**Contribution by the Venice Commission of the Council of Europe**

**to the thematic report to the Human Rights Council, devoted to the exercise of the right to freedom of expression, the right to freedom of association, the right to peaceful assembly and political rights by judges and prosecutors**

**by the United Nations Special Rapporteur on the Independence of Judges and Lawyers**

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[11. CDL-AD(2014)033 Opinion on the Draft Law on the Constitutional Court of Montenegro, §§ 19-22. 7](#_Toc535834827)

[12. CDL-AD(2012)014 Opinion on legal certainty and the independence of the judiciary in Bosnia and Herzegovina, § 81 8](#_Toc535834828)

# General reports

The Venice Commission has frequently dealt with the exercise of the rights which are the topic of the report by the Special Rapporteur on the Independence of Judges and Lawyers.

The most important thematic report is the Venice Commission’s[Report on the Freedom of expression of Judges, adopted by the Venice Commission at its 103rd Plenary Session (Venice, 19-20 June 2015)](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)018-e) (CDL-AD(2015)018). It concludes that “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.

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.

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.

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 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.

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. “ (§§ 80-84).

There is also an important general statement in the Commission’s [Report on the Independence of the Judicial System Part I: The Independence of Judges](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)004-e) as concerns judges: “Moreover, judges should not put themselves into a position where their independence or impartiality may be questioned. This justifies national rules on the incompatibility of judicial office with other functions and is also a reason why many states restrict political activities of judges.” (CDL-AD(2010)004, § 62).

In relation to prosecutors, the [Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)040-e) states “There are various standards on the acceptability of involvement of civil servants in political matters. A prosecutor should not hold other state offices or perform other state functions, which would be found inappropriate for judges. Prosecutors should avoid public activities that would conflict with the principle of their impartiality.” (CDL-AD(2010)040, § 62).

In addition, there are a number of references in opinions relating to individual Venice Commission member States, for instance:

# References in opinions relating to individual member States

## Ordinary judiciary

### CDL-AD(2018)017, Romania - Opinion on draft amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organisation, and Law No. 317/2004 on the Superior Council for Magistracy, §§ 123-132

“Under the proposed new Article 9 (3) of Law no. 303/2004, judges and prosecutors “are obliged, in the exercise of their duties, to refrain from defamatory manifestation or expression, in any way, against the other powers of the state - legislative and executive."

This provision has raised concerns among Romanian magistrates, who fear that it may prevent them from criticising other state powers when addressing cases involving the state and may be used as a tool for political pressure against them.

According to the Venice Commission Report on freedom of expression of judges,[[1]](#footnote-1) based on a review of European legislative and constitutional provisions and relevant case law, freedom of expression guarantees also extend to judges. Moreover, in view of the principles of the separation of powers and the independence of the judiciary, permissible limits of a judge’s freedom of expression call for closer scrutiny. As ruled by ECtHR, opinions expressed by judges on the adequate functioning of justice, which is a matter of public interest, are protected by the European Convention, “[…] even if they have political implications, and judges cannot be prevented from engaging in the debate on these issues. Fear of sanctions may have a discouraging effect on judges expressing their views on other public institutions or policies. This dissuasive effect is detrimental to society as a whole”.[[2]](#footnote-2)

Drawing on the ECtHR’s case law on the matter, the Venice Commission points to the importance of a “contextual” approach in defining those permissible limits.[[3]](#footnote-3) The wider domestic political, historical and social background is also of particular importance.

It is obvious that, as a key pre-requirement for recognising impartiality of judges and of the judiciary, in general, both judges and prosecutors have a duty of restraint, as part of the standards of conduct applying to them.[[4]](#footnote-4) As stated in the Opinion No. 3 on ethics and responsibility of judges of the Consultative Council of European Judges (CCJE),[[5]](#footnote-5) “[a] reasonable balance […] 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.” The European judges’ body further specifies that, while necessary criticism of another state power or of a particular member of it must be permitted, “the judiciary must never encourage disobedience and disrespect towards the executive and the legislature” (CCJE Opinion no. 18 on the position of the judiciary and its relation with the other powers of state).[[6]](#footnote-6)

In the CCJE’s view, “an equal degree of responsibility and restraint” is expected from the other powers of the state”, including with regard to reasonable criticism from the judiciary. Removals from judicial office or other reprisals for reasonable critical expression towards the other powers of the state are unacceptable (reference is made to ECtHR Baka v. Hungary). More generally, unwarranted interferences should be solved through loyal cooperation between the institutions concerned and, in case of conflict with the legislature or the executive involving individual judges, an effective remedy (a judicial council or other independent) should be available.[[7]](#footnote-7)

From this perspective, the new obligation imposed on Romanian judges and prosecutors appears to be unnecessary at best and dangerous at worst. It is obvious that judges should not make defamatory statements with respect to anyone, not only with respect to state powers. It seems unnecessary to specify this by law.

On the contrary, it seems dangerous to do so, especially as the notion of defamation is not clearly defined and this obligation relates specifically to other state powers.[[8]](#footnote-8) This opens the way for subjective interpretation: what is meant by “defamatory manifestation or speech” for a member of the judiciary “in the exercise of their duties”? What are the criteria to assess such conduct? What is, for the purpose of this prohibition, the meaning of the notion of “power”? Does it refer to persons or to public institutions? What is the impact of the new obligation on the SCM task of defending judges and prosecutors, by publicly expressed statements, against undue pressure by other state bodies?

In addition, the new provision cannot be justified as a reflection of the principle of loyal co-operation between institutions, the importance of which was underlined by the Venice Commission already in 2012 in respect of Romania.[[9]](#footnote-9) If this were the motivation of the provision, the same obligation would have to be imposed on all state powers, including with respect to criticism of judges by holders of political office.

There are serious doubts as to how such a general restriction on magistrates’ freedom of expression could be justified. At least from the point of view of necessity and legal clarity, the restriction may be seen as problematic under Article 10 ECHR. It should therefore be deleted.”

### CDL-AD(2018)011 Serbia - Opinion on the draft amendments to the constitutional provisions on the judiciary, § 54

“The third paragraph of this Amendment prohibits judges and court presidents from engaging in political actions. This is by no means an unusual provision and most countries provide for some kind of restriction on the political activity of judges in their constitutions (or in laws or codes of conduct). It is the type of activity that is prohibited which differs from one country to the next – some countries have rules that ban the holding of more than one mandate (e.g. being a judge as well as a member of parliament or government),[[10]](#footnote-10) some prohibit all political activity[[11]](#footnote-11) or the membership in a political party[[12]](#footnote-12) and so on. The Venice Commission has said that *“…judges should not put themselves into a position where their independence or impartiality may be questioned. This justifies national rules on the incompatibility of judicial office with other functions and is also a reason why many states restrict political activities of judges”.[[13]](#footnote-13)* However, the Venice Commission would like to suggest that “political action” be more clearly defined or replaced by introducing a prohibition of membership in a political party.”

### CDL-AD(2013)035, Opinion on the Draft Code on Judicial Ethics of the Republic of Tajikistan, § 33

“Among other requirements, the draft Code stipulates that judges may not be members of

political parties; they should not discriminate against parties on the basis of gender, religion,

ethnicity etc. It seems to be intended that violations of these norms may and should result in

disciplinary sanctions. However, it would be problematic to discipline judges for merely

criticising judicial decisions (violation of Article 13.3) or “assessments with regard to the

activities of state authorities and local authorities, and of the heads of those authorities”

(Article 18.2).”

### CDL-AD(2013)006, Opinion on the Draft amendments to the Law on the Public Prosecution of Serbia, §28

“This Article has been amended to permit meetings of professional associations of prosecutors to take place during work time, provided they do not “disturb the process of work”. This appears to be a reasonable provision.”

### CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, §§64-65

“Prosecutors cannot be involved in any political activity and this is clearly regulated by Hungarian law which follows European practice. Section 44.1 ASPGPOPEPC states that ‘Prosecutor may not be a member of Parliament, Member of the European Parliament, local municipality board representative, mayor or state leader.’

Hungarian law contains also anti-corruption rules which are welcome (financial disclosure rules in Section 44.2 et al. ASPGPOPEPC). As per Section 45 ASPGPOPEPC, prosecutors may not be the senior officers or members obliged to participate in business associations, cooperation companies and cooperatives, or the members of the supervisory boards (members with unlimited liability) of the above mentioned institutions and the members of individual businesses.”

### CDL-AD(2007)011, Opinion on the Draft Law on the Public Prosecutors Office and the Draft Law on the Council of Public Prosecutors of "the former Yugoslav Republic of Macedonia”, §52

“[The provision] prevents prosecutors from acting as members of Parliament or of local authorities, or being members of political parties or engaging in party political activity or being members of executive or supervision boards of trade associations or other legal associations established in order to gain a benefit. These appear to the writer to be appropriate provisions and not to be in conflict with the provisions of paragraph 6 of Recommendation Rec (2000) 19 of the Committee of Ministers of the Council of Europe.”

### CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, §53

“[…] Judges and prosecutors may not be members of political parties and those who become members are deemed to have resigned from the profession. The question of judges and prosecutors joining political parties is one which is at times controversial and it may be reasonable in the developmental state of Turkey to impose such a condition.”

## Specialised constitutional courts:

### [CDL-AD(2017)011](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)011) Opinion on the Draft Constitutional Law on the Constitutional Court of Armenia, § 17.

“The Constitutional Court judge may also not engage in political activities (Article 164.7 of the Constitution). What is understood by “political activities” should be clearly spelled out in this draft Law.”

### [CDL-AD(2016)034](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)034), Opinion on the Draft Law on the Constitutional Court of Ukraine, §§ 30−32.

“However, Article 11.3 of the draft Law extends the requirement of political abstention to activities two years before becoming a constitutional judge and excludes as a judge any person (a) who was a member or held a position in a political party or similar organisation, (b) was a candidate or was elected to a government or local government office or (c) participated in managing or financing a political campaign or other political activities.

While the Venice Commission welcomes the approach to ensure that the judges of the Constitutional Court are not influenced by political motivations, political activities of citizens belong to the core of a pluralistic democracy and, thus, should be promoted. This includes political activities within political parties, even for persons who may be qualified to become a constitutional judge in the future.

The two important principles – the protection of judicial impartiality as a judge and the value of political commitment in a democracy – must be reconciled. In the view of the Venice Commission, notably simple party membership should not disqualify, but even the obligation to refrain from qualified political activities for a time-period of three years is too strict to balance these principles. The removal of this limitation should be considered.”

### [CDL-AD(2015)024](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)024), Opinion on the Draft Institutional Law on the Constitutional Court of Tunisia, § 17

“However, the criterion whereby candidates must not have been a member of a political party for at least ten years seems too strict, given that political involvement, including as a member of a political party, is an important component of democracy. A constitutional court has a specific constitutional legitimacy enabling it to repeal legislation passed by parliament, the representative of the sovereign people. In order to enjoy this legitimacy, a specialist constitutional court is often composed in a balanced way, reflecting the composition of society. In this context, requiring candidates for the post of judge in the Constitutional Court not to have been a member of a party for ten years before their appointment seems excessive. “

### [CDL-AD(2014)033](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)033%20) Opinion on the Draft Law on the Constitutional Court of Montenegro, §§ 19-22.

“Article 11 should determine the kind of offences and their level of gravity which render the judge “unfit for duty”; what are the situations of “permanent incapacity for the function”, and the context and the modalities through which the judge “publicly expressed his political beliefs”. The principle of legality demands that the conditions for such a very serious sanction as the removal be specified in a very detailed and precise way, without giving too wide discretionary power to the Parliament to which the proposal of removal is submitted by the Constitutional Court.”

### [CDL-AD(2012)014](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)014) Opinion on legal certainty and the independence of the judiciary in Bosnia and Herzegovina, § 81

“Individual judicial independence refers to the independence enjoyed by individual judges in carrying out their professional duties. Judges must be independent and impartial. These requirements are an integral part of the fundamental democratic principle of the separation of powers: judges should not be subject to political influence and the judiciary should always be impartial.

This requirement has many aspects and the following four seem of particular importance in the context of BiH. The first one is the appointment and the promotion of judges. All decisions concerning the professional career of judges must be based on objective criteria and must avoid any bias and discrimination. The selection of judges and their promotion must be based on merit (professional qualifications, personal integrity). The second is the security of tenure and financial security. The term of office of judges must be adequately secured by law and, ideally, should end with the retirement of the judge. Adequate remuneration and decent working conditions must also be guaranteed. Any changes in the guarantees should occur only in exceptional situations. The third aspect is independence in the decision-making power*.* Individual judges must be free to decide cases without any external interference. The fourth refers to the rights of judges*.* As other individuals, judges enjoy an array of human rights, yet some of these rights (freedom of association, freedom of expression, etc.) are of special importance to them as these rights help in ensuring their individual independence. On the other hand, certain fundamental rights are somewhat limited for judges: for instance, freedom of expression is limited by the duty of confidentiality, which forms a part of the principle of impartiality.”

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1. Venice Commission, Report on freedom of expression of judges, CDL-AD(2015)018, paras. 12, 80-84. [↑](#footnote-ref-1)
2. See *Baka v. Hungary*, *Application no. 20261/12*, Chamber Judgment, 27 May 2014, para. 101; see also Grand Chamber Judgment, 23 June 2016, para 125. [↑](#footnote-ref-2)
3. All specific circumstances, including the office held by the judge, the content of the statement, the context in which the statement was made, the nature and severity of the penalties imposed, the position held by a particular judge and matters over which he/she has jurisdiction, are to be taken into account when examining such matters. [↑](#footnote-ref-3)
4. See ECtHR, *Prager and Oberschlick v. Austria,* Judgment of 26 April 1995, para. 34, *Alter Zeitschriften Gmbh no. 2 v. Austria,* Judgment of 18 September 2012, para. 39. [↑](#footnote-ref-4)
5. , CCJE (2002) Op. N° 3 on ethics and responsibility of judges, Strasbourg, 19 November 2002; see also United Nations "Basic principles on the independence of the judiciary" (1985), Article 8 stating that judges "shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary". [↑](#footnote-ref-5)
6. Consultative Council of European Judges (CCJE), Opinion n° 18 on "The position of the judiciary and its relation with the other powers of state in a modern democracy", CCJE (2015) 4, para 42. [↑](#footnote-ref-6)
7. Idem, para 43 [↑](#footnote-ref-7)
8. According to the information available to the Venice Commission, there is no definition in Romanian law of defamatory statements or expression, nor legislative provisions specifically regulating such conduct. Section III of Romanian Civil Code contains provisions on the respect for private life and the dignity of the person (including private life, dignity and personal image). Article 70 of the Civil Code protects the right the freedom of expression, in line with article 30 of the Romanian Constitution, within the limits established by article 75 of the Civil Code (where reference is made to the limits allowed by the law and the international treaties or conventions to which Romania is a Party for the exercise of the constitutionally protected fundamental rights). It is noted that previous provisions of the Romanian Criminal code criminalizing defamation and insult were abolished in 2006, by art. I, point.56, of Law no.278/2006. This provision was subsequently declared as unconstitutional (on 18 January 2007). On 18 October 2010, the High Court of Cassation and Justice clarified that insult and defamation should not be re-criminalized following the decision of the Constitutional Court. [↑](#footnote-ref-8)
9. See CDL-AD(2012)026, paras 72-73. [↑](#footnote-ref-9)
10. For example in the Andorra, Denmark, Croatia, Czech Republic, Estonia, France. [↑](#footnote-ref-10)
11. For example in Albania, Armenia, Azerbaijan, Belarus. [↑](#footnote-ref-11)
12. The Austrian Code of Conduct made by judges for judges also advises against party membership. [↑](#footnote-ref-12)
13. Report on the Independence of the Judicial System Part I: The Independence of Judges, paragraph 62. [↑](#footnote-ref-13)