

## **Judges' and Prosecutors' Freedoms of Expression, Association and Peaceful Assembly**

Submission to the United Nations Special Rapporteur on Independence of Judges and Lawyers  
for his upcoming report to the Human Rights Council

February 2019

### **Introduction**

The International Commission of Jurists (ICJ) thanks the Special Rapporteur for this opportunity to provide input to his forthcoming report to the June 2019 session of the UN Human Rights Council, on the exercise of the right to freedom of expression, the right to freedom of association, the right to peaceful assembly and political rights by judges and prosecutors.

The ICJ understands that the aim of the report will be to analyse the legislation and practice existing at the national level on the exercise of these rights by judges and prosecutors, both offline and online, and particularly to identify restrictions specifically applicable to the exercise of fundamental freedoms by judges and prosecutors in order to preserve the dignity of their office and the impartiality and independence of the judiciary.

This submission does not purport to be comprehensive but highlights a range of sources that should be of potential interest to the Report. First, the submission outlines the international normative framework relevant to this topic; second, it outlines key regional jurisprudence and standards; third it notes some illustrative national cases and practice; and fourth it references some recent academic sources. Finally it presents some summary conclusions.

### **1. International Normative Framework**

The **Universal Declaration of Human Rights** (UDHR) recognises, on the one hand, the freedoms of expression, association and peaceful assembly (articles 19 and 20), and on the other the need for courts and other tribunals to be independent and impartial (article 10). The Declaration provides that, "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society" (article 29(2)).

Similar provisions are included in the **International Covenant on Civil and Political Rights** (ICCPR) articles 14 (fair trial), 19 (freedom of expression and restrictions thereof), 21 (right of peaceful assembly and restrictions thereof), 22 (freedom of association and restrictions thereof).

The requirement in article 14 of the ICCPR and article 10 of the UDHR that courts and certain tribunals be "independent and impartial", means that in addition to being free of actual bias "the

tribunal must also appear to a reasonable observer to be impartial”.<sup>1</sup> This in turn implies potential for certain special restrictions on judges’ exercise of expression, association or assembly for the purpose and to the extent necessary to guarantee these qualities. Any such restrictions would nevertheless however need to be consistent with the limitations clauses in articles 19(3), 21, and 22 of the ICCPR and article 29 of the UDHR, including particularly necessity and proportionality.<sup>2</sup> In principle, certain exercises by a judge or prosecutor of his or her freedom of expression, association or assembly, incompatible with his or her professional role, could be a basis for disciplinary action or even removal from office. However, any disciplinary action would itself have to comply with respect for judicial independence, including in relation to fair process and thresholds of seriousness.<sup>3</sup> Furthermore, any disciplinary consequences, including removal from office, would again need to satisfy the requirements of necessity and proportionality.

A number of non-treaty standards, set out below, address these issues in more detail.

The **UN Basic Principles on the Independence of the Judiciary** provide that:

8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.

9. Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence.<sup>4</sup>

The **UN Guidelines on the role of Prosecutors** provide that:

8. Prosecutors like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional disadvantage by reason of their lawful action or their membership in a lawful

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<sup>1</sup> Human Rights Committee, General Comment no. 32 (article 14: Right to equality before courts and tribunals and to a fair trial), UN Doc CCPR/C/GC/32 (2007), para 21.

<sup>2</sup> See Human Rights Committee, General Comment no. 34 (article 19: freedom of opinion and expression), UN Doc CCPR/C/GC/34 (2011), paras 22, 33-34. See also *Practitioners Guide no. 1 on the Independence and Accountability of Judges, Lawyers and Prosecutors* (ICJ, 2005), pp 37-39.

<sup>3</sup> See for instance Human Rights Committee, General Comment no. 32, para 20; UN Basic Principles on the Independence of the Judiciary, endorsed by General Assembly resolutions 40/32 and 40/146 (1985), paras 17 to 20. See also *Practitioners Guide no. 13 on Judicial Accountability* (ICJ, 2016) <https://www.icj.org/wp-content/uploads/2016/06/Universal-PG-13-Judicial-Accountability-Publications-Reports-Practitioners-Guide-2016-ENG.pdf>.

<sup>4</sup> UN Basic Principles on the Independence of the Judiciary, endorsed by General Assembly resolutions 40/32 and 40/146 (1985), articles 8 and 9; see similar provisions in the **Universal Charter of the Judge** (International Association of Judges, updated 2017), Article 3-5 ; the **Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa** (African Commission on Human and Peoples’ Rights, 2005), articles A(4)(s) and (t) ; and **Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region** (7th Conference of the Chief Justices of Asia and the Pacific, 1997), paras 8 and 9. **Council of Europe Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities**, includes a similar provision regarding associations (article 25), as does article 12 of the **Magna Carta of Judges** (Consultative Council of European Judges, 2010). See also **Guarantees for the Independence of Justice Operators** (Inter-American Commission of Human Rights, 2013), paras 168-183.

organization. In exercising these rights, prosecutors shall always conduct themselves in accordance with the law and the recognized standards and ethics of their profession.

9. Prosecutors shall be free to form and join professional associations or other organizations to represent their interests, to promote their professional training and to protect their status.<sup>5</sup>

The **UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms**,<sup>6</sup> recognises the particular rights of all persons to exercise freedoms of expression, association and peaceful assembly for the promotion and protection of human rights and fundamental freedoms and against violations of such rights and freedoms. The Declaration clearly affirms this in both the professional and personal realms (see art 11 for instance). Article 17 states: "In the exercise of the rights and freedoms referred to in the present Declaration, everyone, acting individually and in association with others, shall be subject only to such limitations as are in accordance with applicable international obligations and are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

It is also worth noting that the UN **Human Rights Council**, in successive resolutions on "**the promotion, protection and enjoyment of human rights on the Internet**", has repeatedly emphasised that: "the same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one's choice, in accordance with article 19 of the Universal Declaration of Human Rights and of the International Covenant on Civil and Political Rights."<sup>7</sup>

The **Bangalore Principles of Judicial Conduct** and their official **Commentary** offer extensive relevant guidance. It should be noted that, in line with the foundational principle of judicial independence, the Bangalore Principles are not designed to be implemented and enforced by the legislative or executive branches of government, but by the judiciary itself, together with such "appropriate institutions" as are "established to maintain judicial standards" and "which are themselves independent and impartial."<sup>8</sup> Furthermore, not every breach of the ethical and professional standards set out in the Bangalore Principles will necessarily constitute misconduct of

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<sup>5</sup> UN Guidelines on the Role of Prosecutors, welcomed by General Assembly resolution 45/166 (1990); see similar provision in the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, articles F(d) and (e); and regarding association, the **Standards of professional responsibility and statement of the essential duties and rights of the prosecutor**, (International Association of Prosecutors, 1999; UN Commission on Crime Prevention and Criminal Justice, resolution 17/2, Annex), article 6. See also **Guarantees for the Independence of Justice Operators** (Inter-American Commission of Human Rights, 2013), paras 168-183.

<sup>6</sup> Adopted by General Assembly resolution 53/144 of 9 December 1998.

<sup>7</sup> Most recently: Human Rights Council, resolution 38/7 (2018), article 1.

<sup>8</sup> Bangalore Principles of Judicial Conduct, 2002 (adopted by the Judicial Integrity Group and recognised by among others UN ECOSOC resolutions 2006/23 and 2007/22, Human Rights Council resolution 35/12 (2007)), Preamble and Implementation clause; Commentary on the Bangalore Principles of Judicial Conduct (UNODC/Judicial Integrity Group, 2007), pp. 36-37 and 143; and see Measures for the effective implementation of the Bangalore Principles of Judicial Conduct (Judicial Group on Strengthening Judicial Integrity, 2010).

sufficient character or seriousness to justify disciplinary proceedings or other legal restrictions affecting a judge's rights.<sup>9</sup>

- In relation to independence, the Principles affirm the need for judges to be "independent in relation to society in general and in relation to the particular parties to a dispute which the judge has to adjudicate", though the Commentary emphasises that the judge should not be completely isolated from the community in which he or she lives.<sup>10</sup> Furthermore, judges must both in reality and in appearance "be free from inappropriate connections with, and influence by, the executive and legislative branches of government"; this implies that more onerous restrictions may be imposed on judges' personal and professional associations with members of the executive and legislative branches of government than might be required in relation to other individuals.<sup>11</sup>
- In relation to impartiality, the Commentary to Bangalore Principles notes that "the perception that a judge is not impartial may arise in a number of ways" including among others, the judge's "associations and activities outside the court".<sup>12</sup> The Principles provide that, "A judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary" (2.2). The Commentary explains that in addition to avoiding *ex parte* communications with anyone involved in a case before him or her, "Out of court too, a judge should avoid deliberate use of words or conduct that could reasonably give rise to a perception of an absence of impartiality. Everything - from a judge's associations or business interests, to remarks that he or she may consider to be nothing more than harmless banter - may diminish the judge's perceived impartiality. All partisan political activity and association should cease upon the assumption of judicial office."<sup>13</sup> At the same time, the Commentary notes, "There are some exceptions. These include comments by a judge, on an appropriate occasion, in defence of the judicial institution, or explaining particular issues of law or decisions to the community or to a specialized audience, or defence of fundamental human rights and the rule of law. However, even on such occasions, a judge must be careful to avoid, as far as possible, entanglements in current controversies that may reasonably be seen as politically partisan."<sup>14</sup>

The Principles state that a judge should not "knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process. Nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue."<sup>15</sup> The Commentary adds that, "This prohibition does not extend to public statements made in the course of the judge's official duties, to the explanation of

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<sup>9</sup> See Implementation Measures, paragraph 15.1 and footnote ; UN Basic Principles on the Independence of the Judiciary, articles 17 to 20.

<sup>10</sup> Bangalore Principles, paragraph 1.2 and Commentary pp. 44-46.

<sup>11</sup> Bangalore Principles, paragraph 1.3; Commentary pp 47-49.

<sup>12</sup> Commentary p. 57.

<sup>13</sup> Commentary p. 62.

<sup>14</sup> Commentary p. 62.

<sup>15</sup> Bangalore Principles, paragraphs

court procedures, or to a scholarly presentation made for the purposes of legal education".<sup>16</sup>

However, "If the media or interested members of the public criticize a decision, the judge should refrain from answering such criticism by writing to the press" and "It is generally inappropriate for a judge to defend judicial reasons publicly."<sup>17</sup> Furthermore, the Commentary deems it generally unacceptable either to use the media "to promote a judge's public image and career" or for a judge to comment outside the court on cases before him or her, or before other judges.<sup>18</sup> The Commentary suggests that for a judge to comment on his or her own or another judge's decision, in an academic context, would "usually be permissible only if the comment is on a purely legal point of general interest decided or considered in a particular case", although this appears to be an evolving area where expectations may be growing less restrictive over time.<sup>19</sup>

- In relation to propriety, the Bangalore Principles provide among other things: "As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly." For example, the Commentary adds that becoming a member of or frequenting certain "clubs and other social facilities", such as those "run by or for members of the police force, the anti-corruption agency and the customs and excise department, whose members are likely to appear frequently before the courts" would raise issues. On the other hand "In most societies, it is normal for judges to attend venues organized by the practising legal profession and to mix with advocates on a social basis,"<sup>20</sup> although social relationships between judges and lawyers give rise to complicated issues to which judges and professional regulatory bodies must be particularly sensitive.<sup>21</sup>

The Principles further provide that, "A judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary."<sup>22</sup> The Commentary suggests that as a general principle, "A judge should not involve himself or herself inappropriately in public controversies," because "If a judge enters the political arena and participates in public debates - either by expressing opinions on controversial subjects, entering into disputes with public figures in the community, or publicly criticizing the government - he or she will not be seen to be acting judicially when presiding as a judge

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<sup>16</sup> Commentary p. 65.

<sup>17</sup> Commentary p. 66.

<sup>18</sup> Commentary p. 67.

<sup>19</sup> Commentary p. 67.

<sup>20</sup> Commentary p. 88. Apart from specific examples of this sort of association, earlier at p. 72 the Commentary suggests more generally that «a judge's membership of social, sporting or charitable bodies» should not in itself be the basis for inferring lack of impartiality.

<sup>21</sup> Commentary pp. 89-91. See also Consultative Council of European Judges (CCJE), Opinion No. 16 (2013), on the Relations between Judges and lawyers, paras 24 and 25.

<sup>22</sup> Principles paragraph 4.6.

in court.”<sup>23</sup> At the same time, the Commentary offers a number of situations where the rights of a judge should not be restricted, including particularly:

- “A judge may speak out on matters that affect the judiciary”

The Commentary emphasizes that, “There are limited circumstances in which a judge may properly speak out about a matter that is politically controversial, namely, when the matter directly affects the operation of the courts, the independence of the judiciary (which may include judicial salaries and benefits), fundamental aspects of the administration of justice or the personal integrity of the judge”.<sup>24</sup>

- “A judge may participate in a discussion of the law”

The Commentary also notes that, “A judge may participate in discussion of the law for educational purposes or to point out weaknesses in the law. In certain special circumstances, a judge’s comments on draft legislation may be helpful and appropriate, provided that the judge avoids offering informal interpretations or controversial opinions on constitutionality. Normally, judicial commentary on proposed legislation or on other questions of government policy should relate to practical implications or drafting deficiencies and should avoid issues of political controversy. In general, such judicial commentary should be made as part of a collective or institutionalised effort by the judiciary, not of an individual judge.”<sup>25</sup>

- “When the judge may feel a moral duty to speak”

The Commentary also states that: “Occasions may arise when a judge - as a human being with a conscience, morals, feelings and values - considers it a moral duty to speak out. For example, in the exercise of the freedom of expression, a judge might join a vigil, hold a sign or sign a petition to express opposition to war, support for energy conservation or independence, or funding for an anti-poverty agency. These are expressions of concern for the local and global community. If any of these issues were to arise in the judge’s court, and if the judge’s impartiality might reasonably be questioned, the judge must disqualify himself or herself from any proceedings that follow where the past actions cast doubt on the judge’s impartiality and judicial integrity.”<sup>26</sup>

The Commentary notes that a contribution by a judge to a publication, whether related or unrelated to the law, or appearance by a judge on commercial television or radio, can be acceptable, but that care must be taken to ensure it is presented appropriately.<sup>27</sup>

The Principles further clarify that, “Subject to the proper performance of judicial duties, a judge may”, among other things:

“write, lecture, teach and participate in activities concerning the law, the legal system, the administration of justice or related matters;”

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<sup>23</sup> Commentary p. 95.

<sup>24</sup> Commentary p. 96.

<sup>25</sup> Commentary, pp. 96-97.

<sup>26</sup> Commentary, p. 97.

<sup>27</sup> Commentary, p. 102.

“appear at a public hearing before an official body concerned with matters relating to the law, the legal system, the administration of justice or related matters;”

“serve as a member of an official body, or other government commission, committee or advisory body, if such membership is not inconsistent with the perceived impartiality and political neutrality of a judge;”

“engage in other activities if such activities do not detract from the dignity of the judicial office or otherwise interfere with the performance of judicial duties.”<sup>28</sup>

In regard to “other activities”, the Commentary adds that in principle a judge may for instance “write, lecture, teach, and speak on non-legal subjects, and engage in the arts, sports, and other social and recreational activities”. Furthermore, a judge may, within certain limits, “participate in community, non-profit-making organizations of various types by becoming a member of an organization and its governing body” such as “charitable organizations, university and school councils, lay religious bodies, hospital boards, social clubs, sporting organizations, and organizations promoting cultural or artistic interests.”<sup>29</sup> However, participation should be avoided where the organization’s “objects are political”, or “its activities are likely to expose the judge to public controversy”, or it “is likely to be regularly or frequently involved in litigation”; furthermore, “A judge should not hold membership in any organization that discriminates on the basis of race, sex, religion, national origin, or other irrelevant cause contrary to fundamental human rights”.<sup>30</sup>

The Principles also provide that “A judge may form or join associations of judges or participate in other organisations representing the interests of judges.”<sup>31</sup> The Commentary adds that, “In the exercise of the freedom of association, a judge may join a trade union or professional association established to advance and protect the conditions of service and salaries of judges or, together with other judges, form a trade union or association of that nature. Given the public and constitutional character of the judge’s service, however, restrictions may be placed on the right to strike.”<sup>32</sup>

## 2. Regional Jurisprudence and Standards

As was noted earlier, a number of regional instruments include provisions similar to the relevant provisions of the UN Basic Principles on the Independence of the Judiciary, and the UN Guidelines on the Role of Prosecutors. Examples include the **Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa** (African Commission on Human and Peoples’ Rights, 2005), articles A(4)(s) and (t); and **Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region** (7th Conference of the Chief Justices of Asia and the Pacific, 1997), paras 8 and 9. The most detailed regional jurisprudence and standards on the topic comes from Europe and the Inter-American system, as highlighted below.

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<sup>28</sup> Principles paragraph 4.11 and Commentary pp. 105-113.

<sup>29</sup> Commentary, p. 111.

<sup>30</sup> Commentary, p. 111-112. « Irrelevant cause » appears to be a reference to the term « irrelevant grounds » which is defined in the Principles as follows : « race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes ».

<sup>31</sup> Principles para 4.13.

<sup>32</sup> Commenatry, p. 116.

## Europe:

In 2016, the Grand Chamber of the European Court of Human Rights (ECtHR) adopted a judgment in the case of **Baka v. Hungary**, finding that Hungarian Supreme Court President András Baka's premature termination as President of the Supreme Court (though remaining a judge), following his public criticism of Hungarian legal reforms that he believed undermined judicial independence, violated the European Convention on Human Rights (ECHR), including Article 10 of the Convention.<sup>33</sup>

Among other aspects potentially relevant to the Special Rapporteur's upcoming report,<sup>34</sup> the Grand Chamber stated that, as a general matter (paras 159-161):

[A] high level of protection of freedom of expression, with the authorities thus having a narrow margin of appreciation, will normally be accorded where the remarks concern a matter of public interest, as is the case, in particular, for remarks on the functioning of the judiciary.

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[T]he nature and severity of the sanctions imposed are also factors to be taken into account when assessing the proportionality of the interference.

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[I]n order to assess the justification of an impugned measure, it must be borne in mind that the fairness of proceedings and the procedural guarantees afforded to the applicant are factors to be taken into account when assessing the proportionality of an interference with the freedom of expression guaranteed by Article 10.

Turning specifically to the particular situation of the judiciary, the Grand Chamber stated (paras 162 to 167):

...it can be expected of public officials serving in the judiciary that they should show restraint in exercising their freedom of expression in all cases where the authority and impartiality of the judiciary are likely to be called in question... The dissemination of even accurate information must be carried out with moderation and propriety... The Court has on many occasions emphasised the special role in society of the judiciary, which, as the guarantor of justice, a fundamental value in a law-governed State, must enjoy public confidence if it is to be successful in carrying out its duties ... It is for this reason that judicial authorities, in so far as concerns the exercise of their adjudicatory function, are required to exercise maximum discretion with regard to the cases with which they deal in order to preserve their image as impartial judges...

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<sup>33</sup> Application no. 20261/12 (23 June 2016). The ICJ intervened as a third party, arguing in part that the ECHR precludes restrictions of judicial freedom of expression that hinder the right and duty of the judiciary to speak out about judicial independence: <https://www.icj.org/wp-content/uploads/2015/04/ECtHR-AmicusBrief-Baka-v-Hungary-Advocacy-Legal-Submission-2015-ENG.pdf>.

<sup>34</sup> The Grand Chamber cited extensively several other prior European Court judgments, not further summarized here but also relevant to the upcoming Special Rapporteur's Rapport, including *Wille v. Liechtenstein* [Grand chamber], no. 28396/95 (28 October 1999) and *Kudeshkina v. the Russian Federation*, no.29492/05, (26 February 2009). (Kudeshkina later argued in *Kudeshkina v. the Russian Federation (No. 2)*, Application no. 28727/11, that the domestic courts had subsequently refused to reopen the proceedings concerning her dismissal, and thus committed a new Article 10 violation. The ICJ intervened as a third party in that case (<https://www.icj.org/wp-content/uploads/2012/06/Russian-Federation-Written-submission-legal-submission-2012.pdf>). Kudeshkina's application was however ruled inadmissible on the basis that the Committee of Ministers, and not the European Court, was responsible for reviewing execution of the European Court's judgments (decision of 17 February 2015)).



At the same time, the Court has also stressed that having regard in particular to the growing importance attached to the separation of powers and the importance of safeguarding the independence of the judiciary, any interference with the freedom of expression of a judge in a position such as the applicant's calls for close scrutiny on the part of the Court... Furthermore, questions concerning the functioning of the justice system fall within the public interest, the debate of which generally enjoys a high degree of protection under Article 10... Even if an issue under debate has political implications, this is not in itself sufficient to prevent a judge from making a statement on the matter... Issues relating to the separation of powers can involve very important matters in a democratic society which the public has a legitimate interest in being informed about and which fall within the scope of political debate...

In the context of Article 10 of the Convention, the Court must take account of the circumstances and overall background against which the statements in question were made... It must look at the impugned interference in the light of the case as a whole ..., attaching particular importance to the office held by the applicant, his statements and the context in which they were made.

Finally, the Court reiterates the "chilling effect" that the fear of sanction has on the exercise of freedom of expression, in particular on other judges wishing to participate in the public debate on issues related to the administration of justice and the ... This effect, which works to the detriment of society as a whole, is also a factor that concerns the proportionality of the sanction or punitive measure imposed..." (paras 162 to 167)

In finding the judge's removal from office to have constituted a violation of the judge's freedom of expression in the particular case, the Grand Chamber stated, among other things:

168. ...the impugned interference was prompted by the views and criticisms that the applicant had publicly expressed in the exercise of his right to freedom of expression. It observes in this regard that the applicant expressed his views on the legislative reforms at issue in his professional capacity as President of the Supreme Court and of the National Council of Justice. It was not only his right but also his duty as President of the National Council of Justice to express his opinion on legislative reforms affecting the judiciary, after having gathered and summarised the opinions of lower courts... The applicant also used his power to challenge some of the relevant legislation before the Constitutional Court and used the possibility to express his opinion directly before Parliament on two occasions, in accordance with parliamentary rules... The Court therefore attaches particular importance to the office held by the applicant, whose functions and duties included expressing his views on the legislative reforms which were likely to have an impact on the judiciary and its independence. It refers in this connection to the Council of Europe instruments, which recognize that each judge is responsible for promoting and protecting judicial independence (see paragraph 3 of the Magna Carta of Judges in paragraph 81) and that judges and the judiciary should be consulted and involved in the preparation of legislation concerning their statute and, more generally, the functioning of the judicial system (see paragraph 34 of Opinion no. 3 (2002) of the CCJE in paragraph 80 above; and paragraph 9 of the Magna Carta of Judges in paragraph 81 above).

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170. The present case should also be distinguished from other cases in which the issue at stake was public confidence in the judiciary and the need to protect such confidence against destructive attacks... Although the Government relied on the need to maintain the authority and impartiality of the judiciary, the views and statements publicly expressed by the applicant did not contain attacks against other members of the judiciary...; nor did they concern criticisms with regard to the conduct of the judiciary dealing with pending proceedings...

171. On the contrary, the applicant expressed his views and criticisms on constitutional and legislative reforms affecting the judiciary, on issues related to the functioning and reform of the judicial system, the independence and irremovability of judges and the lowering of the retirement age for judges, all of which are questions of public interest... His statements did not go beyond mere criticism from a strictly professional perspective. Accordingly, the Court considers that the applicant's position and statements, which clearly fell within the context of a debate on matters of great public interest, called for a high degree of protection for his freedom of expression and strict scrutiny of any interference, with a correspondingly narrow margin of appreciation being afforded to the authorities of the respondent State.

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173. Furthermore, the premature termination of the applicant's mandate undoubtedly had a "chilling effect" in that it must have discouraged not only him but also other judges and court presidents in future from participating in public debate on legislative reforms affecting the judiciary and more generally on issues concerning the independence of the judiciary.

174. Finally, due account should be taken of the procedural aspect of Article 10... In the light of the considerations that led it to find a violation of Article 6 § 1 of the Convention, the Court considers that the impugned restrictions on the applicant's exercise of his right to freedom of expression under Article 10 of the Convention were not accompanied by effective and adequate safeguards against abuse.

175. In sum, even assuming that the reasons relied on by the respondent State were relevant, they cannot be regarded as sufficient to show that the interference complained of was "necessary in a democratic society", notwithstanding the margin of appreciation available to the national authorities.

The *Baka* ruling also illustrates that in evaluating whether a judge's freedom of expression has been violated, it is important to look beyond the formal grounds presented for any disciplinary sanctions or other measures adopted, to examine the actual motivation. In the *Baka* case the Government argued his removal as President was merely consequent to a restructuring of the courts for other reasons; the Grand Chamber did not accept this explanation, in light of the circumstances in which the events took place (see paras 143 to 152 of the judgment).

The *Baka* ruling comes against a broader background of regional interpretation and standards in Europe, including the following:

Council of Europe **Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities**, provides that, "Judges may engage in activities outside their official functions" but that, "To avoid actual or perceived conflicts of interest, their participation should be restricted to activities compatible with their impartiality and independence."<sup>35</sup> Furthermore, it states, "Judges should exercise restraint in their relations with the media."<sup>36</sup> The Recommendation also provides that, "Judges should be free to form and join professional organisations whose objectives are to safeguard their independence, protect their interests and promote the rule of law."<sup>37</sup>

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<sup>35</sup> Council of Europe Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, Para 21.

<sup>36</sup> Para 19.

<sup>37</sup> Para 25. See similarly article 12 of the **Magna Carta of Judges** (Consultative Council of European Judges, 2010).

The Council of Europe **European Charter on the Statute for Judges** (1998) provides that:

4.2. Judges freely carry out activities outside their judicial mandate including those which are the embodiment of their rights as citizens. This freedom may not be limited except in so far as such outside activities are incompatible with confidence in, or the impartiality or the independence of a judge, or his or her required availability to deal attentively and within a reasonable period with the matters put before him or her. The exercise of an outside activity, other than literary or artistic, giving rise to remuneration, must be the object of a prior authorization on conditions laid down by the statute.

4.3. Judges must refrain from any behaviour, action or expression of a kind effectively to affect confidence in their impartiality and their independence.

and

1.7. Professional organizations set up by judges, and to which all judges may freely adhere, contribute notably to the defence of those rights which are conferred on them by their statute, in particular in relation to authorities and bodies which are involved in decisions regarding them.

The **Consultative Council of European Judges (CCJE)**, in its **Opinion no. 3 on “the principles and rules governing judges’ professional conduct, in particular ethics, incompatible behaviour and impartiality”**, echoes many elements of the Bangalore Principles and Commentary. The CCJE states among other things that:<sup>38</sup>

...as citizens, judges enjoy the fundamental rights and freedoms protected, in particular, by the European Convention on Human Rights (freedom of opinion, religious freedom, etc). They should therefore remain generally free to engage in the extra-professional activities of their choice.

...However, such activities may jeopardise their impartiality or sometimes even their independence. A reasonable balance therefore needs to be struck between the degree to which judges may be involved in society and the need for them to be and to be seen as independent and impartial in the discharge of their duties. In the last analysis, the question must always be asked whether, in the particular social context and in the eyes of a reasonable, informed observer, the judge has engaged in an activity which could objectively compromise his or her independence or impartiality.

...Judges' participation in political activities poses some major problems. Of course, judges remain citizens and should be allowed to exercise the political rights enjoyed by all citizens. However, in view of the right to a fair trial and legitimate public expectations, judges should show restraint in the exercise of public political activity. Some States have included this principle in their disciplinary rules and sanction any conduct which conflicts with the obligation of judges to exercise reserve. They have also expressly stated that a judge's duties are incompatible with certain political mandates (in the national parliament, European Parliament or local council), sometimes even prohibiting judges' spouses from taking up such positions.

...More generally, it is necessary to consider the participation of judges in public debates of a political nature. In order to preserve public confidence in the judicial system, judges should not expose themselves to political attacks that are incompatible with the neutrality required by the judiciary.

...The discussions within the CCJE have shown the need to strike a balance between the judges' freedom of opinion and expression and the requirement of neutrality. It is therefore necessary for judges, even though their membership of a political party or their participation in public debate on

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<sup>38</sup> Paragraphs 27 to 40.

the major problems of society cannot be proscribed, to refrain at least from any political activity liable to compromise their independence or jeopardise the appearance of impartiality.

...However, judges should be allowed to participate in certain debates concerning national judicial policy. They should be able to be consulted and play an active part in the preparation of legislation concerning their statute and, more generally, the functioning of the judicial system. This subject also raises the question of whether judges should be allowed to join trade unions. Under their freedom of expression and opinion, judges may exercise the right to join trade unions (freedom of association), although restrictions may be placed on the right to strike.

... judges have to show circumspection in their relations with the press and be able to maintain their independence and impartiality, refraining from any personal exploitation of any relations with journalists and any unjustified comments on the cases they are dealing with. The right of the public to information is nevertheless a fundamental principle resulting from Article 10 of the European Convention on Human Rights. It implies that the judge answers the legitimate expectations of the citizens by clearly motivated decisions. Judges should also be free to prepare a summary or communiqué setting up the tenor or clarifying the significance of their judgements for the public. Besides, for the countries where the judges are involved in criminal investigations, it is advisable for them to reconcile the necessary restraint relating to the cases they are dealing with, with the right to information. Only under such conditions can judges freely fulfil their role, without fear of media pressure. The CCJE has noted with interest the practice in force in certain countries of appointing a judge with communication responsibilities or a spokesperson to deal with the press on subjects of interest to the public.

In its 2005 **Opinion no. 7 on "Justice and Society"**, the CCEJ further encouraged a range of judicial "outreach programmes" to increase communication between judiciaries and the general public, and suggested similar measures would be appropriate for prosecutors.<sup>39</sup> The CCJE also addressed a number of issues in the relation of courts with the media, and among many other things, commented that: "Judges express themselves above all through their decisions and should not explain them in the press or more generally make public statements in the press on cases of which they are in charge" (para 34). Furthermore, it said, "When a judge or a court is challenged or attacked by the media (or by political or other social actors by way of the media) for reasons connected with the administration of justice, the CCJE considers that, in view of the duty of judicial self-restraint, the judge involved should refrain from reactions through the same channels"; at the same time, however, "it would be desirable that the national judiciaries benefit from the support of persons or a body (e.g. the Higher Council for the Judiciary or judges' associations) able and ready to respond promptly and efficiently to such challenges or attacks in appropriate cases" (para 55).

In 2015, at the request of the President of the Inter-American Court of Human Rights (apparently in connection with the *López Lone* case described below), the **European Commission for Democracy through Law (Venice Commission)** published a report on "the Freedom of Expression of

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<sup>39</sup> paras 15 to 23. See also the **Istanbul Declaration on Transparency in the Judicial Process**, (Adopted by the Conference of Chief Justices and Senior Justices of the Asian Region, 2013), Principle 10, which encourages "outreach programmes designed to educate the public on the role of the justice system" involving "proactive measures by judges and direct interaction with the communities they serve" which may include "town hall meetings" and "the production of radio and television programmes".

Judges”.<sup>40</sup> The report reviews some international standards, national laws and practices in a number of Council of Europe member states, and jurisprudence of the European Court of Human Rights (however, the decision pre-dates the Grand Chamber judgment in *Baka v Hungary*, described below). The Commission concluded (paras 80 to 84):

- “the specificity of the duties and responsibilities which are incumbent to judges and the need to ensure impartiality and independence of the judiciary are considered as legitimate aims in order to impose specific restrictions on the freedom of expression, association and assembly of judges including their political activities.”
- “any interference with the freedom of expression of a judge calls for close scrutiny.”
- Among the considerations relevant to assessing the proportionality of an interference with the freedom of expression of a judge, is: “the office held by the applicant, the content of the impugned statement, the context in which the statement was made and the nature and severity of the penalties imposed”.
- “In the context of a political debate in which a judge participates, the domestic political background of this debate is also an important factor to be taken into consideration when assessing the permissible scope of the freedom of judges. For instance, the historical, political and legal context of the debate, whether or not the discussion includes a matter of public interest or whether the impugned statement is made in the context of an electoral campaign are of particular importance. A democratic crisis or a breakdown of constitutional order are naturally to be considered as important elements of the concrete context of a case, essential in determining the scope of judges’ fundamental freedoms.”

The **European Network of Councils for the Judiciary**, in its 2013 “Sofia Declaration on Judicial Independence and Accountability”, stated: “The prudent convention that judges should remain silent on matters of political controversy should not apply when the integrity and independence of the judiciary is threatened. There is now a collective duty on the European judiciary to state clearly and cogently its opposition to proposals from government which tend to undermine the independence of individual judges or Councils for the Judiciary.”<sup>41</sup>

#### Inter-American System:<sup>42</sup>

The **Inter-American Court of Human Rights**, in its 2016 judgment in the case of the **López Lone v Honduras**,<sup>43</sup> held the rights of several judges to freedom of expression, assembly and association to have been violated, by their dismissal from their positions for actions they took to protest against a coup d’état and in favour of the re-establishment of democracy and the rule of law in Honduras.

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<sup>40</sup> Opinion no 806/2015, CDL-AD(2015)018 (23 June 2015).  
[https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2015\)018-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)018-e)

<sup>41</sup> [https://www.ency.eu/images/stories/pdf/GA/Sofia/ency\\_sofia\\_declaration\\_7\\_june\\_2013.pdf](https://www.ency.eu/images/stories/pdf/GA/Sofia/ency_sofia_declaration_7_june_2013.pdf)

<sup>42</sup> See also **Guarantees for the Independence of Justice Operators** (Inter-American Commission of Human Rights, 2013), paras 168-183.

<sup>43</sup> Case of *López Lone et al. v. Honduras*, Series C No. 302, judgment of 5 October 2015. We note that the current UN Special Rapporteur on the Independence of Judges and Lawyers was, at the time, among the judges of the Inter-American Court and thus will already be well aware of it, but nevertheless include the reference here for completeness. See also the Inter-American Commission on Human Rights, *Adriana Beatriz Gallo v. Argentina*, case No. 43/15 (28 July 2015);  
<https://www.oas.org/es/cidh/decisiones/2015/ARPU12632ES.pdf> (Spanish);  
<http://www.oas.org/en/iachr/decisions/2015/arPU12632qEN.pdf> (English).

The actions included: taking part in a protest, filing judicial complaints or actions, an opinion stated in the context of a university lecture, and in conversations with colleagues, as well as expressing their opinions through an association of judges of which they were all members.

The Court recognised that in relation to freedom of expression, assembly and association, "Owing to their functions in the administration of justice, under normal conditions of the rule of law, judges may be subject to different restrictions, and in different ways, that would not affect other individuals, including other public officials" (para 169). Furthermore, it held, "the general purpose of guaranteeing independence and impartiality is, in principle, a legitimate reason for restricting certain rights of judges" since international human rights law obliges the State to ensure independence and impartiality of its courts and tribunals in order to respect the rights the persons judged by those tribunals (para 171).

The Court noted that, "the prohibition of judges from participating in activities of a party nature should not be interpreted ... in a way that prevents judges from taking part in any discussion of a political nature" (para 172) and, referring to the Commentary to the Bangalore Principles and other expert sources (including a previous UN Special Rapporteur on the Independence of Judges and Lawyers), it held that "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" and this might indeed be seen not only as a right but an obligation of judges during a coup d'état or other "times of grave democratic crises" (para 173-174).

### 3. Selected National Cases and Practice

Apart from the cases in **Hungary** and **Honduras** mentioned above, among national cases and practices relevant to the topic are the following:

In **Egypt**, since 2014, dozens of judges have been forced into retirement<sup>44</sup> following disciplinary proceedings that resulted in arbitrary limitations to the judges' right to freedom of expression, assembly and association. In the two cases known as the "Judges for Egypt Case" and the "July 2013 Statement Case"<sup>45</sup>, the ICJ found that judges have been removed from office following mass, arbitrary and unfair disciplinary proceedings. In Egypt, judges can be referred by the High Judicial Council or directly by the Minister of Justice to the Supreme Disciplinary Board, after which they are subjected to proceedings that can result in revoking their tenure, forcing them into retirement or declaring them "unfit" in accordance with article 111 and article 73 of Egypt's Judicial Authority Law, the latter prohibiting judges from "political activity". This vague clause has been repeatedly used to arbitrarily limit judges' exercise of the right to freedom of expression, assembly and association, well beyond what is justified as necessary to preserve the impartiality and independence of the judiciary.

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<sup>44</sup> ICJ, "Egypt: arbitrary and unfair removal of judges must be reversed", 28 March 2016, available at <https://www.icj.org/egypt-arbitrary-and-unfair-removal-of-judges-must-be-reversed/>.

<sup>45</sup> ICJ, "Egypt: sustained attacks against judges must stop", 24 February 2016, available at <https://www.icj.org/egypt-sustained-attacks-against-judges-must-stop/>; and ICJ, "Attacks on Judges in Egypt: July 2013 Statement Case", January 2017, available at <https://www.icj.org/wp-content/uploads/2017/01/Egypt-attacks-on-judges-Advocacy-Analysis-brief-2017-ENG.pdf>.

In a recent and still ongoing case, in March 2017, following initial investigations that lasted over a year, Judge Assem Abdel Jabar, former deputy President of the Court of Cassation, and Judge Hicham Raouf, a judge in Cairo's Court of Appeal and former deputy Minister of Justice, were referred to the Supreme Disciplinary Board for "unfitness proceedings" after they participated, together with other leading lawyers and legal experts, in a workshop to discuss and propose new anti-torture legislation.<sup>46</sup> According to article 111 of the Judicial Authority Law, if a judge is found to be "unfit" for office, the disciplinary board can either force the judge into retirement or it can transfer the judge to non-judicial functions. The proceedings against Mr Abdel Jabar and Mr Raouf started in mid-March 2017 and have continued over the course of 14 sessions, during which hearings have been consistently adjourned and no decision was taken. The last session, on 5 January 2019, was adjourned to 23 March 2019, a date that would mark two years since the beginning of the "unfitness proceedings" for both judges, as a repercussion for their participation as legal experts in an anti-torture legislation proposal.

In April 2018, the Cairo Military Court sentenced Hisham Geneina, a former judge and former head of Egypt's Central Auditing Authority, to five years' imprisonment for "publishing false information harmful to national security" after he criticized the Egyptian Authorities' interference with the election process and referred to the existence of documents incriminating military and political leaders in a media interview.<sup>47</sup> Hisham Geneina appealed the verdict and a Military Misdemeanor Court of Appeal is due to issue its verdict on 3 March 2019. Based on the information available, Hisham Geneina has been detained since his arrest in February 2018, including in solitary confinement.

In **Morocco**, Judge Al-Haini, together with his colleague Amal Homani, was referred in February 2016 to the High Judicial Council by the Minister of Justice on unwarranted allegations of "violating the duty of discretion" and "expressing opinions of a political nature" following social media comments and media articles written by the judges in which they criticized the government's Draft Laws on the High Judicial Council and on the Statute for Judges.<sup>48</sup> The ICJ expressed its concern at the unfair and arbitrary nature of the proceedings against Judge Al-Haini which not only targeted him for the legitimate exercise of his right to freedom of expression in consonance with the dignity of the judicial office and the impartiality and independence of the judiciary but also included several flaws curtailing Judge Al-Haini's right to defense.

The ICJ has expressed concern about allegations in **South Korea** that the former Chief Justice and other officials infringed the freedom of expression and freedom of association of individual judges in South Korea. Judges who commented negatively on a proposal by the National Court Administration (NCA) to create a 'second Supreme Court,' were allegedly placed by the NCA under surveillance, both in their professional and personal dealings. Moreover, they were prevented from joining international conferences and national professional organizations. Some

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<sup>46</sup> ICJ, "Egypt: authorities must end actions against independent judges", 14 April 2015, available at <https://www.icj.org/egypt-authorities-must-end-actions-against-independent-judges/>.

<sup>47</sup> ICJ, "Egypt: immediately release Hisham Geneina, quash his conviction", 25 April 2018, available at <https://www.icj.org/egypt-immediately-release-hisham-geneina-quash-his-conviction/>.

<sup>48</sup> ICJ, "Morocco: end disciplinary proceedings against judges", 7 December 2018, available at <https://www.icj.org/morocco-end-disciplinary-proceedings-against-judges/>; and ICJ, "Morocco: Arbitrary dismissal of Judge Al-Haini must be reversed", 13 February 2016, available at <https://www.icj.org/morocco-arbitrary-dismissal-of-judge-al-haini-must-be-reversed/>.

were also either sidelined for promotions or were not given preference for educational opportunities abroad.<sup>49</sup>

In the **Philippines**, on 17 August 2017 the Office of the Court Administrator (OCA) of the Supreme Court issued Circular No. 173-2017 to all judges and court personnel on the proper use of social media.<sup>50</sup> The circular does not differentiate between different kinds of information and in particular does not recognise the expansive scope reflected in international standards, when it comes to comments aimed at upholding independence of the judiciary and related issues. Indeed, to the contrary, ICJ understands that the circular was invoked to warn members of the judiciary that they would face disciplinary action if they expressed opinions on social media on the ouster of Maria Lourdes Sereno as Chief Justice of the Supreme Court.<sup>51</sup> This cast a chilling effect on the right to freedom of expression of the members of the judiciary.

The ICJ, together with Judges for Judges, has also followed the case of Miroslava Todorova a judge from **Bulgaria**. In that case, following public statements by a judge including in her role as head of an association of judges, the judge was subjected to disciplinary proceedings based on alleged inefficiency and performance issues. The ICJ and Judges for Judges concluded that, under the circumstances, there was an appearance that the disciplinary proceedings against Todorova were instituted and pursued selectively, and that the system of the disciplinary proceedings in Bulgaria did not provide sufficient safeguards to dispel this appearance.<sup>52</sup>

The current approach in Canada is reflected in the **Canadian Judicial Council's "Ethical Principles for Judges"**,<sup>53</sup> which provide among other things that: "Judges should refrain from conduct such as membership in groups or organizations or participation in public discussion which, in the mind of a reasonable, fair minded and informed person, would undermine confidence in a judge's impartiality with respect to issues that could come before the courts;"<sup>54</sup> and that "Judges should refrain from... taking part publicly in controversial political discussions except in respect of matters directly affecting the operation of the courts, the independence of the judiciary or fundamental aspects of the administration of justice."<sup>55</sup> The Commentary to the Principles counsels as follows:

The application of Principle D.3(d), which counsels avoidance of public participation in controversial political discussions, is more open to debate and problems of application than the other principles in this section. Judges on appointment do not surrender all of the rights to freedom of expression enjoyed by everyone else in Canada. But, the office of judge imposes restraints that are necessary to maintain public confidence in the impartiality and independence of the judiciary. In defining the appropriate degree of involvement of the judiciary in public debate, there are two fundamental

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<sup>49</sup> <https://www.icj.org/south-korea-individual-independence-of-judges-must-be-upheld-and-protected/> (28 June 2018).

<sup>50</sup> <http://oca.judiciary.gov.ph/wp-content/uploads/2017/08/OCA-Circular-No.-173-2017.pdf>

<sup>51</sup> See "Philippines: Supreme Court decision removing its Chief Justice contributes to deterioration of the rule of law" (30 May 2018), <https://www.icj.org/philippines-supreme-court-decision-removing-its-chief-justice-contributes-to-deterioration-of-the-rule-of-law/>.

<sup>52</sup> See ICJ and Judges for Judges, *Judicial Independence and Accountability in Bulgaria : The Case of Judge Miroslava Todorova* (2017), pp. 2-3 and 16; "Bulgaria: ICJ raises concern at dismissal of Judge Todorova" (August 27, 2012), <https://www.icj.org/bulgaria-icj-raises-concern-at-dismissal-of-judge-todorova/>

<sup>53</sup> [https://www.cjc-ccm.gc.ca/cmslib/general/news\\_pub\\_judicialconduct\\_Principles\\_en.pdf](https://www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf)

<sup>54</sup> Principle 6D.1.

<sup>55</sup> Principle 6D.3(d).



considerations. The first is whether the judge's involvement could reasonably undermine confidence in his or her impartiality. The second is whether such involvement may unnecessarily expose the judge to political attack or be inconsistent with the dignity of judicial office. If either is the case the judge should avoid such involvement.

Principle D.3(d) recognizes that, while restraint is the watchword, there are limited circumstances in which a judge may properly speak out about a matter that is politically controversial, namely, when the matter directly affects the operation of the courts, the independence of the judiciary (which may include judicial salaries and benefits), fundamental aspects of the administration of justice, or the personal integrity of the judge. Even with respect to these matters, however, a judge should act with great restraint. Judges must remember that their public comments may be taken as reflective of the views of the judiciary; it is difficult for a judge to express opinions that will be taken as purely personal and not those of the judiciary generally. There are usually alternatives to public discussion. For example, the chief justice of the court may raise the matter formally with the appropriate official or officials. Except for statutory and constitutional duties and matters affecting the operation of the courts or the proper administration of justice, chief justices are in no different position than their colleagues.

...Nothing in these Principles prevents or indeed discourages judicial participation in law reform or other scholarly or educational activities of a nonpartisan nature directed to the improvement of the law and the administration of justice. Judges seconded to law reform commissions may exercise greater latitude with respect to matters under consideration by the Commission. ...However, when engaging in such activities, the judge must not be seen as "lobbying" government or as indicating how he or she would rule if particular situations were to come before the judge in court. This, of course, does not prevent judges from making representations to government concerning judicial independence or, through the appropriate mechanisms, with respect to salaries and benefits. Discussion of the law for educational purposes or pointing out weaknesses in the law in appropriate settings is in no way discouraged. For example, in certain special circumstances, judicial commentary on draft legislation may be helpful and appropriate, so long as the judge avoids giving informal interpretations or opinions on constitutionality. Normally, judicial commentary on proposed legislation or on other questions of government policy should relate to practical implications or legislative drafting and should avoid issues of political controversy. In general, such judicial commentary should be made as part of a collective or institutionalized effort by the judiciary, not that of an individual judge.<sup>56</sup>

#### 4. Academic Sources

**Jasmin Moran, "Courting Controversy: The Problems Caused by Extrajudicial Speech and Writing" (2015),<sup>57</sup>** discusses a number of cases of out-of-court statements by judges, in a number of common law jurisdictions (in particular, New Zealand, England, Scotland and the United States), and examines legal, ethical and policy questions about the correct balance between judicial freedom of expression and the need to safeguard impartiality of the courts. She concludes (p. 488-489):

The current approach to this problem, found in judicial conduct codes and case law, is that judges are free to express opinions on legal issues outside of judgments in written publications and

<sup>56</sup> Canadian Judicial Council, *Ethical Principles for Judges*, pp. 41-43.

<sup>57</sup> 46 *Victoria U. Wellington L. Rev.* 453 (2015).

speeches. However, if the tone and language used are intemperate, the *Saxmere* test<sup>58</sup> for apparent bias may be satisfied and the judge will need to recuse him or herself.

The remainder of the article analysed whether this is the correct approach. Any approach must navigate between two concerns: protecting judicial free speech, and ensuring the effective and efficient functioning of the legal system. These goals are at odds with each other and the line must be drawn somewhere between them. The status quo achieves an appropriate balance, recognising free speech but also upholding the integrity of the justice system by protecting judicial impartiality. The threshold for recusal is high enough to preclude problems such as litigants bringing hollow bias claims. In this context, a policy of judicial silence is not only unnecessary, but also undesirable. It denies judges the right to express their opinions and robs society of an invaluable educative resource.

**Sietske Dijkstra, in "The Freedom of the Judge to Express his Personal Opinions and Convictions under the ECHR" (2017),**<sup>59</sup> reviews European Court jurisprudence, up to and including the Grand Chamber judgment in *Baka*, considering on the one hand cases examining judges' freedom of expression under article 10 of the European Convention, and on the other hand cases examining complaints from litigants alleging lack of impartiality as required by article 6 as a result of statements by judges. She concludes among other things that under the European Convention the starting point is that judges are entitled to exercise right to freedom of expression and related rights, but at the same time, the Europe Court accords national authorities a certain "margin of appreciation" in evaluating the validity of restrictions on those rights, arising from the special situation of judges. It also appears however that the "margin of appreciation" is replaced by "close scrutiny" when it comes for instance to restrictions on judges' participation in public debates about judicial independence itself. A certain amount of unpredictability arises from the variable accordance of a "margin of appreciation" and the many situation-specific factors and differing interests involved. From the point of view of fair trial rights, she notes that the focus in article 6 on independence and impartiality means that an exercise of expression or association that might not necessarily result in a violation of article 6 in a case presided over by a judge, might nevertheless be subject to valid restrictions without violating the judge's personal rights of expression or association. So although "the perspective of Article 6(1) ECHR adds to an understanding of the limits of judicial freedom," at the same time, "because of its narrow scope, its meaning is limited."

#### **Conclusions:**

Based on the above sources, as well as the ICJ's global experience with States and judiciaries from around the world over some six decades, the ICJ states the following summary conclusions:

1. Judges and prosecutors are like other citizens entitled to freedom of expression, belief, association and assembly.

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<sup>58</sup> Moran quotes the following test from the New Zealand case of *Saxmere*: "Apparent bias is established if A fair-minded lay observer might reasonably apprehend the judge might not bring an impartial mind to the resolution of the question the judge is required to decide."

<sup>59</sup> 13(1) Utrecht Law Review 1-17 (2017).

2. Any limitation by a State of the exercise of these rights by judges and prosecutors is subject to the general criteria under international law for such restrictions, including as regards necessity and proportionality.
3. Given the fundamental importance of the independence of the judiciary, for the right to fair trial, effective remedy for human rights violations, and the rule of law more generally, in principle any restrictions on the exercise of these freedoms that are specifically related to their judicial functions, should be established by the judiciary itself or another independent body with majority membership of judges.
4. Any proceedings against a judge or prosecutor that are related to their exercise of these freedoms, including allegations that they violated validly imposed restrictions, should comply fully with international human rights law and standards in terms of the grounds and procedures used. In particular, the thresholds of seriousness, standards of procedural fairness, and need for independence, as set out in the UN Basic Principles on the Independence of the Judiciary and other relevant standards, apply to any process for discipline or removal of a judge on grounds related to the exercise of these freedoms.
5. Judges and prosecutors play special roles as organs of the State that are subject to requirements of impartiality and independence in order to respect and give effect to the human rights of others. Consequently, restrictions to their exercise of these freedoms that are demonstrably necessary and appropriate to guarantee their impartiality and independence can in principle be justified.
6. At minimum, if a judge or prosecutor has previously exercised these freedoms in a way that would give rise to a reasonable apprehension of bias in their subsequent adjudication of a case, rules should be in place to ensure the judge or prosecutor recuses themselves from the matter, and judges and prosecutors should respect those rules and recuse themselves in practice where necessary to ensure that justice is both independent and impartial, and seen to be independent and impartial.
7. The duty to recuse can arise either from statements about or relationships with parties to a dispute before a court, or from statements about particular issues that subsequently fall to be determined by a court, or relationships to persons or organisations that have taken particularly forceful positions on such issues.
8. Exercise of these freedoms can lead to a requirement to recuse, regardless whether the activity occurred in their public professional or private life. As such judges and prosecutors should consider in all their activities, the possible future consequences and perceptions likely to arise from their exercise of these freedoms, and should seek to minimize the situations in which they may eventually be called upon to recuse themselves.
9. At the same time, the above considerations do not mean that a judge or prosecutor can never engage in expression, association or assemblies that touch on issues or parties that could speculatively come before the courts at some future point. Total isolation from the community and society is neither realistic nor required of judges and prosecutors, nor would it be desirable in any event since the administration of justice, while based on the law and the evidence before a judicial decision-maker, should nevertheless be informed by awareness and engagement with the community and society.

10. In general, involvement in or comment on matters of party politics carry particularly high risks of giving rise to perceptions of lack of independence in relation to the government and other political organs of society, and perceptions of lack of impartiality in matters in which the government is a party or the lawfulness of its legislation, policies or practices otherwise fall to be determined. As such, judges and prosecutors must be particularly cautious in exercising these freedoms in relation to party political matters, and judiciaries and professional bodies have relatively wide scope to enact restrictions on this ground.
11. On the other hand, international law and standards recognise the particular importance for judges (and prosecutors) to be able to exercise their freedoms of expression, association and assembly in order to address: threats to the independence of the judiciary; threats to judicial integrity; fundamental aspects of the administration of justice; or to otherwise promote and protect universally recognized human rights and fundamental freedoms and the rule of law. As such, there is very limited scope for any authority to restrict exercise of these freedoms for these purposes, or to impose disciplinary or other consequences for having done so. This is true whether or not the matter is otherwise seen as politically controversial.
12. The above standards and principles apply to online forms of expression and association (including social media) in an equal or analogous manner to their application to offline forms. However, judges and prosecutors should be aware of and take into account practical aspects of online forms of expression and association, such as their potentially greater reach in terms of publicity or amplification to larger networks, and greater permanence of statements, as well as the potentially very significant implications of relatively small and casual actions of simply "liking" or otherwise relaying information presented by others.