

<sup>18</sup> Cf. ECtHR *Perinçek v. Switzerland* [GC], 15.10.2015, Appl. no. 27510/08, § 273.

<sup>19</sup> See CCJE Opinion No. 3 (2002), paras 27 et seq, especially 28, 33. The balance struck by the ECtHR has also been subject to scholarly attention, see i.a. *Anja Seibert-Fohr*, *Judges' Freedom of Expression and Their Independence: An Ambivalent Relationship*, 89-110, and with respect to social media use, *Jannika Jahn*, *Social Media Communication by Judges: Assessing Guidelines and New Challenges for Free Speech and Judicial Duties in the Light of the Convention*, 137-153, both in: *Rule of Law in Europe - Recent Challenges and Judicial Responses*, Elósegui/Miron/Motoc (eds.), 2021.

<sup>20</sup> Commentary on the Bangalore Principles, para 134.

<sup>21</sup> CCJE Opinion No. 3 (2002), para 28.

<sup>22</sup> Cf. ECtHR *Baka v. Hungary* [GC], 23.06.2016, Appl. no. 20261/12, § 166; *Wille v. Liechtenstein* [GC], 28.10.1999, Appl. no. 28396/95, § 63.

<sup>23</sup> See CCJE Opinion No. 3 (2002), para 28; European Charter on the statute for judges, para 4.3 (explanatory commentary), states that judges shall not become social or civic outcasts.



34. The definition of the content and rules on freedom of expression and the ethical restrictions on its exercise should be done by judges themselves or judicial associations<sup>24</sup>.
35. When assessing any interference, the proportionality of the sanction or other measure must also be examined. Penalties should not have a “chilling effect” for other judges’ exercise of freedom of expression, i.e. they should not prevent other judges from exercising it in relation to issues concerning the administration of justice and the judiciary<sup>25</sup>. Opinions expressed in line with the recommendations of this Opinion should not be subject to disciplinary measures.

## V. Limitations on the freedom of expression / controversial cases

36. In order to assist judges in striking a balance between their right to freedom of expression and the goal of maintaining public confidence in their impartiality and independence, guidance should be given as regards statements that might lead to their recusal (sections 1 and 2), statements that might adversely affect the authority and reputation of the judiciary (sections 3 and 4) and the exercise of political mandates that might raise separation of powers issues (section 5).

### 1. Statements with a nexus to judicial disputes

37. The CCJE stresses that judges should refrain from making any comment that might affect or be reasonably expected to affect the right to a fair trial of any person or issue pending before them<sup>26</sup>. Statements made by a judge on a pending case, including the tone and the context of the statement, can affect this right, as the ECtHR has held<sup>27</sup>. It stressed that in the exercise of their adjudicatory function, judges must exercise maximum discretion with regard to cases with which they deal, in order to preserve their image of impartiality. Judges should behave in a manner that avoids creating the impression that they hold any personal prejudice or bias in a given case. If a judge publicly implies that he/she has already formed an unfavourable view of the applicant’s case before sitting in the case, his/her statements objectively justify the accused person’s fears about his/her impartiality<sup>28</sup>. It follows that the CCJE supports the requirement set out in the Commentary on the Bangalore Principles that a judge must display a detached, unbiased, impartial, open-minded and balanced attitude in his/her public pronouncements<sup>29</sup>, especially if a potential link exists with pending or ongoing proceedings.

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<sup>24</sup> See the Guide on How to Develop and Implement Codes of Judicial Conduct, United Nations Office on Drugs and Crime, Vienna, 2019, p. 14-16.

<sup>25</sup> See ECtHR *Baka v. Hungary* [GC], 23.06.2016, Appl. no. 20261/12, § 167. This was the case in *Kudeshkina v. Russia*, 26.2.2009, Appl. no. 29492/05, where the applicant judge was removed from office after publicly questioning the independence of the judiciary, § 99.

<sup>26</sup> See already in the CCJE Opinion No. 3 (2002), para 40, cf. Bangalore Principles, para 2.4.

<sup>27</sup> See ECtHR *Olujić v. Croatia*, 5.2.2009, Appl. no. 22330/05, §§ 59 et seq; cf. *Buscemi v. Italy*, 16.9.1999, Appl. no. 29569/95, § 68; *Lavents v. Latvia*, 28.11.2002, Appl. no. 58442/00, § 119.

<sup>28</sup> Cf. ECtHR *Lavents v. Latvia*, 28.11.2002, Appl. no. 58442/00, § 119; *Buscemi v. Italy*, 16.9.1999, Appl. no. 29569/95, § 68.

<sup>29</sup> Commentary on the Bangalore Principles, para 136, see also paras 45, 65, 71; Bangalore Principles, paras 2.2, 2.4.

38. The mere fact that a topic or issue is capable of being an issue in a future case is not sufficient to prevent judges from exercising their right to freedom of expression, especially when the likelihood of a judge having to adjudicate in such a specific case in the future is low.
39. Increased vigilance is required in the context of ongoing investigations, especially in criminal investigations with a view to the guarantee of the presumption of innocence enshrined in Article 6(2) of the ECHR<sup>30</sup>. In criminal proceedings, judges must pay particular attention to their choice of words if they want to inform the public about proceedings before a person has been tried and found guilty of a particular criminal offence<sup>31</sup>. Pronouncements on the accused person's guilt before trial run contrary to Article 6 of the ECHR<sup>32</sup>.
40. Judges' comments on decided cases, other than their own, do not necessarily raise an issue on their impartiality. Commenting on case law is directly connected to their professional activity. In their professional activities, judges have the right to make constructive and respectful comments on decided cases.
41. Judges should show circumspection in their relations with the media and refrain from any personal exploitation of any relations with journalists<sup>33</sup>. The public should not get the impression that judges want to influence the outcome of a case through media communication.
42. The CCJE agrees with the European Court of Human Rights (ECtHR) that individual judges should refrain from making use of the media with respect to their own cases, even if provoked<sup>34</sup>. If the media or interested members of the public criticise a decision, a judge should avoid answering such criticism by writing to the press or by responding to journalists' questions<sup>35</sup>. A judge should answer the legitimate expectations of the citizens through clearly reasoned decisions<sup>36</sup>. However, when judges or their judgments are unfairly criticised, the associations of judges, the council for the judiciary and/or the court president have an institutional duty to clarify the facts to preserve the image of an authoritative and independent judiciary also in public debates. In addition and in exceptional cases where a judge is defamed or denigrated, he/she should have the right to defend himself/herself and protect their integrity as any other citizen. Judges should get institutional support in that respect.
43. Confidential information acquired by a judge in his/her official capacity must not be used or disclosed by the judge for any purpose not related to the judge's official duties.

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<sup>30</sup> See ECtHR *Poyraz v. Turkey*, 7.12.2010, Appl. no. 15966/06, §§ 76-78; *Fatullayev v. Azerbaijan*, 22.4.2010, Appl. no. 40984/07, §§ 159-162; *Lavents v. Latvia*, 28.11.2002, Appl. no. 58442/00, §§ 126-127.

<sup>31</sup> See also ECtHR *Daktaras v. Lithuania*, 10.10.2000, Appl. no. 42095/98, § 41; *Butkevičius v. Lithuania*, 26.3.2002, Appl. no. 48297/99, § 50.

<sup>32</sup> Cf. ECtHR *Previti v. Italy* (dec.), 8.12.2009, Appl. no. 45291/06, § 253.

<sup>33</sup> CCJE Opinion No. 3 (2002), para 40.

<sup>34</sup> For the ECtHR case law, see *Lavents v. Latvia*, 28.11.2002, Appl. no. 58442/00, § 118; *Buscemi v. Italy*, 16.9.1999, Appl. no. 29569/95, § 67.

<sup>35</sup> Cf. Commentary on the Bangalore Principles, para 74.

<sup>36</sup> Cf. Commentary on the Bangalore Principles, para 74.

44. Under no circumstances may judges be forced to explain publicly the reasons for their judgments as delivered.

## **2. Statements regarding public debates**

45. The principles of democracy, separation of powers and pluralism call for the freedom of judges to participate in debates of public interest<sup>37</sup>. However, the principle of separation of powers requires judges to refrain from acting as politicians themselves when speaking in public. Thus, a reasonable balance needs to be struck between the degree to which judges may be involved in public debates and the need for them to be and to be seen to be independent and impartial in the discharge of their duties<sup>38</sup>. The content and context of a given statement assume special relevance in this regard<sup>39</sup>.
46. Due to their unique position in a democracy based on the rule of law, judges have the expertise and ensuing responsibility to contribute to the improvement of the law, the defence of fundamental rights, the legal system and the administration of justice<sup>40</sup>. Hence, subject to preserving their impartiality and independence, they should be permitted and even encouraged to participate in discussions on the law for informative and educational purposes<sup>41</sup> and to express views and opinions on weaknesses in the application of the law and improving the law, as well as the legal system.
47. In all public statements on matters of public interest, judges should express themselves with prudence, moderate in tone, balanced and respectful manner. They should refrain from discrimination, political, philosophical or religious proselytising or militancy.

## **3. Statements regarding matters of concern for judiciary as an institution**

48. Judges have the right to make comments on matters that concern fundamental human rights, the rule of law, matters of judicial appointment or promotion and the proper functioning of the administration of justice, including the independence of the judiciary and separation of powers<sup>42</sup>. If the matter directly affects the operation of the courts, judges should also be free to comment on politically controversial topics, including legislative proposals or governmental policy<sup>43</sup>. This follows from the fact that the public has a legitimate interest in being informed about these issues as they involve very important matters in a democratic society<sup>44</sup>. Judges in leadership positions or those holding a position in judges' associations or the council for the judiciary are in a prominent position to speak out on behalf of the judiciary.

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<sup>37</sup> Cf. ECtHR *Previti v. Italy* (dec.), 8.12.2009, Appl. no. 45291/06; cf. CCJE Opinion No. 18 (2015), para 42.

<sup>38</sup> Cf. CCJE Opinion No. 18 (2015), para 42; CCJE Opinion No. 3 (2002), paras 30 et seq, esp. 33.

<sup>39</sup> See the Report of the UN Special Rapporteur on the independence of judges and lawyers, 29 April 2019, A/HRC/41/48, para 42.

<sup>40</sup> See the Commentary on Bangalore Principles, para 156.

<sup>41</sup> See the Commentary on the Bangalore Principles, para 139.

<sup>42</sup> Report of the UN Special Rapporteur on the independence of judges and lawyers, 29 April 2019, A/HRC/41/48, para 69; see also Commentary on the Bangalore Principles, para 138; CCJE Opinion No. 3 (2002), paras 33-34.

<sup>43</sup> Commentary on the Bangalore Principles, para 138.

<sup>44</sup> Cf. ECtHR *Baka v. Hungary* [GC], 23.06.2016, Appl. no. 20261/12, § 165.

49. Judges have the right to make demands and comments concerning their status, their working conditions, as well as all other questions regarding their professional interests. Judges' associations play a prominent role on this issue<sup>45</sup>.
50. Judges should exercise restraint<sup>46</sup> to avoid compromising their impartiality or independence. Further, public representations made to the government on matters of concern for the judiciary, must not appear as lobbying the government or as indicating how a judge would rule if particular situations were to come before the court. A high-ranking judge must be particularly cautious in this regard due to his/her prominent position.

#### **4. Public criticism of the judiciary / fellow judges**

51. As regards the public critique or information of matters concerning the judiciary, including comments on fellow judges, the CCJE follows the European Court of Human Rights (ECtHR) in acknowledging that restraint applies to judges in all cases where the authority and impartiality of the judiciary are likely to be called in question<sup>47</sup>. That is because it is necessary to protect public confidence against damaging attacks, especially in view of the fact that judges who face criticism are subject to a duty of restraint that precludes them from replying<sup>48</sup>.
52. Statements are permissible if they do not go beyond mere criticism from a strictly professional perspective, if they are part of a debate on matters of great public interest and if they are based on substantiated allegations<sup>49</sup>. Moderation and propriety must guide the judge even in the dissemination of accurate information<sup>50</sup>. When criticising other actors in the justice system, a judge must maintain respect. Criticism should not be motivated by personal grievance or hostility or the expectation of personal gain. Generally, judges should avoid expressing themselves in an impulsive, irresponsible and offensive manner.
53. It is important that the judiciary provides an atmosphere that allows judges to make critical comments, especially in a hierarchically organised judiciary where judges are dependent on higher-ranking colleagues in terms of input into promotions. However, judges should avail themselves first of any existing remedial measures, before going public.

#### **5. Active political mandate / former political mandate**

54. Direct involvement in partisan party politics can raise doubts as to the separation of powers and the independence or impartiality of a judge, which is why many States restrict the political activities of judges. With the aim of guaranteeing to citizens the rights under Article 6 of the ECHR, the European Court of Human Rights (ECtHR) recognises

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<sup>45</sup> CCJE Opinion No 23 (2020).

<sup>46</sup> Commentary on the Bangalore Principles of Judicial Conduct, para 138.

<sup>47</sup> Cf. ECtHR *Kudeshkina v. Russia*, 26.2.2009, Appl. no. 29492/05, § 86; *Di Giovanni v. Italy*, 9.7.2103, Appl. no. 51160/06, § 71; *Panioglu v. Romania*, 8.10.2020, Appl. no. 33794/14, § 114.

<sup>48</sup> Cf. ECtHR *Morice v. France* [GC], 23.04.2015, Appl. no. 29369/10, § 128.

<sup>49</sup> Cf. ECtHR *Baka v. Hungary* [GC], 23.06.2016, Appl. no. 20261/12, § 171; *Panioglu v. Romania*, 8.10.2020, Appl. no. 33794/14, § 119; *Kudeshkina v. Russia*, 26.2.2009, Appl. no. 29492/05, § 93.

<sup>50</sup> See ECtHR *Kudeshkina v. Russia*, 26.2.2009, Appl. no. 29492/05, § 93.

as proportionate for countries to exclude judges from political office<sup>51</sup>. The Commentary on the Bangalore Principles states that judicial duties are incompatible with certain political activities, such as the membership of a national parliament or local council<sup>52</sup>.

55. The CCJE joins the ECtHR in finding that having previously belonged to a political party is not enough to cast a doubt on the impartiality of a judge, particularly if there is no indication that the membership has any link with the substance of the case<sup>53</sup>.
56. However, in order to protect public confidence in the judiciary, basic standards of judicial conduct, such as preserving the reputation of the judiciary, should continue to apply when a judge holds a political mandate<sup>54</sup>. If judges have violated standards of judicial independence and impartiality by making certain statements during their political activity, they must recuse themselves in cases where the respective matters become relevant. In order to keep the possibility of resuming their judicial function after their political mandate, it is imperative that they avoid making statements that make them appear unsuitable for judicial office.
57. In countries where judges may hold a (part-time) political mandate or be a member of a political party in addition to their judicial office, they should show restraint so as not to compromise their independence or impartiality<sup>55</sup>. It is imperative that they avoid taking strictly partisan and firm views on any issues or political matters that raise reasonable doubts as to their overall capacity to rule on such matters in an objective manner.

## **VI. Defending judicial independence as a legal and / or ethical duty of judges, associations of judges and councils for the judiciary**

58. In line with CCJE Opinions No. 3 (2002)<sup>56</sup> and No. 18 (2015)<sup>57</sup>, the CCJE asserts that each judge is responsible for promoting and protecting judicial independence, which functions not only as a constitutional safeguard for the judge but also imposes on judges an ethical and/or legal duty to preserve it and speak out in defence of the rule of law and judicial independence when those fundamental values come under threat<sup>58</sup>. It extends to both matters of internal and external independence.
59. With a view to European and international cooperation in legal matters and the importance of European and international law in protecting judicial independence, judges may address threats to judicial independence both at national and international level.

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<sup>51</sup> See ECtHR *Briķe v. Latvia*, 29.6.2000, Appl. no. 47135/99.

<sup>52</sup> Commentary on the Bangalore Principles, para 135.

<sup>53</sup> See ECtHR *Otegi Mondragon and Others v. Spain* (dec.), 6.11.2018, Appl. no. 4184/15 (et al).

<sup>54</sup> Cf. ECtHR *Kudeshkina v. Russia*, 26.2.2009, Appl. no. 29492/05, §§ 85 et seq; in this case, the judge was suspended from her judicial function pending the elections in which she was standing as a candidate.

<sup>55</sup> Cf. CCJE Opinion No. 3 (2002), paras 30, 33; see also Report of the UN Special Rapporteur on the independence of judges and lawyers, 29 April 2019, A/HRC/41/48, para 66.

<sup>56</sup> CCJE Opinion No. 3 (2002), para 34.

<sup>57</sup> CCJE Opinion No. 18 (2015), para 41.

<sup>58</sup> ECtHR, *Żurek v. Poland*, 10.10.2022, Appl. no. 39650/18, § 222; Report of the UN Special Rapporteur on the independence of judges and lawyers, 29 April 2019, A/HRC/41/48, para 102; General Assembly of the ENCJ, Sofia Declaration 2013, para vii; Commentary on Bangalore Principles, para 140, cf. also CCJE Magna Carta of Judges, para 3.

60. If judicial independence or the ability of the judicial power to exercise its constitutional role are threatened, or attacked, the judiciary must be resilient and defend its position fearlessly<sup>59</sup>. This duty particularly arises, when democracy is in a malfunctioning state, with its fundamental values disintegrating, and judicial independence is under attack.
61. Since the duty to defend flows from judicial independence, it applies to every judge<sup>60</sup>. When a judge makes such statements not only in his or her personal capacity, but also on behalf of a judicial council, judicial association or other representative body of the judiciary, the protection afforded to that judge will be heightened.<sup>61</sup> Taking this into account and depending on the issue and context, the council for the judiciary<sup>62</sup>, associations of judges<sup>63</sup>, court presidents or other independent bodies may be best placed to address these issues, for example high-level constitutional issues. Judges may also express their views within the framework of an international association of judges.
62. If any of these issues were to arise in the judge's court, however, and if the judge's impartiality might reasonably be questioned, the judge must disqualify him/herself from any proceedings<sup>64</sup>.

## VII. Ethical duty of judges to explain justice to the public

63. Judges should strive to promote and preserve public trust in the judicial activity by enhancing understanding, transparency and by helping to avoid public misrepresentations<sup>65</sup>. The CCJE endorses the position taken in the Bangalore Principles that judges should aim to inform the public about what judicial independence means<sup>66</sup>. Judges should further explain the work of the judiciary, including the duties and powers of judges. They should elucidate the role of the judiciary and their relationship with the other powers of state. Overall, they should illustrate how the values of the justice system work in practice<sup>67</sup>.
64. So far, the CCJE has focused on the educative role of courts and the associations of judges, because they are particularly well placed to assume such a role<sup>68</sup>. The Committee of Ministers of the Council of Europe has encouraged the establishment of courts' spokespersons or media and communication services under the responsibility of

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<sup>59</sup> CCJE Opinion No. 18 (2005), para 41.

<sup>60</sup> ECtHR *Żurek v. Poland*, 10.10.2022, Appl. no. 39650/18, § 222.

<sup>61</sup> ECtHR *Żurek v. Poland*, 10.10.2022, Appl. no. 39650/18, § 222.

<sup>62</sup> The mission of them is to safeguard the independence of the individual judge and the judiciary and to protect the rule of law, CCJE Opinion No. 23 (2020), para 29; see also CCJE Opinion No. 7 (2005), C.13.

<sup>63</sup> Generally, associations of judges have an important role in defending judicial independence in public debate, see the CCJE Opinion No. 23 (2020), para 17.

<sup>64</sup> Cf. Commentary on Bangalore Principles, para 140.

<sup>65</sup> Cf. CCJE Opinion No. 7 (2005), paras 6-23; see also the ENCJ, Justice Society and the Media, Report of 2011-2012.

<sup>66</sup> Commentary on the Bangalore Principles, para 44.

<sup>67</sup> See also the ENCJ Report on Public Confidence and the Image of Justice (2018-2019), Chapter V, 5.3.

<sup>68</sup> CCJE Opinion No. 23 (2020), paras 44-46; CCJE Opinion No. 18 (2015), para 32; CCJE Opinion No. 7 (2005), paras 6-23.

the courts, the councils for the judiciary or any other independent body<sup>69</sup>. The European Network of Councils for the Judiciary (ENCJ) notes that individual judges should be reluctant to appear as a spokesperson in the media<sup>70</sup>.

65. The CCJE takes the view that individual judges with appropriate communication skills may also explain the functioning and values of the judiciary<sup>71</sup>. In addition to educational fora<sup>72</sup>, they can use the media, including social media as an excellent tool for outreach and public education<sup>73</sup>. In such cases, judges should thoroughly prepare in co-operation with judges appointed to take care of media relations or public information officers<sup>74</sup>, and be mindful to observe the duties of judicial restraint, expressing themselves in a neutral and unbiased manner<sup>75</sup>.

## VIII. Use of social media by judges

### 1. Freedom of expression of judges offline and online

66. It is widely accepted that the rights that people have offline are equally protected online, in particular freedom of expression. Subject to the following, judges may use social media like any other citizens<sup>76</sup>.

### 2. Developing guidelines for social media use of judges

#### a) Definition of social media

67. The CCJE recalls the general understanding of the notion of social media as forms of electronic communication (such as websites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (such as videos). Following the Council of Europe Committee of Ministers' Recommendation CM/Rec(2022)11 on principles for media and communication governance, the Opinion uses a broad notion of media and qualifies social platforms as digital services that connect participants in multisided markets, set the rules for such interactions and make use of algorithmic systems to collect and analyse data and personalise their services<sup>77</sup>.

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<sup>69</sup> See Recommendation of the Committee of Ministers CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities, para 19; cf. European Commission for the Efficiency of Justice (CEPEJ), Guide on Communication with the Media and the Public for Courts and Prosecution Authorities, CEPEJ(2018)15 and already CCJE Opinion No. 7 (2005), paras 33 et seq.

<sup>70</sup> ENCJ, Report 2011-2012, para 6.2.6.

<sup>71</sup> Cf. ENCJ Report 2018-2019, Chapter V, 5.3.

<sup>72</sup> Cf. Commentary on the Bangalore Principles, paras 156-157.

<sup>73</sup> Cf. Report of the UN Special Rapporteur on the independence of judges and lawyers, 29 April 2019, A/HRC/41/48, para 77; UNODC Non-Binding Guidelines on the Use of Social Media by Judges, paras 1, 8; cf. ENCJ Report 2018-2019, Chapter II, 2.1.

<sup>74</sup> See ENCJ, Report 2011-2012, para 6.2.6.

<sup>75</sup> Cf. UNODC Non-Binding Guidelines on the Use of Social Media by Judges, para 1.

<sup>76</sup> For the application of Art. 10 of the ECHR to online communication, see ECtHR *Delfi AS v. Estonia* [GC], 16.6.2015, Appl. no. 64569/09, § 110; *Kozan v. Turkey*, 1.3.2022, Appl. no. 16695/19.

<sup>77</sup> See Appendix to Recommendation CM/Rec(2022)11 of the Committee of Ministers on principles for media and communication governance, para 4.

## **b) Applicability of general rule on judicial restraint**

68. International instruments do not contain much guidance on how judges should exercise their freedom of expression online. Common ground, which the CCJE endorses, is that the general duty of judicial restraint applies<sup>78</sup>. This means that judges should avoid expressing views or sharing personal information online that can potentially undermine judicial independence and impartiality, the right to fair trial or the dignity of the office and (public confidence in) the authority of the judiciary. For that purpose, judges have to show circumspection in their use of social media<sup>79</sup>. As the UN Special Rapporteur on the independence of judges and lawyers has stated, applying judicial restraint to social media communications does not mean that judges have to retreat from public life happening on social media<sup>80</sup>.
69. Subject to some exceptions, private communication should not be subject to restrictions on freedom of expression. Private communication is understood as taking place bilaterally or in a closed group to which access has to be permitted by the judge, including person-to-person messaging services or closed social platform groups.

## **c) Adapting judicial conduct to the specific challenges of social media communication**

70. The use of social media raises new challenges and ethical concerns relating to the propriety of the content posted and the demonstration of bias or interest. Social media features a broad accessibility and transmission, which entails greater scrutiny of the content posted. Social media has a permanent storage capacity, which enhances the risk of profiling. It contains personal communication in written form, which increases the risk of private messages being published without permission, as well as the risk of content being distorted in ensuing communication<sup>81</sup>. Communication is fast and pointed, which might induce judges to publish imprudent posts. Actions, such as “liking” or forwarding information presented by others, may appear relatively small and casual, but they qualify as regular expressions of a judge's opinion<sup>82</sup>. As opposed to traditional media, a gatekeeper is missing in social media, which allows judges to publish anything that comes to their mind.
71. These specific risks require a judge to exercise special caution in his/her social media communication<sup>83</sup>. The CCJE notes a significant risk that sharing personal content may adversely impact upon the reputation of a judge or the entire judiciary<sup>84</sup>. It follows that judges should not engage in exchanges over social media sites or messaging services with parties, their representatives or the general public about cases before or likely to

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<sup>78</sup> See also UNODC Non-Binding Guidelines on the Use of Social Media by Judges, paras 1, 15; Report of the UN Special Rapporteur on the independence of judges and lawyers, 29 April 2019, A/HRC/41/48, paras 78, 81; cf. Recommendation of the Committee of Ministers CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities, para 19.

<sup>79</sup> Cf. CCJE Opinion No. 3 (2002), para 40, with respect to relations with the press.

<sup>80</sup> Report of the UN Special Rapporteur on the independence of judges and lawyers, 29 April 2019, A/HRC/41/48, para 79.

<sup>81</sup> Cf. Report of the UN Special Rapporteur on the independence of judges and lawyers, 29 April 2019, A/HRC/41/48, para 81; cf. ENCJ Report 2018-2019, Chapter II, 2.1.

<sup>82</sup> Cf. UNODC Non-Binding Guidelines on the Use of Social Media by Judges, para 6.

<sup>83</sup> Cf. Report of the UN Special Rapporteur on the independence of judges and lawyers, 29 April 2019, A/HRC/41/48, para 81.

<sup>84</sup> Cf. ENCJ Report 2018-2019, Chapter II, 2.1.



come before them for decision<sup>85</sup>. They should be cautious about the risk of misrepresentation of including statements in closed groups. They should be wary of creating a “profile” through their comments that gives the impression of lacking openness and objectivity regarding certain subject matters. The same holds for social platform groups that they enter or people they follow and comments they “like” or “retweet”, since the more one-sided these are, the more people might perceive these judges not to be independent and impartial<sup>86</sup>. When involved in a discussion on their work as a judge, the protection of the authority and dignity of the office should discourage judges from comments that call into question their propriety in performing their duties.

72. Judges have to make sure that they maintain the authority, integrity, decorum and dignity of their judicial office<sup>87</sup>. They should be mindful that language, outfit, photos and the disclosure of other personal details might infringe the reputation of the judiciary. Allowing judges to share private details, such as lifestyle or family bears some risks in this regard. Whether an expression potentially compromises the reputation of the judge or the judiciary should be assessed in the light of the circumstances of the case.
73. Judges should not engage in social media in a manner that can negatively affect the public perception of judicial integrity, e.g. acting as influencers.
74. Judges should consider whether any inappropriate digital content antedating their appointment to the bench might damage the public confidence in their impartiality or undermine the reputation of the judiciary. If so, they should, if possible, remove this content, following the applicable rules of their jurisdiction<sup>88</sup>.

#### **d) Suggesting a transparent use of social media (subject to permission)**

75. The duty of judicial restraint applies to social media communication, regardless of whether or not judges disclose their identity<sup>89</sup>. There is no basis to prevent judges from using pseudonyms. However, pseudonyms do not permit unethical behaviour. Furthermore, not mentioning the judicial office or using a pseudonym does not guarantee that the true name or judicial status will not become public. Placing a disclaimer in their social media profiles that all the content or opinions are expressed in their personal capacity does not relieve judges from exercising restraint.

#### **e) Stressing the importance of training for judges in the use of social media**

76. The CCJE stresses the importance of training all judges on social media applications and the ethical implications of using them in personal and professional contexts<sup>90</sup>.
77. It should help judges to understand what degree of reticence allows them to protect their security and to fulfil their obligations of maintaining independence and impartiality, the

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<sup>85</sup> See also UNODC Non-Binding Guidelines on the Use of Social Media by Judges, para 17.

<sup>86</sup> Cf. UNODC Non-Binding Guidelines on the Use of Social Media by Judges, para 18.

<sup>87</sup> Cf. UNODC Non-Binding Guidelines on the Use of Social Media by Judges, paras 5 and 18.

<sup>88</sup> Cf. UNODC Non-Binding Guidelines on the Use of Social Media by Judges, para 21.

<sup>89</sup> See also UNODC Non-Binding Guidelines on the Use of Social Media by Judges, para 16. Provided this does not violate applicable ethical standards or existing rules that prohibit an identification of the judge as a member of the judiciary on social media. Cf. paras 12-13.

<sup>90</sup> See also ENCJ Report 2018-2019, Chapter II, 2.7; ENCJ Report 2011-2012, 6.2.4 ; UNODC Non-Binding Guidelines on the Use of Social Media by Judges, paras 14, 38-40; cf. CCJE Opinion No. 23 (2020), para 18; CCJE Magna Carta, para 18.

dignity of their office and public confidence in the judiciary. Understanding which social media platforms are in use, how the various social media platforms operate, what type of information it may be appropriate to share on various social media platforms and which potential risks and consequences participation in such platform communication might have, would be an appropriate area for training judges. The training should cover technical aspects (such as the different privacy settings of different social platforms), aspects of profiling and data protection.

78. The judiciary should provide training to newly appointed judges and to permanent judges on a continuous basis. Associations of judges may contribute to training, exchanging and sharing knowledge and best practices among judges.

## **IX. Recommendations**

1. A judge enjoys the right to freedom of expression like any other citizen. In addition to a judge's individual entitlement, the principles of democracy, separation of powers and pluralism call for the freedom of judges to participate in debates of public interest, especially as regards matters concerning the judiciary.
2. In situations where democracy, the separation of powers or the rule of law are under threat, judges must be resilient and have a duty to speak out in defence of judicial independence, the constitutional order and the restoration of democracy, both at national and international level. This includes views and opinions on issues that are politically sensitive and extends to both internal and external independence of individual judges and the judiciary in general. Judges who speak on behalf of a judicial council, judicial association or other representative body of the judiciary enjoy a wider discretion in this respect.
3. Aside from associations of judges, councils for the judiciary or any other independent body, individual judges have an ethical duty to explain to the public the justice system, the functioning of the judiciary and its values. By enhancing understanding, transparency and by helping to avoid public misrepresentations, judges may help to promote and preserve public trust in the judicial activity.
4. In exercising their freedom of expression, judges should bear in mind their specific responsibilities and duties in society, and exercise restraint in expressing their views and opinions in any circumstance where, in the eyes of a reasonable observer, their statement could compromise their independence or impartiality, the dignity of their office, or jeopardise the authority of the judiciary. In particular, they should refrain from comments on the substance of cases they are dealing with. Judges must also preserve the confidentiality of proceedings.
5. As a general principle, judges should avoid becoming involved in public controversies. Even in cases where their membership in a political party or their participation in public debate is allowed, it is necessary for judges to refrain from any political activity that might compromise their independence or impartiality, or the reputation of the judiciary.
6. Judges should be aware of the benefits as well as the risks of media communication. For that purpose, the judiciary should provide training for judges that educates them on the use of media, which can be utilised as an excellent tool for public outreach. At the same time, awareness should be raised that when posting on social media, anything they publish becomes permanent, even after they delete it, and may be freely interpreted

or even taken out of context. Pseudonyms do not cover unethical online behaviour. Judges should refrain from posting anything that might compromise public trust in their impartiality or conflict with the dignity of their office or the judiciary.

7. Rules or codes of conduct concerning the extent of judges' freedom of expression and any limitations on its exercise should be drawn up by judges themselves or their judicial associations.