



OSCE/ODIHR Recommendations on Judicial Independence and Accountability (Warsaw Recommendations), 2023

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Presentation on European standards and good practices on
freedom of expression and association of judges

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INTERNATIONAL/EUROPEAN PRINCIPLES and STANDARDS

Freedom of expression as -individual and collective- fundamental right

- ***“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ..” Article 10 (1) European Convention on Human Rights -Article 11 EU Charter of fundamental rights***
- ***A judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly”The Bangalore Principles of Judicial Conduct” 2002, para 4.6***
- ***CCJE Opinion no. 3 (2002) on the principles and rules governing judges’ professional conduct, in particular ethics, incompatible behaviour and impartiality***

Judges should not be isolated from the society in which they live, since the judicial system can only function properly if judges are in touch with reality.. (para 27)

(...). 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” (para 28)



INTERNATIONAL - EUROPEAN PRINCIPLES and STANDARDS

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

IV. General principles para 24-25-26

As enshrined in Article 10 ECHR, everyone has the right to freedom of expression....

Freedom of expression constitutes one of the essential foundations of a democratic society..... The CCJE takes a broad view on the personal scope of the right to freedom of expression of judges as an individual right. ... The right to free expression of judges extends to personal opinions expressed in connection with the exercise of their office and entitles judges to make statements out of court as well as in court, both in public and in private, and to engage in public debates and in social life in general.

IX. Recommendations n. 1 *A judge enjoys the right to freedom of expression like any other citizen. In addition to a judge's individual entitlement, the principles of democracy, separation of powers and pluralism call for the freedom of judges to participate in debates of public interest, especially as regards matters concerning the judiciary*





...about limits and restrictions.....
*The exercise of these freedoms.. may be subject to ..restrictions ...as are **prescribed by law and are necessary in a democratic society**or for maintaining the authority and impartiality of the judiciary”, Article 10 ECHR (2) .*

- IV. General principles CCJE *Opinion No. 25 (2022) on freedom of expression of judges*
- “ **important criteria to be considered are the wording of the statement and circumstances, context and overall background against which a statement was made, including the position of the relevant judge (para 31)**
- **It should be taken into account that public statements by a judge may contribute to the protection of the rule of law and the separation of powers (para 32)**
- **Corrective measures, such as a judge’s recusal or voluntary withdrawal, should be preferred to a general preventive infringement of judges’ freedom of expression aimed at avoiding such situations” (para 33)**



From “freedom of expression” to “duty to speak out”

- 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** (ENCJ SOFIA declaration on judicial independence and accountability, 5th – 7th June, 2013, para vii)
- **When democracy and fundamental freedoms are in peril, a judge’s reserve may yield to the duty to speak** (Proposal of the Executive Board ENCJ to expel the Polish Council for the Judiciary –KRS on 27.5.2020)
- Given the current developments in Europe, the ENCJ calls on all governments to refrain from any form of prosecution or persecution of judges ...for speaking out in favour of the Rule of Law and Judicial Independence. It is a judges’ **duty to speak out** when democracy, Rule of Law and fundamental freedoms are in peril (ENCJ ATHENS declaration on judicial solidarity in times of crisis, 1st - 3rd June 2022 para 12)
- “ In situations where democracy, the separation of powers or the rule of law are under threat, judges must be resilient and have a **duty to speak out** in defence of judicial independence, the constitutional order and the restoration of democracy, both at national and international level” (IX. Rec. n.2, CCJE Opinion no. 25 2022).



- “Judges should be able to exercise this freedom to contribute to public discourse on issues affecting the rule of law and enjoyment of human rights **Judges also have a duty to speak out in defence of the rule of law and judicial independence in situations where these values are threatened**” (para. 28 OSCE- ODHIR Recommendations on Judicial Independence and Accountability -Warsaw Recommendations) 2023
- “...judges have a duty to speak out even on a politically controversial topic if this is in defence of the constitutional order and the restoration of democracy where democracy, the integrity and independence of the judiciary and the rule of law are threatened..... Moreover, it is of constitutional importance that judges be able to express their collective position in such matters. In light of the foregoing, restrictions of judges’ freedom of expression must not be used to impose disciplinary sanctions on judges who publicly comment on issues pertaining to the functioning of the justice system, the reform of the judiciary or other issues relating to the separation of powers and the rule of law in Poland” (Opinion no. JUD-POL/365/2019 Warsaw, 14 January 2020, para 58 https://www.osce.org/f/documents/c/c/443731_2.pdf -OSCE-ODHIR, Urgent Interim Opinion on the Bill amending the Act on the Organization of Common Courts, the Act on the Supreme Court and Certain Other Acts of Poland -as of 20 December 2019)

Freedom of expression of judges before the ECtHR

-“ the **employment relationship** of judges **with the State must be understood in the light of the specific guarantees essential for judicial independence**. Thus, when referring to the “**special trust and loyalty**” that they must observe, it is **loyalty to the rule of law and democracy and not to holders of State power**”

(*Bilgen v. Turkey*, application App No 1571/07, 9.3.2021, para 79; Grand Chamber, case of *GRZĘDA v. POLAND*, Application no. 43572/18, 15.3.22, para 264)

“Loyalty” to Rule of Law and democracy

External limitations... close scrutiny

- ***Freedom of expression....is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb***
- ***Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted, and the necessity for any restrictions must be convincingly established***
- ***The adjective “necessary”, within the meaning of Article 10 § 2, implies the existence of a “pressing social need”.***

Wille v. LIECHTENSTEIN, Application no. 28396/95, 28.10.99 (para 61)



The role of judges' freedom of expression in protecting judicial independence and Rule of law.

- **BAKA v. HUNGARY** (Application no. 20261/12, 23 June 2016)

“...the applicant expressed his views on the legislative reforms in 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 Court 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” (para 168)

- **KÖVESI v. ROMANIA** (Application no 3594/19, 5 August 2020)

“The Court attaches particular importance to the office held by the applicant (chief of the national anticorruption prosecutor’s office), whose functions and duties included expressing her opinion on the legislative reforms which were likely to have an impact on the judiciary and its independence and, more specifically, on the fight against corruption conducted by her department (para 205)



FIRST SECTION

CASE OF ŻUREK v. POLAND

(Application no. [39650/18](#))

JUDGMENT

Art 6 § 1 (civil) • Access to court • Lack of judicial review of premature termination *ex lege*, after legislative reform, of a serving regional court judge's mandate as member of the National Council of the Judiciary (NCJ) and its spokesperson • Findings in *Grzęda v. Poland* [GC] applied: Art 6 § 1 applicable and very essence of right of access to court impaired
Art 10 • Freedom of expression • Measures taken against the applicant by the authorities for public statements made in his professional capacity as NCJ spokesperson concerning legislative reforms affecting the judiciary • Impugned measures to be seen in context of successive Polish reforms resulting in the weakening of judicial independence and having regard to the sequence of events in their entirety • General right to freedom of expression of judges to address matters as to the functioning of the justice system might be transformed into a corresponding duty to speak out in defence of the rule of law and judicial independence when those fundamental values are threatened • Criticism in context of debate of great public interest, not containing attacks against the judiciary • Statements calling for high degree of protection • Accumulation of measures could be characterised as a strategy aimed at intimidating (or even silencing) the applicant • Impugned measures with chilling effect on judges' participation in public debate on legislative reforms affecting the judiciary and on its independence • Interference not "necessary in a democratic society"

STRASBOURG

Żurek v Poland
application No.
39650/19, 16
June 2022

- *In the present case, the Court is assessing the situation of an applicant who was not only a judge, but also a member of a judicial council and its spokesperson. **However, the Court would note that a similar approach would be applicable to any judge who exercises his freedom of expression – – with a view to defending the rule of law, judicial independence or other similar values falling within the debate on issues of general interest** (para 222)*
- *...the general right to freedom of expression of judges to address matters concerning the functioning of the justice system may be transformed into a corresponding duty to speak out in defence of the rule of law and judicial independence when those fundamental values come under threat* (para 222)



Critical issues related to the right/duty to speak out: statements and opinions with “political implications”

- *...questions of constitutional law, by their very nature, have political implications. It cannot find, however, that this element alone should have prevented the applicant from making any statement on this matter (Wille v. Liechtenstein para 67)*
- *...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(Baka v. Hungary para 165)*

Persecution of judges

EUROPE for POLAND

**Campaign for protection
of independent judges and rule of law
in Poland and Europe**



The duty to speak out - the chilling effect

- **TULEYA v. POLAND**, Applications no. 21181/19 and 51751/20 , First section 6 July 2023)**the applicant is one of the most emblematic representatives of the judicial community in Poland who has steadily defended the rule of law and independence of the judiciary.** ... Having regard to the circumstances of the present case, **it appears that the measures taken by the authorities could be characterised as a strategy aimed at intimidating (or even silencing) the applicant in connection with the views that he had expressed in defence of the rule of law and judicial independence. The Court considered that the impugned measures undoubtedly had a “chilling effect” in that they must have discouraged not only the applicant but also other judges from participating in public debate on legislative reforms affecting the judiciary and more generally on issues concerning the independence of the judiciary** (see *Baka*, §173; *Kövesi*, § 209; *Żurek*, § 227..) (para 544)

Freedom of Expression / Freedom of Association

CCJE Opinion No. 23 (2020) The role of associations of judges in supporting judicial independence

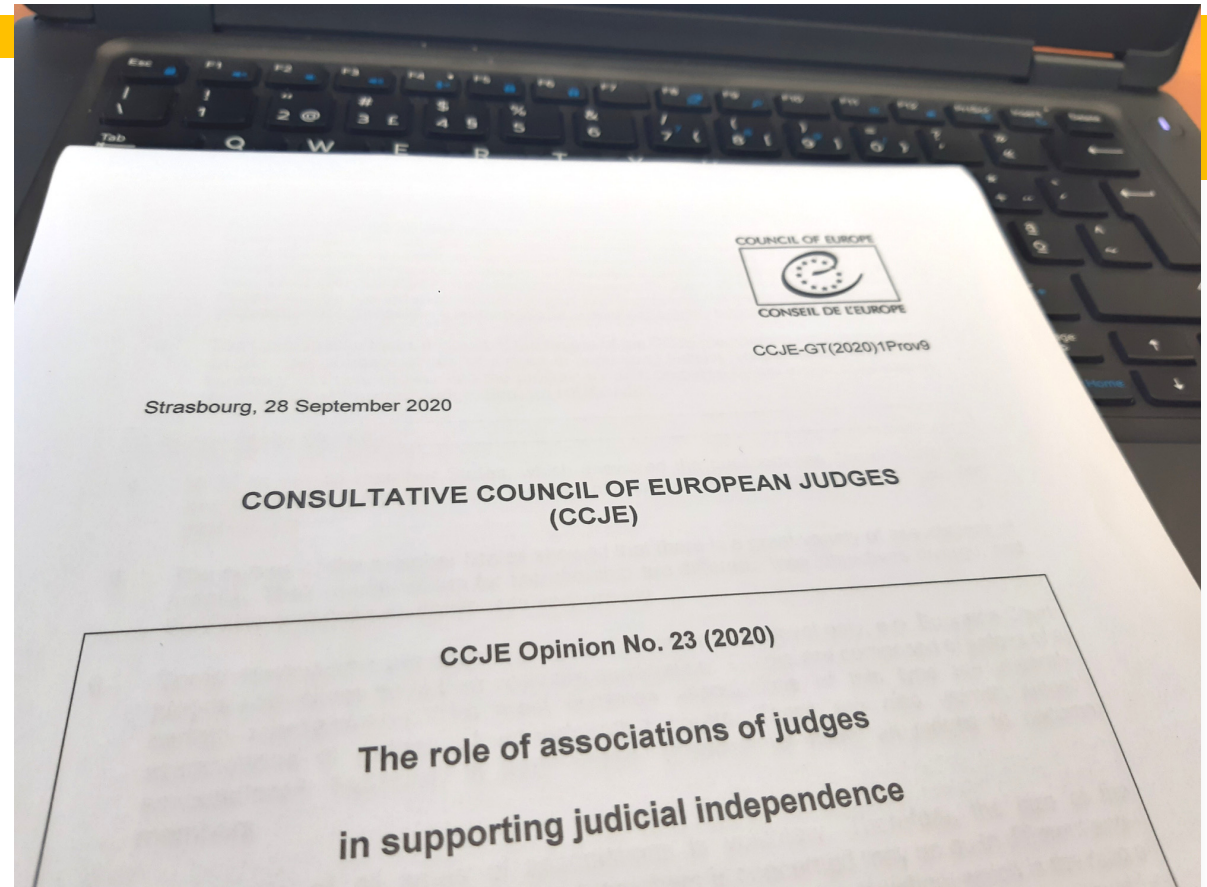
III. International Framework (12-15)

The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR) and **the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, art. 11/1)** **grant everybody the right to associate, that is the right to form and to join associations.**

....The right to associate is not only in the interest of a judge personally. As regards judges, this right is in the interest of the whole judiciary as well...

In Europe, the right to form associations of judges was further developed in 1998 by the European Charter on the Statute for Judges and in 2010 by Recommendation (2010) 12 of the Committee of Ministers of the Council of Europe on Judges, Independence, Efficiency and Responsibilities (Recommendation (2010)12) and by the CCJE Magna Carta of Judges (Fundamental Principles). ...

The “defence of the mission of the judiciary in the society”: **...developments in terms of broadening the tasks of associations of judges can also be seen when analysing the objectives of associations of judges, where today more and more the focus on the status of judges is accompanied by an equally strong awareness of raising regard for the rule of law”**



The associations of judges have the potential to significantly contribute to the rule of law in the member States ..(CCJE opinion no. 23-2020 para 54)



- The freedom of association vis à vis the experience of Rule of law backsliding
- A new idea of *impartiality*: the many faces of the attack on the freedom of speech and association of the judiciary.
- The *Muzzle law* in Poland
- *L'amendement bâillon* in France

Freedom of association implies the possibility of a “broader” exercise of the right to express critical opinions in the public debate

Opinion no. 25(2022) on freedom of expression of judges

*“If judicial independence or the ability of the judicial power to exercise its constitutional role are threatened, ...**the judiciary must be resilient and defend its position fearlessly. This duty particularly arises, when democracy is in a malfunctioning state, with its fundamental values disintegrating, and judicial independence is under attack**” (para 60). **“Since the duty to defend flows from judicial independence, it applies to every judge . When a judge makes such statements not only in his or her personal capacity, but also on behalf of a judicial council, judicial association or other representative body of the judiciary, the protection afforded to that judge will be heightened. Judges may also express their views within the framework of an international association of judges**” (para 61)*

“Judges who speak on behalf of a judicial council, judicial association or other representative body of the judiciary enjoy a wider discretion in this respect” (Rec. n.2)



The recognition of the right to freedom of association inevitably has the consequence of conferring on judicial association and their representatives the right to express themselves that is even broader than that which results from ordinary legal principles. ...

“la possibilité d’adopter un ton polémique, pouvant comporter une certaine vigueur, constitue un corollaire indispensable à un plein exercice de la liberté syndicale” (para 51)

Avis de la formation plénière du Conseil supérieur de la magistrature du 13 décembre 2023

13 décembre 2023 // 11h39



Tweet



Le Conseil supérieur de la magistrature a été saisi le 2 mai 2023 par le ministre de la Justice d’une demande d’avis en application de l’article 65 de la Constitution.

La demande s’appuyait sur le souhait d’approfondir la réflexion sur le statut de la magistrature et l’objectif de mieux préserver l’image de la justice. Elle portait en premier lieu sur l’articulation entre liberté d’expression des magistrats et l’obligation déontologique de réserve et de discrétion, plus particulièrement quant à l’usage des réseaux sociaux, aux formes d’expression « *à l’occasion d’audiences solennelles, ou encore par le biais de l’expression syndicale* ». En second lieu, elle était relative à l’exercice du droit de grève par les magistrats.

En ce qui concerne l’exercice du droit de grève, le Conseil supérieur de la magistrature considère qu’il ne lui appartient pas de trancher cette question, qui relève selon lui des juridictions constitutionnelle, administratives et européennes.

S’agissant de la liberté d’expression des magistrats et de sa conciliation avec l’obligation de réserve, le Conseil rappelle que le principe général est celui de la liberté d’expression des magistrats, qu’ils doivent exercer « *dans les limites du respect de [leur] serment et notamment des devoirs de réserve, d’impartialité, de*

délicatesse, de respect du secret professionnel et de l’image qu’ils renvoient de la justice ».

Le Conseil rappelle que la liberté d’expression des magistrats n’est pas consacrée pour leur seul bénéfice mais qu’elle constitue « *une garantie pour chacun des justiciables. Les magistrats, qui exercent leur fonction avec indépendance, constituant ainsi l’un des piliers de l’État de droit, ont le devoir de faire le nécessaire pour préserver ce dernier ainsi que les autres valeurs fondamentales dont ils sont les gardiens.* »

Il précise que si des restrictions sont apportées à la liberté d’expression des magistrats, c’est « *pour venir au soutien d’autres principes tout aussi fondamentaux* » dont celui de « *garantir l’autorité et l’impartialité du pouvoir judiciaire* ».

Il en déduit que l’examen au cas par cas de la limitation de la liberté d’expression des magistrats doit prendre en compte la nature du discours, les fonctions exercées et le public concerné.

AFFAIR SARISU PEHLIVAN

c. TÜRKİYE, 6 June 2023

(Requête no [63029/19](#))

- la requérante était également secrétaire générale du Syndicat des juges, une organisation syndicale agissant pour la défense de l'État de droit et de l'indépendance de la justice (..) et que c'est en cette qualité qu'elle a été interviewée. ... compte tenu de la fonction de « chien de garde social » que cette organisation non gouvernementale pouvait assumer, la requérante avait non seulement le droit mais **encore le devoir**, en tant que secrétaire générale d'un syndicat légal qui continuait à mener ses activités librement, de formuler un avis sur les questions concernant le fonctionnement de la justice ...(para 41)*

In today's Chamber judgment¹ in the case of [Sarisu Pehlivan v. Türkiye](#) (application no. 63029/19) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 10 (freedom of expression) of the European Convention on Human Rights.

The case concerned a disciplinary penalty imposed by the Council of Judges and Prosecutors (CJP) on the applicant, a judge who at the relevant time was secretary-general of the judges' trade union, following the publication of an interview she had given to a national daily newspaper.

The Court noted that while the applicant had been required to comply with the duty of discretion and restraint inherent in her position as a judge, as secretary-general of a trade union of judges she also assumed a role as an actor in civil society. It found that the statements made by the applicant had clearly formed part of a debate on matters of public interest and warranted a high level of protection. The political implications of the applicant's statements on the issues concerned were not sufficient in themselves to justify restricting her freedom of expression as secretary-general of the judges' trade union in an area affecting the essence of her profession.

As to the procedural safeguards to which the applicant was entitled, the Court noted that the reasoning as such of the CJP's decision imposing the penalty did not include any arguments capable of properly balancing the applicant's right to freedom of expression against her duty of discretion and restraint as a judge. Nor was there evidence of such a balancing exercise in the decisions subsequently given by various bodies of the CJP in the context of the applicant's appeals.



Italian Magistrates protesting over the draft of constitutional law- 27 January 2025









"In questa Costituzione (...) c'è dentro tutta la nostra storia, tutto il nostro passato. Questa (...) non è una carta morta (...) è un testamento, un testamento di centomila morti. Dovunque è morto un italiano per riscattare la libertà e la dignità (...) lì è nata la nostra Costituzione"

PIERO CALAMANDREI

"Se volete andare in pellegrinaggio dove è nata la nostra Costituzione, andate sulle montagne, nelle carceri, nei campi, dovunque è morto un italiano per riscattare la nostra libertà, perché è lì che è nata questa nostra Costituzione"

PIERO CALAMANDREI



LA LEGGE
E'
UGUALE
PER TUTTI



