



Strasbourg, 23 June 2015

**CDL-AD(2015)018**  
Engl.Only

**Opinion n°806/2015**

**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**REPORT**

**ON THE FREEDOM OF EXPRESSION OF JUDGES**

**Adopted by the Venice Commission,  
a its 103<sup>rd</sup> Plenary Session  
(Venice, 19-20 June 2015)**

**on the basis of comments by:**

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## I. Introduction

1. By a letter dated 14 April 2015, Mr. Humberto Antonio Sierra Porto, the President of the Inter-American Court of Human Rights, requested the assistance of the Venice Commission in developing a comparative law research on restrictions on freedom of expression, freedom of association, right to peaceful assembly and political rights of judges.
2. Mr. Johan Hirschfeldt (Sweden), Mr. Milenko Kreca (Serbia) and Mr. Christoph Grabenwarter (Austria) were appointed as Rapporteurs.
3. This Report which was prepared on the basis of the comments submitted by the experts above, was adopted by the Venice Commission at its 103<sup>rd</sup> Plenary Session (Venice, 19-20 June 2015).

## II. Background and Preliminary Remarks

4. It appears from the letter of the President of the Inter-American Court of Human Rights that the request for research is related to a pending case before the Inter-American Court of Human Rights, namely the case of *López Lone and others v. Honduras*. The case concerns the dismissal of four judges, who were part of an organisation called the Association of Judges for Democracy (hereinafter "AJD"). The AJD considered the removal of President Zelaya from power (28 June 2009) a coup d'état, while the Supreme Court, in a number of communiqué issued in 2009, had considered that it was a constitutional succession. The four judges were removed from their posts after disciplinary proceedings were initiated against them for participating in political demonstrations, for expressing opinions or making statements against the judiciary or for having filed legal proceedings against the alleged constitutional succession.
5. Against this background, in their request for an assistance in developing a constitutional law research, the Inter-American Court raised the following questions:
  - a. What kind of restrictions (constitutional, legal or regulatory) can be found in comparative law regarding the exercise of the right to freedom of expression, the right to freedom of association, the right to peaceful assembly and the political rights of judges, in the light of their functions and duties as judges?
  - b. If at all, what scope or interpretation has been given to these restrictions by constitutional courts or other high courts in States where they do exist? Are these restrictions dependent on the position and matters over which the particular judge has jurisdiction? Should the venue or capacity in which these opinions are given be taken into account (whether or not they were exercising or could be understood to be exercising their official duties)? Should the purpose of such opinions or demonstrations be taken into account?
  - c. Is a context, such as democratic crisis or a breakdown of constitutional order, relevant when evaluating the applicability of these restrictions?
6. In this research report, the Venice Commission, without analysing the concrete case pending before the Inter-American Court of Human Rights and without any suggestion concerning the outcome of the concrete case, will limit its scope to a presentation of the national legislative and constitutional provisions concerning the freedom of expression, association, right to peaceful assembly and political rights of judges and to an abstract

analysis of the case-law of the European Court of Human Rights (hereinafter, “ECtHR”) concerning the freedom of expression of judges<sup>1</sup>.

7. The limited timeframe for the preparation of this report did not allow for an exhaustive research of comparative law<sup>2</sup>. Particular focus has been placed on the analysis of the Swedish legislative and constitutional provisions and the domestic case-law in Germany and in Austria.

### III. Comparative law on the freedom of expression and association of judges

8. The Opinion no. 3 of the Consultative Council of European Judges<sup>3</sup> states that “[t]he judicial system can only function properly if judges are not isolated from the society in which they live (...). 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) (...). 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”.

9. The Council of Europe (hereinafter, “CoE”) member states have established constitutional restrictions (A) and/or adopted relevant legislation and code of conduct (B) in order to achieve this balance between the requirements of independence and impartiality of the judicial function and the fundamental rights of judges.

#### A. Constitutional provisions

10. In **Andorra, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, “the former Yugoslav Republic of Macedonia”, Malta, the Republic of Moldova, Monaco, the Netherlands, Norway, Portugal, Russia, San Marino, Slovenia, Spain, Sweden, Switzerland and Turkey**, there are no constitutional provisions concerning specifically the freedom of expression of judges nor the freedom of association of judges. In Austria, Article 11 para. 2 ECHR<sup>4</sup> forms an integral part of the Constitution.

11. Concerning the freedom of expression of judges, the Constitution of **Albania**, in its Article 137, deals with this issue and stipulates that “*a judge of the High Court enjoys immunity regarding the opinions expressed or decisions taken in the exercise of his functions*”. Article 86 of the Constitution of Montenegro provides that the President of the Supreme Court, the President and the judges of the Constitutional Court, and the Supreme State Prosecutor shall enjoy the same immunity as the members of the Parliament.

12. Moreover, it appears that none of the constitutions of the CoE Member States provide for specific restrictions on the freedom of expression of judges.

<sup>1</sup> See for a similar approach, CDL-AD(2014)014, *Amicus Curiae* Brief for the Constitutional Court of Georgia on Individual Application by Public Broadcasters, adopted by the Venice Commission at its 98<sup>th</sup> Plenary Session (Venice, 21-22 March 2014).

<sup>2</sup> The President of the Inter-American Court of Human Rights underlined that the Court is scheduled to begin the study of the above-mentioned case in July 2015 and requested the Venice Commission to submit the research report by mid to late June 2015.

<sup>3</sup> Opinion no. 3 of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges’ professional conduct, in particular ethics, incompatible behaviour and impartiality (November 2002).

<sup>4</sup> See the Analysis on the ECHR below under VI.

13. Concerning the freedom of association, a number of constitutions of CoE Member States provide for specific restrictions for judges. With respect to political activities, a judge cannot be a member of or be involved in a political party in **Armenia** (Article 98<sup>5</sup>), **Azerbaijan** (Article 126<sup>6</sup>), **Hungary** (Article 26<sup>7</sup>), **Montenegro** (Article 54<sup>8</sup>), **Poland** (Article 178<sup>9</sup>), **Romania** (Article 40<sup>10</sup>), **Serbia** (Article 55<sup>11</sup>) and **Ukraine** (Article 127<sup>12</sup>). With regard to trade unions, a judge may not belong to them in **Poland** (article 178 paragraph 3<sup>13</sup>), **Slovakia** (article 37<sup>14</sup>, which also includes associations and the right to strike), and **Ukraine** (article 127<sup>15</sup>).

14. Finally, in **Armenia**, the right to freedom of peaceful and unarmed assembly is secured under article 29 of the Constitution. The same article provides that the exercise of this right by judges may be restricted and refers to the domestic legislation for further regulation.<sup>16</sup>

## B. Legislative provisions and codes of conduct

15. A study conducted by the Consultative Council of European Judges (CCJE) in 2002 on “the principles and rules governing judges professional conduct with particular reference to efficiency, incompatible behaviour and impartiality” highlighted that some countries provide for statutory obligations for judges whereas others have established a judge’s code of conduct<sup>17</sup>. The findings of the above-mentioned study have been used in the present research report.

### - Statutory obligations

16. There are statutory obligations for judges in many CoE member states including **Andorra**<sup>18</sup>, **Austria**<sup>19</sup>, **Croatia**<sup>20</sup>, **Czech Republic**<sup>21</sup>, **Denmark**<sup>22</sup>, **Estonia**<sup>23</sup>, **France**<sup>24</sup>,

<sup>5</sup> Constitution of Armenia, Article 98 paragraph 2: “[...] Judges and members of the Constitutional Court may not be members of any political party, nor may they engage in any political activity”.

<sup>6</sup> Constitution of Azerbaijan, Article 126 paragraph II: “[...] Judges [...], may not be involved in political activity and join political parties, [...]”.

<sup>7</sup> Constitution of Hungary, Article 26 paragraph 1: “[...] Judges shall not be members of a political party or engage in any political activity”.

<sup>8</sup> Constitution of Montenegro, Article 54: “[...] A judge of the Constitutional Court, a judge, a state prosecutor and his deputy, [...] shall not be a member of any political organization. [...]”.

<sup>9</sup> Constitution of Poland, Article 178 paragraph 3: “A judge shall not belong to a political party, a trade union or perform public activities incompatible with the principles of independence of the courts and judges”.

<sup>10</sup> Constitution of Romania, Article 40 paragraph 3: “Judges of the Constitutional Court, the advocates of the people, magistrates, [...], are forbidden to join political parties”.

<sup>11</sup> Constitution of Serbia, Article 55 paragraph 5: “Judges of Constitutional Court, judges, public prosecutors, Defender of Citizens, [...] may not be members of political parties”.

<sup>12</sup> Constitution of Ukraine, Article 127 paragraph 2: “Professional judges shall not belong to political parties and trade unions, take part in any political activity, hold a representative mandate, occupy any other paid positions, perform other remunerated work except scholarly, teaching and creative activity”.

<sup>13</sup> Constitution of Poland, article 178 paragraph 3: “A judge shall not belong to a political party, a trade union or perform public activities incompatible with the principles of independence of the courts and judges”.

<sup>14</sup> Constitution of Slovakia, article 37 paragraph 4: “A judge shall not belong to a political party, a trade union or perform public activities incompatible with the principles of independence of the courts and judges”.

<sup>15</sup> See footnote no. 10.

<sup>16</sup> Constitution of Armenia, article 29: “Everyone shall have the right to freedom of peaceful and unarmed assembly. Restrictions on exercising these rights by servicemen in the armed forces, police, national security, prosecutor’s office, as well as for judges and members of the Constitutional Court may be prescribed only by the law”.

<sup>17</sup> [http://www.coe.int/t/dghl/cooperation/ccje/textes/Travaux3\\_fr.asp](http://www.coe.int/t/dghl/cooperation/ccje/textes/Travaux3_fr.asp).

<sup>18</sup> The *Justice Act of 3 September 1993* provides under Chapters III and IV, the regime of incompatibilities and prohibitions as well as the recusal and abstentions of judges. It also provides the duty of confidentiality under Article 71 and professional secrecy under Article 72.

<sup>19</sup> *The Law on the Service of Judges and Prosecutors*.

<sup>20</sup> *The Law on Courts*.

<sup>21</sup> *The Act on Courts and Judges (law No. 6/2002 Coll.)*.

<sup>22</sup> *The Danish Administration of Justice Act*.

**Germany**<sup>25</sup>, **Iceland**<sup>26</sup>, **Lichtenstein**<sup>27</sup>, **Lithuania**<sup>28</sup>, **Malta**<sup>29</sup>, **Moldova**<sup>30</sup>, **Norway**<sup>31</sup>, **the Netherlands**<sup>32</sup>, **Poland**<sup>33</sup>, **Portugal**<sup>34</sup>, **Slovakia**<sup>35</sup>, **Romania**<sup>36</sup>, **the Russian Federation**<sup>37</sup>, **Slovenia**<sup>38</sup>, **Turkey**<sup>39</sup> and **Ukraine**<sup>40</sup>. Those statutory obligations impose restrictions of different level from country to country on the freedom of expression and association of judges including their political activities. Some of those statutory obligations for judges are addressed below.

17. In **Croatia**, obligations of judges are regulated under Articles 92 to 98 of the *Law on Courts* (as amended in 2010). A judge's behaviour must not be detrimental to the dignity of judicial power, and must not put in question his/her professional impartiality and independence or the independence of judicial power. A judge must not disclose information concerning parties to a dispute, their rights, obligations or legal interest, which came to his/her knowledge in the course of the performance of his/her judicial duty. A judge shall keep the confidentiality of all information which was not disclosed during a trial. According to Article 94, a judge must not be a member of a political party, nor be involved in political activity. Judges may freely associate in associations of judges for the purpose of protection of their independence and interests. Lastly, according to the Law on High Council of Justice, violation of official secret relating to the performance of judicial duties and damaging the reputation of the court or judicial office are considered as disciplinary grounds.

18. In **Germany**, the *German Judiciary Act*, in the version published on 19 April 1972 (*Bundesgesetzblatt*) as last amended on 5 February 2009 provides special obligations of judges and the "maintenance of independence" under its Section 39<sup>41</sup>. In practice, this principle of moderation ("*Mäßigungsgebot*") is mainly relevant with respect to conduct outside office. Public political statements are not ruled out. A judge should not mention his or her office when he or she expresses political opinions in public, except with respect to a legal question (lecture and law review article for instance). A judge shall preserve secrecy regarding the course of deliberations. Judges may be members of associations, including trade unions, and belong to a political party. They can stand as a candidate for Parliament. If he or she is elected, the right and the duty to hold judicial office are suspended. In case of a culpable violation of an official duty, a judge can be subject to disciplinary proceedings.

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<sup>23</sup> The *Status of Judges Act*.

<sup>24</sup> The *Organic Law no. 58-1270 of 22 December 1958 on the Status of the Judiciary*.

<sup>25</sup> The *German Judiciary Act*.

<sup>26</sup> The *Act on the Judiciary (law no. 15/1998)*.

<sup>27</sup> The *Civil Servants Act (Beamtengesetz)* of 1938, the *Court Organisation Act (Gerichtsorganisationsgesetz)* of 1922 and the *Judges Act (Richterdienstgesetz)*.

<sup>28</sup> The *Law on Courts (2002)*.

<sup>29</sup> The *Code of Organisation and Civil Procedure*.

<sup>30</sup> The *Status of Judges Act*.

<sup>31</sup> The *Courts of Justice Act and the Civil Service Act*.

<sup>32</sup> The *Judiciary Organization Act*, the *Legal Status of Judicial Officers Act* and the *General Administrative Law Act*.

<sup>33</sup> The *Statute of 1 October 2001 on the Constitution on Common Courts of Law*, the *Statute of 21 August 1997 on the Constitution of the Military Courts* amended on 1 October 2001, the *Statute of 11 May 11 1995 on the Supreme Administrative Court* and the *Statute of 20 September 1984 on the Supreme Court*.

<sup>34</sup> The *Status of Judges Act*.

<sup>35</sup> The *Act No. 385/2000 Coll.*

<sup>36</sup> The *Law on the Status of Judges*

<sup>37</sup> The *Law No. 3132-I of 26 June 1992 on the Status of Judges in the Russian Federation*.

<sup>38</sup> The *Judicial Service Act (OG No. 19/94, 8/96 and 24/98)*.

<sup>39</sup> The *Law no. 2802 on Judges and Public Prosecutors*.

<sup>40</sup> The *Law on the status of judges*.

<sup>41</sup> German Judiciary Act, Section 39 "Maintenance of independence: In and outside office a judge shall conduct himself, in relation also to political activity, in such a manner that confidence in his independence will not be endangered".

See, [http://www.gesetze-im-internet.de/englisch\\_drig/englisch\\_drig.html#p0208](http://www.gesetze-im-internet.de/englisch_drig/englisch_drig.html#p0208)

19. In **Romania**, according to the *Law on the Status of Judges* (no. 303/2004), judges may not be members of political parties or undertake political activities. They are obliged to refrain from expressing or manifesting their political beliefs (Article 8). According to Article 9, judges may not express publicly their opinion about the processes that are underway and are not allowed to comment on or to justify in the press or in audio-visual programs the judgments in cases dealt by them. According to Article 10, judges may participate in the development of publications or specialized studies of literary or scientific works, except for political ones.

20. In **Turkey**, Provisions of Article 4 of the *Law no. 2802 on Judges and Public Prosecutors* are similar to the provisions of the Article 138 of the Constitution: judges shall be independent in the discharge of their duties; they shall give judgement in accordance with the Constitution, law and their personal conviction conforming to the law. According to Article 65 of this Law, a disciplinary sanction (reprimand) may be imposed on judges for having undertaken actions that could jeopardize the respect and trust in the judicial function. In the case of *Kayasu v. Turkey*<sup>42</sup> of the ECtHR, the applicant who was a prosecutor at the time of the facts, was condemned to a reprimand on the basis of Article 65 by a decision of the High Judicial Council for having filed a criminal complaint, as a citizen, before the Prosecutor of the State Security Court of Ankara against the perpetrators of the military coup d'état of 12 September 1980. Further, although the last sentence of Article 51 of the Law no. 2802 which imposed a prohibition on judges and prosecutors to be members of political parties has been abolished in March 1995, the same prohibition is maintained in Article 11 of the Law no. 2820 on Political Parties.

21. In **the Russian Federation**, the *Law No. 3132-I of 26 June 1992 on the Status of Judges in the Russian Federation* provides that “a judge must refrain from anything that would diminish the authority of the judicial power or the dignity of a judge or cast doubts on his or her objectivity, fairness and impartiality”<sup>43</sup>. If he or she commits a disciplinary offence, he or she will be applied a disciplinary penalty i.e. a warning or depending on the severity of his or her misbehaviour, an early termination of judicial office<sup>44</sup>. A disciplinary offence means a breach of the Law No. 3132-I or of the Code of Judicial Ethics. The breach should contain an element of the judge’s “fault”, and lead to the “diminishing of the authority of the judicial power” and “injuring the good reputation of the judge”.

22. In Austria, the Law on the Service of Judges and Prosecutors (Law No. 305/1961) regulates official duties of judges at several points. Section 57 contains the most relevant obligation related to the Freedom of Expression of Judges: among other official duties, para. 1 of the provision includes the commitment to fidelity towards State and Law. A breach of this provision means a disciplinary offence. Depending on the degree of misconduct, the disciplinary sanction may include reproof, financial penalty, transfer to a different office or even dismissal. However, like in Germany, the provision in question does not rule out public political statements. A comprehensive case-law deals with admissibility of disciplinary measures against judges but Section 57 para. 1 comes very rarely into play.

#### - **Codes of Conduct for Judges**

23. A number of CoE countries have adopted “Codes of conduct” for judges prepared and adopted in general by associations of judges<sup>45</sup>. Such codes of conduct for judges may give guidance to disciplinary authorities for their decisions in disciplinary matters<sup>46</sup>.

<sup>42</sup> ECHR, *Kayasu v. Turkey* (64119/00 and 76292/01), 13 November 2008, para. 10.

<sup>43</sup> Law No. 3132-I of 26 June 1992 on the Status of Judges in the Russian Federation, Section 3(2).

<sup>44</sup> Law No. 3132-I of 26 June 1992 on the Status of Judges in the Russian Federation, Section 12(1).

<sup>45</sup> In Croatia, the Code of Ethics was adopted by a body composed of presidents of Councils of Judges (body of self-government existing at every court of appeal elected by judges and with a duty to evaluate work of judges), in the Czech Republic, by the Union of Judges, in Italy, by the National Judges’ Association, in Lithuania, by the General meeting of Judges, in Malta, by the All Maltese Judges, in Moldova, by the Conference of judges etc. In

24. In the **Russian Federation**, the Code of Judicial Ethics, adopted by the All-Russian Conference of Judges on 19 December 2012, provides that the judge should cooperate (“interact”) with mass-media in order to ensure adequate press-coverage of the court’s activities (Article 13 para.1). In his/her contacts with the mass media, the judge is supposed to inform the public about the work of the judges, improve understanding of the law and respect for the judges (Article 13 para. 2). However, in commenting to the press the judge must act with diligence and shall not give comments on the substance of pending cases. When the case is over, the judge may explain orally or in writing the meaning of the judicial decision taken (13 para. 3). In commenting decisions of other judges, the judge must show moderation and accuracy or respect. The judge is entitled to give comments on his/her decisions, and express opinions on the established practice of the material or procedural law (13 para 4). In discussions “within the judicial community”, the judge may express disagreement with the actions of other judges, in order to improve adjudicative process (13 p. 4 paragraph 2). If the judge’s activities are misrepresented by the mass-media, it belongs to the judge to decide how to react and whether he/she must use the legal means which she/he has at his/her disposal “as an ordinary citizen”. Applying to the law-enforcement bodies seeking protection of honour and dignity, or directly addressing the mass-media is possible only where other legal means to unfair criticism are exhausted or unavailable (13 para. 5). In replying to public criticism the judge must show moderation and diligence. Where public criticism affects negatively the image of the judicial power, it is preferable to react to it through a publication in the mass-media of the commentary prepared by the press-service of the court, of the Judicial Department or of the bodies of judicial self-governance (13 para. 6).

25. In **Lithuania**, Section 3 of the Ethics of Judges adopted by the General meeting of Judges on 18 December 1998 declares that even during his leisure time a judge must act in a manner that does not degrade the judicial function. This section also prevents a judge from giving legal consultations, requires to avoid public speeches about cases heard by him/her or his/her colleagues, to avoid any comments relating to the matter of a case while communicating with society and journalists, do not publicly declare his/her political views, to avoid any activity that may make an impression that a judge is influenced by any political ideology<sup>47</sup>.

26. The Code of Judicial Ethics of **Ukraine** was approved by the XI<sup>th</sup> Congress of Judges of Ukraine on 22 February 2013 and provides for divers rules concerning the use of freedom of expression by judges in different contexts. According to Article 11, a judge, within the procedure established by law, may provide the media with a possibility to obtain information, while not violating the rights and freedoms of citizens, damage of their honour and dignity, authority of justice. However, a judge shall not make public statements, comment in the media on pending cases and cast doubt on judgments that came into force. A judge shall not disclose information which became known to him/her in connection with the consideration of a case (Article 12), may not belong to any political party and participate in any political activity or have a representative mandate (Article 16). Judges have the right to participate in civil society activities, public events, if they do not damage their status and authority of the

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the Slovak Republic, the Code of Conduct was prepared and adopted by the President of the Council of Judges and the Ministry of Justice.

<sup>46</sup> See the study conducted by the CCJE: ([http://www.coe.int/t/dghl/cooperation/ccje/textes/Travaux3\\_fr.asp](http://www.coe.int/t/dghl/cooperation/ccje/textes/Travaux3_fr.asp)). In Croatia, if a judge member of Association breaches the Code, he/she can be brought before the Court of Honour of the Association; in Estonia and Lithuania, rules of conduct do not impose sanctions but violations of the rules may result in a disciplinary sanction provided by the Law on the Status of Judges; in Italy, the code of conduct aim to serve as an instrument for self-control within the judicial profession and violations may or may not involve sanctions of a disciplinary or criminal nature; in Ukraine, the provisions of the code are not considered to be additional reasons for disciplinary sanctions for judges.

<sup>47</sup> Questionnaire on the conduct, ethics and responsibility of judges: reply submitted by the delegation of Lithuania (CCJE):

[https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE\(2002\)12&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3](https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE(2002)12&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3)



judiciary (Article 17). According to Article 17, it is acceptable for a judge to have a social network account, use Internet-forums and other forms of online communication, however, a judge may post and comment only on information which does not undermine the authority of a judge and the judiciary.

27. The Code of Ethics for Members of the Judiciary of **Malta** (As amended on 8 February 2010), in its Article 12, states that members of the Judiciary shall not join organizations, associations or bodies with political leanings. Members of the Judiciary shall not discuss out of Court, cases that are pending in court. In full respect of freedom of expression members of the Judiciary should discourage persons from discussing, in their presence cases that are *sub judice* (Article 13). Lastly, members of the Judiciary shall not, whether in their private or public life, act in such manner as might imply political partiality (Article 25).

28. The Code of Judicial Ethics of **Croatia** (2005), in its Article 5, provides that a judge shall refrain from making statements or comments which may disrupt the fairness of adjudication within the procedure and create an impression of bias. He/She shall not disclose confidential information of which he or she has become aware in the course of performing his or her office and shall not express opinions on particular pending court proceedings. Judges may participate in public discussions on the law, the legal system and the functioning of the justice system. However, when appearing in public, or when commenting on social phenomena through the public media, they shall endeavour to ensure that the views they express and their overall conduct is in conformity with the provisions of this Code (Article 12). Finally, judges have the right to establish professional associations and participate in the work of these associations which advocate their interests and protect their independence and the status of judicial power.

#### **IV. Restrictions on Freedom of Expression, Freedom of Association and Assembly of Judges in the Swedish constitutional and legislative provisions**

##### **A. Constitutional framework**

29. All judges, as well as civil servants, enjoy the same freedom of expression, freedom of association and the right of political assembly and the political rights as all citizens. This includes the right to be member of political parties and to hold a representative mandate in Parliament and local governments. These rights are enacted in the Swedish constitution.

30. The Swedish constitution consists of four fundamental laws. Of particular relevance for the present study are: the Instrument of Government, (*Regeringsformen*), the Freedom of the Press Act (*Tryckfrihetsförordningen*) and the Freedom of Expression Act (*Yttrandefrihetsgrundlagen*).

31. The instrument of Government ("IG") deals with human rights and freedoms in its Chapter 2 and guarantees the freedom of expression (freedom to communicate information and express thoughts, views and opinions and sentiments, pictorially, in writing or in any other way) (IG Chapter 2, Article 1, paragraph 1, point 1); freedom of assembly (freedom to organise and attend meetings for information, expression of opinion or other similar purposes or to present artistic work) (IG Chapter 2, Article 1, paragraph 1, point 3); freedom to demonstrate (freedom to organise and take part in demonstrations in a public place) (IG Chapter 2, Article 1, paragraph 1, point 4); freedom of association (freedom to associate with others for public or private purposes, including also membership to a political party) (IG Chapter 2, Article 1, paragraph one, point 5).

32. According to Article 20, these rights and freedoms may be limited by means of law and are covered by qualified procedural rules.<sup>48</sup>

### B. Constitutional guarantees concerning the freedom of expression

33. The Constitution of Sweden provides for a number of safeguard principles in order to ensure the effective protection of the freedom of expression. Those safeguards are also applicable to civil servants including judges.

34. The Freedom of the Press Act, as well as the Freedom of Expression Act, is characterized by the principle of **sole responsibility**. This is of particular significance in the case of the daily press and other periodical publications, as well as radio and television where, several different contributors may be involved. A single individual is registered as responsible editor and is liable for any offences. Other persons such as journalists, technical staff, outside contributors and sources are immune from liability and can therefore remain anonymous<sup>49</sup>.

35. The protection also covers providers of information to include information that has been intended for publication but never been published. This individual legal right to anonymity in publishing information is protected by a **ban on seeking sources**, which is regarded as a crime, misuse of office<sup>50</sup>.

36. Thirdly, the notion of '**reprisals ban**' has been developed in legal practice, especially by the Parliamentary Ombudsman. This refers to the prohibition of any measure entailing negative consequences for public sector employees (civil servants as well as judges) arising from their assistance in the publication of information in a constitutionally protected medium. This ban is now to be found in the Freedom of the Press Act and the Freedom of Expression Act and regarded as a crime, misuse of office. But the ban has a general protective impact also on situations where the expression is not covered by the constitutional protection for certain media.

37. Consequently, in case a judge gives information for publication to a newspaper anonymously he or she is protected against public (including judicial) authorities by the ban on seeking sources. If the judge gives the information for publication openly under his or her full name, the judge is protected against reprisals from public (including judicial) authorities by the ban on reprisals.

38. Lastly, in order for criminal liability arises for the author of a book or the editor of a publication, the information should constitute a crime proscribed both under the Freedom of Press Act and the Criminal Code<sup>51</sup>.

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<sup>48</sup> The limitations by means of law of relevance here mainly consist of different crime-provisions regulated in the Penal Code, general crimes and crimes that are connected with the duty of a judge or a civil servant. Of certain importance here are the provisions on misuse of office in Chap. 20 of the Penal Code. According to the third paragraph a person who discloses information which he is duty-bound by Law or other statutory instrument to keep secret could be sentenced for breach of professional confidentiality.

<sup>49</sup> Article 1 of Chapter 8 (Liability Rules) of the Freedom of Press Act provides that: "Liability under penal law for an offence against the freedom of the press committed by means of a periodical lies with the person notified as responsible editor at the time when the periodical was published. (...)"

<sup>50</sup> Chapter 3 (On the right to anonymity) of the Freedom of Press Act.

<sup>51</sup> See Article 4 of Chapter 7 of the Freedom of Press Act. The crimes referred to under Article 4 are high treason, instigation of war, espionage, unauthorised trafficking in secret information, carelessness with secret information, insurrection, dissemination of rumours which endanger the security of the Realm, offences against civil liberty, defamation, unlawful threats (including against a civil servant).

### **C. Application of the constitutional guarantees on freedom of expression to civil servants and judges**

39. It is important to stress that in case a judge presents information or gives opinions or comments in the exercise of his/her official duties and must be seen as acting within his or her capacity as a judge or as the official representative of the court to which he/she belongs, the above mentioned constitutional protections are not applicable. Instead, the judge in such a situation is fully responsible under ordinary legal provisions and the obligation on judges to pay regard, in the performance of their duties, to the equality of all before the law and to observe objectivity and impartiality should be taken into account<sup>52</sup>. In other words, the requirement of impartiality should be weighed against the protection of freedom of expression.

40. For instance, public expressions by a judge that are obviously connected with the administration of justice in a particular case dealt with by the same judge could of course raise public questions about whether the judge should be disqualified from hearing the case<sup>53</sup>. Such expression may undermine the confidence which must be inspired by the courts in a democratic society. In the Swedish Code of Procedure there are provisions on the situations where a judge should be disqualified because of conflict of interests<sup>54</sup>.

41. In order to set aside the constitutional guarantees for freedom of expression, the connexion between the expressed views and the tasks within the administration of justice must be obvious. In case the connexion is not obvious, the courts and supervising bodies has to give the priority to the freedom of expression of a judge and no action against the judge is permitted.

42. It is hard to draw the line in practice between expressions protected by the constitutional freedoms on one hand and expressions that should be regarded as being in connection with the judicial functions on the other. Furthermore, it could be argued that in some cases, although a judge's statements are not obviously connected to his/her official duties, his/her personal views may be a reason to consider that the judge concerned is not suited to handle certain type of cases. In the context of public statements by a civil servant, the Swedish Parliamentary Ombudsman considered that:

“The principle that publicly expressed opinions of a civil servant is a private matter could not be maintained completely without exception. One must assume that for example, a decision maker, whose personal views attracted public attention, may seem less suited to handle certain types of cases and that this sometimes can give the public authority the right to take action. It is a matter of preventing confidence damages similar to those likely to arise from conflicts of interest. (...) Measures could therefore be justified even when there is in itself no real reason to distrust the relevant decision-maker's ability in the service.

The requirement that the authorities must be impartial is, like with the protection of freedom of expression, included in the Constitution. There is therefore a conflict where different constitutional provisions must be weighed against each other. If such a trade-off gives the result that a public statement of an official should give rise to actions by the authority (=employer), these may of course not be more restrictive than what is strictly necessary in order to manage the conflict of interest arising.”

<sup>52</sup> According to Article 9 of Chapter 1 of the Instrument of Government Courts of law, administrative authorities and others performing public administration functions shall pay regard in their work to the equality of all before the law and shall observe objectivity and impartiality.

<sup>53</sup> Here it could be mentioned that a judge was recently warned by the disciplinary board for having published critical comments on his private Facebook page about a lawyer that took part in a hearing in the court where the concerned judge sits.

<sup>54</sup> Chapter 4 Section 13 of the Swedish Code of Procedure.

43. Consequently, through certain activities including certain expressions connected with the judicial duties, a judge may put him/herself in a situation where he/she “has shown himself or herself through (...) gross or repeated neglect of his or her official duties to be manifestly unfit to hold the office (...)” (Article 7 of Chapter 11 of the Instrument of Government). Under such very strict conditions and according to the latter constitutional provision, it is possible as an ultimate measure to remove a Supreme Court justice or another permanent judge by a court decision.

44. However, the Venice Commission is not aware of any such precedent in the Swedish domestic case-law. There are only a few decisions and statements in certain connection with the issue by the Parliamentary Ombudsman and the Chancellor of Justice. In a case that took place in September 2011, a civil servant had expressed private views about Islam and Nazism and later became responsible for issues on integration of refugees in a ministerial office. In this case, the Chancellor of Justice, referring also to the above mentioned decision of the Ombudsman, considered that although the starting point was that a civil servant should not be subjected to any reprisals for having expressed his/her private views (see, para. 36 of the Present Report – Reprisal ban-), the requirement of impartiality must be weighed against the protection of freedom of expression. In conclusion, it was justified that the concerned civil servant be removed from the Office on integration of refugees and be given another duty within the concerned ministry, which was considered by the Chancellor of Justice as a “consensus solution” between the principle of ban on reprisals and the requirement of impartiality of the civil servant with regard to his/her duties.

## **V. Comparative case-law: Germany and Austria**

45. The following survey of selected case-law relating to political activities of judges deals with judgments of German and Austrian (high)courts. There are very few judgments concerning the matter because in general, freedom of expression and freedom of association and assembly of judges are guaranteed by both the German and the Austrian Constitution the same way as for all other citizens. The survey focuses on the few cases where the fundamental rights mentioned above are applied differently in case a judge is involved in the matter.

### **A. Germany**

46. Both the Federal Constitutional Court and the Federal Administrative Court have established some general principles in their case-law on the freedom of political activities of judges. In this respect, the courts had to deal mainly with disciplinary sanctions imposed on judges who were engaged in political activities.

#### **- General framework<sup>55</sup>**

47. As a general principle, a judge may express his political opinion as any other citizen<sup>56</sup> and may engage in political activities as well. He may affiliate to a political party, take part in election campaigns or even engage himself as an operative of a political party. In general, a judge may in these matters put his official position on record as well. The Federal Administrative Court asserted that state and society should have no interest in non-critical judges.

<sup>55</sup>The following analysis is based on two judgments of the Federal Constitutional Court (published in NJW 1983, p. 2691; NJW 1989, p. 93) and a judgment of the Federal Administrative Court (BVerwGE 78, p. 216).

<sup>56</sup> See especially Article 5 and 8 Basic Law of the Federal Republic of Germany [Basic Law] concerning freedom of expression, arts and sciences and freedom of assembly.

48. Nevertheless, freedom of political expression of judges has to be read in conjunction with the traditional principles of the professional civil service<sup>57</sup>. The Constitutional Court pointed out that a judge is obliged to administer his office in an uncommitted manner with regard to political issues; he has to serve the law only. Therefore, a judge may engage in political activities only to an extent compatible with the trust of the public in the impartial and neutral administration of his office. This is also because a judge possibly has to decide in cases of a political nature which often come along with public controversies. Political activities of judges must not lead to the impression that the judge in question is not loyal to the legal order and neutral to the parties before the court. The trust of the public in the impartiality of the judiciary is (inter alia) based on the idea that judges take perceptible distance from current political debates. The fact that the trust of the public in the impartiality and independence of the judiciary is unsettled because of certain political activities of judges is not in accordance with the concept of an impartial and independent judge as prescribed by the German Constitution. It is irrelevant that a certain judge considers himself as independent. As already pointed out, a judge may mention his official position in the context of political debate but he/she is supposed to draw a line between his official function as a judge and his contribution to political controversies. In other words, the expression of a political opinion of a judge has to be distinguishable from an official statement. Furthermore, a judge is not allowed to enforce his political views by emphasizing his official position.

- **Case-law**

49. The following judgments have been selected in consideration of their general relevance for the subject matter.

**a. Federal Constitutional Court, 30. August 1983, 2 BvR 1334/82**

50. A judge has been subject to a disciplinary sanction imposed by the president of the regional high court for having taken part in a newspaper advertisement<sup>58</sup> dealing with a teacher who has been banned from his profession because of his candidacy for the DKP (German Communist Party). The signees of the advertisement, among them the respective judge, expressed solidarity with the person concerned by the occupational ban and petitioned to the competent courts to enforce the Basic Law and to reinstate the teacher. The judge added also his official position to his signature on the advertisement.

51. The Federal Constitutional Court found that the judge in question has infringed his obligation to participate in political controversies in a restraint manner. In particular the Federal Constitutional Court referred to the fact that the judge took part in a public announcement concerning a pending case; that the advertisement was designed in a striking way and that it contained an entirely one-sided claim. Furthermore, the Federal Constitutional Court pointed out that the aim of the advertisement should have been to influence the lay judges of the labour court before which the case was pending. Finally, the Federal Constitutional Court referred to the display of the official position of the judge under his signature on the advertisement.

52. For these reasons, the Constitutional Court held that by imposing a disciplinary sanction on the judge, there had been no violation of his freedom of expression enshrined in Article 5 of the Basic Law.

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<sup>57</sup>Article 33 § 5 Basic Law.

<sup>58</sup>The headline of the advertisement reads as follows: "No occupational ban on M".

***b. Federal Constitutional Court, 6 June 1988, 2 BvR 111/88; Federal Administrative Court, 29 October 1987, 2 C 72/86***

53. A judge and a prosecutor were subject to a disciplinary sanction imposed by the president of the court. The disciplined judge and prosecutor had taken part in a newspaper advertisement<sup>59</sup> dealing with the intended deployment of missiles on German ground aimed for protection against the former Soviet Union. The text of the advertisement expressly stated that the deployment of the missiles was unconstitutional. The advertisement was signed by 35 judges and prosecutors of a district in Northern Germany. They added their official position to their names on the advertisement.

54. The Federal Administrative Court pointed out that both the judge and the prosecutor made use of their official position to reinforce their political opinion; they implied in their statement an official reference and therefore linked their private political activity to their office, which was incompatible with the rules governing their official duties. The Federal Administrative Court emphasized that the judge and the prosecutor had stressed their official self-conception and that the trust of the public in the independent administration of their office is undermined by this conduct. The Federal Administrative Court held that the imposition of a disciplinary sanction was in conformity with the law.

55. For the same reasons, the Federal Constitutional Court held that by imposing a disciplinary sanction on the judge and the prosecutor, there has been no violation of their right to freedom of expression enshrined in Article 5 of the Basic Law.

***c. Disciplinary Court of Lower Saxony, 14. September 1989, DGH 1/89***

56. In this case, although no disciplinary sanction was imposed on the judge, his superior judge notified him that he had committed a breach of duty. The judge in question was one of the signees of a newspaper advertisement, along with 554 other judges and prosecutors. The advertisement dealt with a blockade of an access road to a depot of missiles on German ground run by the United States of America. The blockade was performed by judges. The advertisement criticized the convictions of the protesters and expressed solidarity with the convicted judges.

57. The Disciplinary Court of Lower Saxony ruled that the advertisement expresses an unacceptable approval of the unlawful behavior of the protesters. The text of the advertisement suggests that the blockade is a legitimate and lawful act protected by the freedom of expression. According to the Disciplinary Court it did not matter that the advertisement was published in a newspaper mainly read by well-educated people because despite that they were not lawyers and were therefore capable of being influenced by the statement of the judges. It was incompatible with the official duties of a judge to publicly pay tribute to the unlawful conduct of his peers.

58. The Disciplinary Court of Lower Saxony concluded that the judge had violated his official duties by taking part in that kind of political activity.

**B. Austria**

59. Only very few cases have been decided in Austria concerning political activities of judges. In contrast to Germany, there is no established general framework by the Supreme Court in neither civil nor criminal cases, by the Supreme Administrative Court and the Constitutional Court related to the matter.

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<sup>59</sup> The headline of the advertisement reads as follows: "35 judges and prosecutors of the jurisdiction of Lübeck against the deployment of missiles".

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60. The reasoning of the relevant decisions, as far as it is published, is relatively short:
- The fact that a judge advocates the monarchy as a form of government by singing the emperors anthem constitutes a breach of official duties (Supreme Court, 7 October 1921, Ds 24/21).
  - It constitutes a breach of official duties for a judge to implicitly request to commit crimes, accuse the Federal President of exercising his power of pardoning in a one-sided manner and to encourage criminals (in an ironically way) to commit their offences in a ruthless manner (Supreme Court, 20 December 1976, Ds 8/76).
  - It unsettles the trust of the public in the judiciary if a judge implies that the judiciary as a whole or certain judges are bribable by quoting *Charles Maurice de Talleyrand*: “The judiciary is a prostitute of politics” (Supreme Court, 1 July 1994, Ds 1/94).

## VI. Case-law of the European Court of Human Rights

61. The well-established case-law of the European Court of Human Rights (hereinafter “ECtHR”) suggests that the guarantees provided by Article 10 (Freedom of Expression) of the European Convention on Human Rights (“ECHR”) extends to employment relations in general and to public servants in particular. Articles 1 and 14 ECHR stipulate that “everyone within [the] jurisdiction” of the Contracting States must enjoy the right and freedoms in Section I [of the ECHR] “without discrimination on any ground”. Paragraph 2 of Article 10 which lays down the strict conditions according to which the freedom of expression may be subjected to restrictions, does not refer to any category of persons (no *ratione personae* restrictions), but to a number of legitimate aims (*ratione materiae* restrictions), allowing the freedom of expression to be interfered with, provided that the interference is in accordance with the law and necessary in a democratic society. Article 11 § 2 (Freedom of Assembly and Association) allows the Contracting States to impose special restrictions on the exercise of the freedoms of assembly and association by “members of the armed forces, of the police or of the administration of the States” and confirms that as a general rule the guarantees in the Convention extend to civil servants who do not therefore fall outside the scope of the ECHR.

62. Thus, in the case of *Vogt v. Germany*, which concerned the dismissal of the applicant, a secondary school teacher, from the civil service on account of her political activities as a member of the German Communist Party, the Court considered that the fundamental principles in the field of freedom of expression as laid down in the case-law, apply also to civil servants<sup>60</sup>. The Court adopted the same approach concerning a ban on local government employees participating in political activities<sup>61</sup>, dismissal of the Head of the Press Department of the Moldovan Prosecutor General’s Office for divulging documents which disclosed interference by a high-ranking politician in pending criminal proceedings<sup>62</sup>, a ban on the publication and distribution by soldiers of a paper criticising certain senior officers<sup>63</sup> or the criminal conviction and dismissal of a public prosecutor for abuse of authority and insulting the armed forces<sup>64</sup>.

63. Nevertheless, it is also established in the case-law that the phrase “carries with it duties and responsibilities” in paragraph 2 of Article 10 suggests that specific restrictions of the civil servants’ freedom may be justified due to the specificities of their function<sup>65</sup>. In other

<sup>60</sup> ECHR, *Vogt v. Germany*, app. no. 1785/91, 26 September 1995, para. 53.

<sup>61</sup> ECHR, *Ahmed and others v. United Kingdom*, 2 September 1998.

<sup>62</sup> ECHR, *Guja v. Moldova* [GC], no. 14227/04, 12 February 2008, para. 52.

<sup>63</sup> ECHR, *Engel and others v. the Netherlands*.

<sup>64</sup> ECHR, *Kayasu v. Turkey*, no. 64119/00 and 76292/01, 13 November 2008, para. 89.

<sup>65</sup> See, Christoph Grabenwarter, *European Convention on Human Rights – Commentary-*, 2014, p. 271.

words, the specific status of civil servants places them in a less advantageous position than other individuals as regards the justification of restrictions imposed on their freedom of expression<sup>66</sup>. In the case of *Handyside v. the United Kingdom*, the European Commission of Human Rights considered in its Report of 30 September 1975 that “*in assessing the grounds [for restricting the freedom of expression], [the Commission] must have regard to the particular situation of the person exercising freedom of expression and to the duties and responsibilities which are incumbent on him by reason of this situation. Thus different standards may be applicable to different categories of persons, such as civil servants, soldiers, policemen, journalists, publishers, politicians etc., whose duties and responsibilities must be seen in relation to their function in society*”. This specific nature of civil service requires that a civil servant is bound by a duty of loyalty and discretion which should be taken into account when assessing the scope of freedom of expression of civil servants<sup>67</sup>.

64. The ECtHR’s considers therefore that it is the duty of the courts to determine, having regard to the particular circumstances of each case, “*whether a fair balance has been struck between the fundamental right of the individual to freedom of expression and the legitimate interest of a democratic state in ensuring that its civil service properly furthers the purposes enumerated in Article 10, para.2*”<sup>68</sup>. The restrictions imposed on a civil servant’s freedom of expression should not affect the substance of this right.

#### A. Freedom of expression of judges

65. Their status does not deprive judges of the protection of Article 10 ECHR<sup>69</sup>. Moreover, the ECtHR considered in the case of *Harabin v. Slovakia*<sup>70</sup> 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 calls for close scrutiny.

66. It is important to point out that the “duties and responsibilities” referred to in Article 10 (2) have a special significance in cases concerning the freedom of expression of judges, since 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<sup>71</sup>. The discretion owed particularly by the judiciary requires that the dissemination of even accurate information is carried out with moderation and propriety<sup>72</sup>.

67. In assessing whether an interference in the right to freedom of expression of a judge corresponds to a “pressing social need” and “was proportionate to the legitimate aim pursued” the ECtHR considers the impugned statement in the light of all the concrete circumstances of the case as a whole. In this context, a particular importance is attached to *the office held by the applicant*<sup>73</sup>, *the content of the impugned statement*<sup>74</sup>, *the context in which the statement was made*<sup>75</sup> and *the nature and severity of the penalties imposed*<sup>76</sup>. The fairness of proceedings and the procedural guarantees afforded are also among the factors

<sup>66</sup> See, Loukis G. Loucaides, *Essays on the Developing Law of Human Rights*, 1995, p. 57; Paul Mahoney, *Free speech of civil servants and other public employees*, *Essays in Honour of Nicholas Bratza*, 2012, p. 258.

<sup>67</sup> ECHR, *Kudeshkina v. Russia*, 29492/05, 26 February 2009, para. 85.

<sup>68</sup> *Ibid.*

<sup>69</sup> ECHR, *Baka v. Hungary* (Chamber judgment), 20261/12, 27 May 2014, para.88 (the case was referred to the Grand Chamber on 15 December 2015 at the Government’s request).

<sup>70</sup> ECHR, *Harabin v. Slovakia*, 62584/00, 29 June 2004.

<sup>71</sup> ECHR, *Wille v. Liechtenstein*, 28396/95, 28 October 1999, para. 64.

<sup>72</sup> ECHR, *Kudeshkina v. Russia*, para. 93.

<sup>73</sup> ECHR, *Wille v. Liechtenstein*, para. 63 and 64; ECHR, *Baka v. Hungary* (Chamber judgment), para. 99.

<sup>74</sup> ECHR, *Pitkevich v. Russia* (dec.), 47936/99, 8 February 2001.

<sup>75</sup> ECHR, *Kudeshkina v. Russia*, para. 95.

<sup>76</sup> ECHR, *Kudeshkina v. Russia*, para. 98.



to be taken into account when assessing the proportionality of an interference with the freedom of expression<sup>77</sup>.

### **B. Judicial Office held by the applicant**

68. The judicial status held by an applicant is one of the essential factors that is taken into account by the ECtHR when examining whether, in view of the specific duties and responsibilities inherent to that status, the applicant has infringed his duty of loyalty and discretion through the opinion he/she expressed<sup>78</sup>.

69. In the case of *Baka v. Hungary*, the applicant, in his capacity as the President of Supreme Court and of the National Council of Justice, expressed his views on various legislative and constitutional reforms affecting the judiciary. Later, a bill on the transitional provisions of the Fundamental Law, providing that the mandates of the President of the Supreme Court as well as the President and the members of the National Council of Justice would be terminated upon the entry into force of the Fundamental Law was adopted by the Parliament of Hungary. As a consequence, the applicant's mandate as President of the Supreme Court ended on 1 January 2012.

70. In reaching the conclusion that the premature termination of the applicant's mandate had been the result of his views expressed publicly in his professional capacity and that this termination was in breach of the applicant's right to freedom of expression, the ECtHR attached a particular importance to the office held by the applicant and considered that as President of the National Council of Justice, the applicant has not only the right to, but also the duty to express his opinion on legislative reforms affecting the judiciary, after having gathered the opinions of different courts<sup>79</sup>.

71. In the case of *Wille v. Liechtenstein*, the ECtHR examined whether the refusal of the Prince of Liechtenstein to reappoint the applicant as the President of the Supreme Court was a consequence of his views that he expressed during a series of lectures at a research institute on questions of constitutional law and whether this interference corresponded to a "pressing social need". In this case, in view of the status of the applicant (a high ranking judge), the ECtHR reiterated the special significance of "duties and responsibilities" referred to in Article 10(2) and that the public officials serving in the judiciary 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 into question. At the same time, the Court also considered that an interference with the freedom of expression of a judge in a position such as the applicant calls for close scrutiny.

### **C. Content of the impugned statement**

72. According to the case-law, 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<sup>80</sup>. The fact that, there is little scope under Article 10(2) of the Convention for restrictions on political speech or on debate of questions of public interest is also considered by the ECtHR in cases concerning the freedom of expression of judges. Further, whether or not the expression of opinion contributed to a "debate of public interest" is also an important factor for the ECtHR when assessing the proportionality of interference in the freedom of expression of judges.

<sup>77</sup> See, for instance, *Saygılı and Seyman v. Turkey*, 51041/99, 27 June 2006, paras. 24 and 25; *Kudeshkina v. Russia*, para. 96.

<sup>78</sup> ECHR, *Kudeshkina v. Russia*, para. 93.

<sup>79</sup> The case was referred to the Grand Chamber on 15 December 2014 and is not final yet.

<sup>80</sup> *Wille v. Liechtenstein*, para. 67.

73. In *Wille v. Liechtenstein*, the Court considered that although the lecture given by the applicant [President of the Supreme Court] at a research institute concerned matters of constitutional law which had inevitably political implications, this element alone should not have prevented the applicant from making any statement on this matter. The lecture in question concerned the issue of whether one of the sovereigns of the State [the Prince of Liechtenstein] was subject to the jurisdiction of the Constitutional Court.

74. Similarly, in *Kudeshkina v. Russia*, the interviews given by the applicant, a judge at the Moscow City Court, referred to a disconcerting state of affairs in the judiciary and alleged that “instances of pressure on judges were commonplace” and claimed that “this problem had to be treated seriously if the judicial system was to maintain its independence and enjoy public confidence”. The ECtHR concluded that the right to freedom of expression of the applicant was violated because of her dismissal as a result of her opinions that she expressed during the interviews. In the Court’s view, the applicant had raised a very important matter of public interest, which should be open to free debate in a democratic society. It is recalled that political speech “enjoys special protection under Article 10”<sup>81</sup>.

75. The motive for making a statement is also relevant in the assessment made by the Court concerning the proportionality of the interference. The Court reiterated that “an act motivated by a personal grievance or a personal antagonism or the expectation of personal advantage, including pecuniary gain, would not justify a particular strong level of protection”<sup>82</sup> by Article 10 ECHR. In *Wille* case, when finding a violation of the applicant’s right to freedom of expression, the Court took in particular into account that the lecture given by the applicant did not contain any remarks on pending cases, severe criticism of persons or public institutions or insult of high officials or the Prince. Consequently, the Court found that the lecture in question did not have a bearing on his performance as President of the Administrative Court or any other pending or imminent proceedings<sup>83</sup>.

76. The case of *Albayrak v. Turkey* is another example where the question whether the impugned statement or conduct of the applicant had a bearing on his performance as a judge is examined by the Court in order to assess the proportionality of the interference. The ECtHR considered that there was no reference in the case file to any known incident which would “suggest that the applicant’s impugned conduct, including that of following PKK-related media, had a bearing on his performance as a judge and, particularly, during any previous, pending or imminent proceedings”<sup>84</sup>.

#### D. Context in which the statement is made

77. As mentioned above, the ECtHR considers the impugned statements in the light of all the concrete circumstances of the case as a whole, including the context in which these statements are made. In particular, when assessing measures of a criminal-law nature in the context of a political debate, the domestic political background of discussion is of particular importance<sup>85</sup>.

<sup>81</sup> *Kudeshkina v. Russia*, para. 95.

<sup>82</sup> *Kudeshkina v. Russia*, para. 95.

<sup>83</sup> See also *Baka v. Hungary* (para. 100) where the Court examined whether the views expressed by the applicant went beyond mere criticism from a strictly professional perspective, or that they contained gratuitous personal attacks or insults.

<sup>84</sup> *Albayrak v. Turkey*, no. 38406/97, 31 January 2008. See, *a contrario*, *Pitkevich v. Russia* (dec.), 47936/99, 8 February 2001. In the latter case, the Court observed that the facts adduced by the authorities as warranting the dismissal of the applicant, a judge at the Noyabrsk City District Court, related exclusively to her official activities and did not concern an expression of her views in private and were therefore “relevant” to establishing the applicant’s suitability as a judge (non-violation of Article 10 ECHR).

<sup>85</sup> Christoph Grabenwarter, *European Convention on Human Rights – Commentary-*, 2014, p. 273. In the case of *Kayasu v. Turkey* (64119/00 and 76292/01) (13 November 2008), although the author of the statements was a public prosecutor and not a judge, the Court in its assessment of the proportionality of the interference in the right to freedom of expression of the applicant, took into account the particular context of a historical, political and legal

78. In the case of *Kudeshkina*, the fact that the applicant made the impugned statements in the context of her election campaign as a candidate in general elections for the State Duma of the Russian Federation was considered by the ECtHR as an element which extends the scope of the freedom of expression of the applicant. The Court recalled that, in its case-law, it had attributed particular importance to the unhindered exercise of freedom of speech by candidates in the context of electoral debate<sup>86</sup>.

#### **E. Nature and severity of the penalties imposed**

79. The nature and severity of the penalties imposed are factors to be taken into account when assessing the proportionality of an interference with the freedom of expression guaranteed by Article 10<sup>87</sup>, in particular when assessing whether the penalty could discourage other judges in the future from making statements critical of public institutions or policies<sup>88</sup>. As stated by the Court, the penalty imposed on a judge for having expressed his/her opinions should adequately take into account the gravity of the offence and the legitimate aim pursued for restricting the freedom of expression<sup>89</sup>.

### **VII. Conclusion**

80. European legislative and constitutional provisions and relevant case-law show that the guarantees of the freedom of expression extend also to civil servants, including judges. But, 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.

81. However the ECtHR has considered 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 calls for close scrutiny.

82. In comparative law, the level of restriction of the exercise of the above freedoms for judges differs from country to country according to their respective legal cultures. Although judges can be member of a political party in Germany and Austria, this is prohibited in Turkey, Croatia or in Romania. Whereas in Lithuania, judges should avoid publicly declaring their political views and in Ukraine, they should not participate in any political activity, there are much less restrictions on political speeches by judges in Sweden also as a consequence of the principle of "reprisal ban". In Germany, although political statements by judges are not ruled out, they are expected not to enforce those statements by emphasising their official position.

83. In its assessment of the proportionality of an interference with the freedom of expression of a judge with regard to his/her specific duties and responsibilities, the ECtHR considers the impugned statement in the light of all the concrete circumstances of the case, including 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 this context, the position held by a particular judge and matters over which he/she has

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debate concerning, among other things, the possibility of prosecuting the instigators of the coup d'état of 12 September 1980. This was, according to the ECtHR, unquestionably a matter of general interest, in which the applicant had intended to participate both as an ordinary citizen and as a public prosecutor.

<sup>86</sup> *Kudeshkina v. Russia*, para. 87.

<sup>87</sup> See, among other authorities, *Ceylan v. Turkey* [GC], no. 23556/94, § 37, ECHR 1999-IV, and *Skalka v. Poland*, no. 43425/98, §§ 41-42, 27 May 2003.

<sup>88</sup> See *Kudeshkina v. Russia*, para. 98.

<sup>89</sup> See *Baka v. Hungary*, para. 101.

jurisdiction or the venue or capacity in which a judge expresses his/her opinions are taken into account and appear as important factors in order to assess whether the interference was proportionate. In Sweden for instance, it is particularly relevant, when expressing his/her opinions, the judge concerned is acting within his/her capacity as a judge or not, as a factor which determines the applicability of extensive guarantees of the freedom of expression provided for in the Constitution.

84. 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.