What standards should be applied to judges exercising freedom of expression on social networks?

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Abstract:

The article addresses the questions concerning the enjoyment of freedom of expression on social networks by judges. This topic raises numerous challenges, especially in the light of the specific features characterizing free speech in the digital environment, because it is set at the intersection of two countervailing constitutional interests: on the one hand, the protection of liberty of speech as a core democratic principle; on the other hand, the protection of the functions and independence of the judiciary, which is composed by a category of civil servants that feature special prerogatives and duties. This work, therefore, aims to define properly the nature, characteristics, and scope of the free speech rights of individual judges on social networks via a comparative analysis of domestic legislation and by reviewing the relevant case law of the European Court of Human Rights and of the Euro-pean Court of Justice. Specifically, the article investigates whether and to what extent such specific forms of ex-pression should be subjected to different and special standards as opposed to other forms of expression. Moreover, it addresses the relationship of these issues with the goals of guaranteeing the proper administration of jus-tice, as well as the impartiality and independence of judges.

Judges' free speech on social media, an initial assessment

According to estimates, social media users worldwide reached 4.89 billion in 2023 and the number is expected to rise to almost six billion by 2027.[1] The percentages are impressive, not only among young persons but also among adults. For those with a public image, social media has provided a valuable opportunity to connect more effectively with a community: not only people working in show business but also many politicians[2] and public servants have their professional profile, which in some cases is mixed with and in others separate from their personal profile.

Members of the judiciary may comprise a particular case. In October 2023, a senior judge at the Court of Catania in Sicily came under fire from the Italian government and the mass media for having decided on 29 September 2023 to disapply the government's decree on the detention of asylum seekers in "detention and repatriation centres", finding that it violated EU Law. As a result of the ruling, the detention of several Tunisian citizens with similar situations, who landed on the island of Lampedusa on 20 September 2023 and were subsequently transferred to one of these centres, was ruled unlawful. As a further result, the financial bond of 4,938 euros that asylum seekers must pay to avoid being detained at such centres under the terms of recently adopted Italian regulations on landings was cancelled in those specific cases. On 2 October, the conservative newspaper *Il Giornale*[3] published an article based on a review of the judge's Facebook profile and wrote that, in July 2018, she had allegedly shared (albeit without any comment) a petition on her private Facebook profile calling for a 'motion of no confidence' against a prominent conservative political leader. In June 2018, she also reportedly posted a newspaper article featuring cases involving the migrant-rescue non-governmental organisations 'Open Arms' and 'Sea Watch' as well as a request by Palermo public prosecutors to close a criminal file opened against them. In addition, she had allegedly "liked", amongst others, the two organisations' Facebook pages alongside those of minor left-wing parties and the profile of a trade unionist who represented migrant farmworkers and is now a member of parliament. In 2016, she reportedly shared another petition urging EU institutions to save migrant lives and to host them using funds designated for Turkish and Northern African authorities to stop cross-border movements. Finally, she had allegedly also "liked" posts published by "Permanent No Borders Unit – Ventimiglia" as well as photographs taken in May 2011 when a ferry

[1] Statista Research Department, 'Social Media: Worldwide Penetration Rate 2024' (*Statista*) <https://www.statista.com/statistics/269615/social-network-penetration-by-region/> accessed 2 April 2024.
[2] On the consequences of platform power, see Giovanni De Gregorio and Oreste Pollicino, 'The European Constitutional Road to Address Platform Power' (*Verfassungsblog*, 31 August 2021) <https://verfassungsblog.de/power-dsa-dma-03/> accessed 2 April 2024.
[3] Francesca Galici, 'Firme anti-Salvini e post pro migranti. Ecco chi è la giudice che sfida il governo' *Il Giornale* (2 October 2023) <https://www.ilgiornale.it/news/politica/firme-anti-salvini-e-post-pro-migranti-ecco-chi-giudice-che-2219534.html> accessed 2 April 2024.

carried 1,300 migrants to Catania, captioned "modern deportation, support to no-border networks". Although she did not have to face any disciplinary proceedings, the judge's Facebook profile was nevertheless closed immediately after publishing the article in *Il Giornale* due to its significant mediatic echo.

This case helps us to outline how freedom of expression on social media platforms differs from other traditional media or, more generally, in public, this being especially true when the person exercising their freedom of expression is a public official or, even more, a judge. All the values and fundamental rights underpinning the model of free speech on classic media, such as the press, are still relevant. However, the critical difference is the technological context within which we try to guarantee free speech on social networks. [4] First, opinions or comments expressed on social networks may have more far-reaching effects than on other media because a post can typically be seen/read worldwide. Secondly, the consequences are often lasting, given that the information shared on social media is not only recorded but is often also available on the web several years after being initially shared. Thirdly, after information has been disseminated worldwide, the enforcement of an individual's "right to be forgotten" and, therefore, the delisting of that content face significant issues in practical terms and may, therefore, lead to unsatisfactory results when such a right is invoked before a national court.[5] Fourthly, the author may not be fully aware of the consequences of their speech (which are also not entirely foreseeable). Moreover, the speech can be shared at any time, including when at home or during time off work, and therefore may not be sufficiently meditated. Fifthly, a "like", a "friendship", or sharing an image or document on social media, even without any comment, are characteristic forms of communication on digital platforms. They differ from expressions in traditional media, such as in an interview released to the press, but must not, as such, be disregarded as irrelevant. Finally, platforms are easily exposed to data collection in bad faith (*"doxing"*),[6] which involves searching for and publishing private or identifying personal information selected over a significant period. Whereas individual instances of communication on social networks may not be particularly relevant, the online disclosure of bulk details associated with a personal profile may have a distorting effect, as it may involve self-serving cherry-picking of specific pieces of information and the

[4] Jack Balkin, 'The Future of Free Expression in a Digital Age' (2012) 36 Pepperdine Law Review <https://digitalcommons.pepperdine.edu/plr/vol36/iss2/9>.

[5] See, among others, Paul Lambert, *The Right to Be Forgotten* (2nd edn, Bloombsbury 2022) 145–154.

[6] "Doxing" can be defined as the practice of "releasing private information … online to the wider public without the user's consent", including "information that may put users at risk of harm, especially names, addresses, employment details, medical or financial records, and names of family members". Rob Cover, 'What Is Doxing, and How Can You Protect Yourself?' *The Conversation* (13 February 2024) <http://theconversation.com/what-is-doxing-and-how-can-you-protect-yourself-223428> accessed 2 April 2024.

presentation only of the content that reflects the bias of the person who carried out the search. Sophisticated and relatively accessible software may be used extensively (e.g., facial recognition scanners in conjunction with artificial intelligence) to search and select frames captured in private videos spontaneously or unthinkingly posted on social networks years before. Although these technologies have been developed only recently, they can draw on considerable digital archives, in many cases created before the adoption of privacy guidelines and may be purposely used to challenge and undermine the public credibility of the targeted victim.

Moving to the particular characteristic of free speech on social media involving members of the judiciary, this analysis covers both ordinary judges as well as public prosecutors, as both groups endorse, and should continue to endorse, a shared judicial culture of impartiality and independence to prevent and prosecute crime and protecting citizens' rights.[7]

This chapter will specifically address individual judges' use of social media, given that communication by courts as a whole is a separate issue.[8]

As far as methodology is concerned, it must be accepted that, due to a lack of sufficient case law on the specific topic primarily addressed (judges' freedom of expression on social networks), the reasoning used here will need to be developed starting from a broader perspective on freedom in general, then moving step-by-step through free speech of judges as a particular category of civil servant and finally focusing on the consequences of the use or rejection of social media.

For the same reason, given the lack of extensive specific statutory regulation of a newly expanding phenomenon, this article aims to analyse the legal framework by considering the case law, especially that of the European Court of Human Rights (ECtHR) and the Court of Justice of European Union (CJEU), as well as soft law rules, mainly from the Council of Europe and United Nations, seeking to identify viable international standards.

We shall consider whether, in the digital era, there is scope for a specific type of freedom of expression for individual judges, whether it can be classified as a "right" for them to intervene in the media and, finally, whether it matters in terms of the proper administration of justice. There may be conceptual difficulties in identifying a right of free speech from a classical point of view because at first sight, communication on social media by judges may be seen to be not natural at all. Indeed, those in whose name justice is administered have the right to know how this is achieved and how judges, who are subject only

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[7] *Kayasu v. Turkey* App. 64119/00 and 76292/01 (ECtHR, 13 November 2008)

[8] Press releases are often published on institutional web pages, where the courts announce and summarise, *inter alia*, important decisions informing the public. This information may well also be released on digital networks; however, it is not analysed here as it cannot be regarded as individual communication by judges.

to the law, exercise their judicial power. However, this right is traditionally meant to be satisfied by providing reasons for rulings and establishing rules on access to case documents.

For sure, the right of the public to be adequately informed in this area entails a duty on judges to state reasons for their judgments. Nonetheless, it could also be essential to strengthen the system's antibodies, thus enabling it to avoid - or at least limit - the risks associated with the so-called "spectacularisation" of justice. Indeed, it is widely accepted that media accounts of judicial action may end up presenting to the public at large a distorted image of how justice is administered.[9] With the appropriate content and in a measured tone, judges can help limit such a phenomenon by providing good quality sources of information concerning legal issues relevant to public debate, which is increasingly shaped by general and often inaccurate information gathered on social networks. Just as the media has the task of imparting reliable information and spreading ideas, the public also has a right to receive them.[10]

The inherent risks connected to judges' use of the Internet must be balanced against the freedom enjoyed by them precisely because their assessment commits not only the respective author but also, due to the often evident nature of online communication, to some extent, the entire judicial system. During the inauguration of the 2019 judicial year in Florence, Italian President Sergio Mattarella called on judges to exercise restraint and use social networks with discretion, as he saw a risk that their impartiality might be questioned.[11] Hence, insofar as judiciary members are called upon to have a say in exercising democratic freedoms, including, in particular, freedom of expression in the digital society,[12] they must also balance and minimise their own use of those tools.

Judges must not disregard the need for reasonable self-restraint to guarantee their dignity, integrity, impartiality and independence as individuals and uphold the image of impartiality of the judicial system as a whole[13] and of colleagues, even when expressing sharp criticism.[14] However, a judge who is "anodyne" to the values, issues and ideals of the society in which they live and operate may be so detached as not to be able to guarantee effective service in applying the law and protecting citizens' fundamental rights.

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[9] European Network of Councils for the Judiciary, 'Report on Public Confidence and the Image of Justice 2019-2020: Communication with Other Branches of Power' (*ENCJ*, 10 June 2020) <https://www.encj.eu/index.php/node/480> accessed 2 April 2024.
[10] *Bédat v. Switzerland* App no 56925/08 (ECtHR, GC, 29 March 2016), para 51.
[11] Concetto Vecchio, 'Giustizia, Mattarella: "Uso Social Magistrati Può Offuscare Credibilità" - La Repubblica' *La Repubblica* (5 April 2019) <https://www.repubblica.it/politica/2019/04/05/news/giustizia_mattarella_magistrati_siano_sobri_nei_comportamenti_-223350476/> accessed 2 April 2024; Vito Tenore, 'La Libertà Di Pensiero Tra Riconoscimento Costituzionale e Limiti Impliciti Ed Espliciti: I Limiti Normativi e Giurisprudenziali per Giornalisti, Dipendenti Pubblici e Privati Nei Social Media' (2019) 2 Il lavoro nelle pubbliche amministrazioni 83.
[12] For further references, see Oreste Pollicino, *Judicial Protection of Fundamental Rights on the Internet: A Road Towards Digital Constitutionalism?* (Hart 2021).
[13] *Olujic v. Croatia* App no 22330/05 (ECtHR, 5 February 2009).
[14] *Di Giovanni v. Italy* App no 51160/06 (ECtHR, 9 July 2013).

The imposition of clear limits on judges' online 'footprint' would help to meet these goals whilst also ensuring freedom to participate in public debate. The Council of Europe also felt a similar need when its Commission for the Efficiency of Justice adopted the "Guide on Communication with the Media and the Public for Courts and Prosecution Authorities".[15] Its main objective is to offer guidance to members of the judiciary in managing communications with the media. Moreover, its introductory part clarifies how important it is to use instruments of this type,[16] not only in the context of judges' public roles but also in their private lives.[17]

This chapter will distinguish between judges' individual use of social networks in their official capacity, usage directly related to judicial functions, and their private communication since the three scenarios raise different questions.

Finally, the issue as to whether the standards that are called for differ from those applicable to other forms of expression will be assessed by considering criminal law alongside disciplinary liability rules, coupled with a comparative analysis and a consideration of soft law international standards as possible sources of homogeneous regulation, which may strike a fair balance between the different human and fundamental rights at stake.

Restrictions on free speech, public authorities and members of the judiciary in particular

Freedom of expression is one of the core fundamental rights on which modern democratic states are based. Moreover, this freedom provides a matrix to which a whole "constellation" of other fundamental rights can be linked. These include, *inter alia*, the right to disseminate and receive information, the right not to be harassed because of one's opinions, the right to freely profess one's religion or political beliefs

[15] European Commission for the Efficiency of Justice (CEPEJ), 'Guide on Communication with the Media and the Public for Courts and Prosecution Authorities' (CEPEJ 2018) CEPEJ(2018)15 <https://rm.coe.int/cepej-2018-15-en-communication-manual-with-media/16809025fe> accessed 2 April 2024.
[16] See Article 1.3 of the document.
[17] The CEPEJ points out that judicial offices should be ready to communicate in three different situations: first in relation to ordinary activity, secondly in situations in which public debate asks questions about the functioning of the judicial system or specific processes, and thirdly in emergency situations where a judge or a judicial institution has been publicly attacked in case involving suspected or proven judicial error.

and freedom of association. To a certain extent, even the ability to receive free and independent information is protected as a precondition for exercising truly free expression of thought.[18] Since the European Communities initially pursued aims of a purely economic nature, the right to freedom of expression has only been positively recognised within EU law in recent times through the reference made by the Treaty of Maastricht to the rights secured by the European Convention on Human Rights (Article F).[19] Subsequently, since the proclamation of the Charter of Fundamental Rights of the European Union,[20] the rules contained in it have had the same status as the Treaty (Article 6). There, the right to freedom of speech is expressly enshrined in Article 11 of the Charter, the wording of which is almost identical to Article 10 of the Convention. Articles 6, 8 and 17 of the Convention, as well as Articles 7, 47 and 54 of the Charter are also significant as paradigms for international case law and European law frameworks when dealing with freedom of expression, including freedom of expression for the judiciary. As is the case for all other relative rights,[21] freedom of expression can be limited,[22] although not all forms of interference are tolerated. Interference with the right to free speech may entail various measures, generally a "formality, condition, restriction or penalty".[23] Hence, when interpreting the Convention, the Strasbourg Court carries out a case-by-case review of situations that may have a restrictive impact on freedom of expression[24] and applies a proportionality test[25] in the form of a "three-step analysis" that takes into consideration the proportionality of the measure adopted and the necessity of the limitation within the democratic sphere.[26]

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[18] Pierpaolo Gori, *ECHR Article 10: How Does the Protection Work?* (Aracne 2014). For general principles in relation to the duties of internet providers of news see the landmark case *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015).

[19] Convention for the Protection of Human Rights and Fundamental Freedoms, ECHR, Rome, 4 November 1950.

[20] Charter of Fundamental Rights of the European Union OJ C 364/1 2000.

[21] By contrast, "absolute rights", like the right to life (Articles 2 of the Convention) or the prohibition on torture or inhuman or degrading treatment (Article 3 of the Convention) do not tolerate any interference in principle.

[22] According to the framework set out above, it is possible to identify a pattern of internal and external limitations of the exercise of freedom of expression as follows; internal limitations, enshrined by Article 10(2) ECHR and Article 52(3) of the Charter; external limitations, set by other human rights/fundamental rights protected by the Charter and the ECHR that need to be balanced with Articles 10 ECHR and 52 Charter, as typical "relative" human and fundamental rights, namely Articles 6,18 and 17 ECHR, and Articles 7 and 47 of the Charter).

[23] *Wille v Liechtenstein* App no 28396/95 (ECtHR, 28 October 1999), para 43.

[24] An example may be found in *Schweizerische Radio- und Fernsehgesellschaft and Others v Switzerland* App no 41723/14 (ECtHR, 22 December 2020), para 72

[25] Gehan Gunatilleke, 'Justifying Limitations on the Freedom of Expression' (2021) 22 Human Rights Review 91.

[26] The first step requires a verification as to whether the interference by the responsible Government is prescribed by law. If the first condition is satisfied, the second stage of the analysis involves ascertaining whether the legal interference is pursuing a legitimate aim as defined by Article 10(2) ECHR and Article 52(3) of the Charter. If the second condition is also fulfilled, then a final requirement must be met, namely the proportionality of the measure as needed in a democratic society. See Pierpaolo Gori, 'La Libertà Di Manifestazione Del Pensiero, Negazionismo, *Hate Speech*' in Francesco Buffa and Maria Giuliana Civinini (eds), *La Corte di Strasburgo* (Key Editore 2019).

Within this scenario, sectoral public authorities' freedom of speech may manifest in two ways: it may be exercised privately or in an official capacity[27]. It is essential to distinguish between situations in which freedom is significantly restricted due to the speaker's status as a civil servant and ordinary personal communications, bearing in mind that even the latter may be subject to more constraints than those applicable to the speech of ordinary citizens.

Regarding private communication, judges are treated in a similar but not identical manner to other public figures, such as members of the Parliament.[28] First, they are bound by professional duties, which prevent them from disseminating information about the functions performed within trials.[29] Secondly, as is inevitable within a democratic society, politicians knowingly expose themselves to close scrutiny by the public at large; consequently, they must display a greater degree of tolerance, especially when making public statements open to criticism.[30] This principle of increased tolerance does not apply in the same way to all persons employed by the state,[31] and it is not accepted[32] that a government-appointed expert can be equated with a politician.

Members of the judiciary occupy a unique position,[33] which needs to be further distinguished from that of other civil servants, since judges form part of a fundamental institution of the state, which is a prominent guarantor in a democratic society,[34] and therefore the judiciary is not considered to be part of the ordinary civil service.[35]

As far as official communications are concerned, when acting in their official capacity, public prosecutors and judges may thus be subject to stricter limits in terms of what is regarded as acceptable criticism than ordinary citizens.[36] Judges have an obligation and a duty of discretion falling under Article 10(2) of the

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[27] On this aspect, as well as the consequences for the application of limits and counterlimits to Article 10 ECHR, it is important to recall Judge Wojtyczek's dissenting opinion in *Baka v Hungary* App no 20261/12 (ECtHR, 23 June 2016).

[28] An example is to be found in Article 68(1) of the Italian Constitution, which provides: "members of parliament cannot be held accountable for the opinions expressed or votes cast in the performance of their function".

[29] On this issue, the resolution published by the Italian Consiglio Superiore della Magistratura (CSM), 'Linee-guida per l'organizzazione degli uffici giudiziari ai fini di una corretta comunicazione istituzionale - dettaglio' (*CSM*, 11 July 2018) <https://www.csm.it/web/csm-internet/-/linee-guida-per-l-organizzazione-degli-uffici-giudiziari-ai-fini-di-una-corretta-comunicazione-istituzionale> accessed 2 April 2024.

[30] *Mladina d.d. Ljubljana v Slovenia* App no 20981/10 (ECtHR, 17 April 2014), para 40.

[31] *Busuioc v Moldova* App no 61513/00 (ECtHR, 21 December 2004), para 64.

[32] *Nilsen and Johnsen v Norway* App no 23118/93 (ECtHR, GC, 25 November 1999).

[33] This aspect was previously examined by the Italian Constitutional Court in Judgment No. 100/1981, which states as follows: "judges must enjoy the same rights of liberty as are guaranteed to every other citizen, but it must also be admitted that the functions exercised and the qualification they hold are not indifferent and without effect for the constitutional order".

[34] *Prager and Oberschlick v Austria* App no 15974/90 (ECtHR, 26 April 1995), para 34.

[35] *Albayrak v Turkey* App no 38406/97 (ECtHR,31 January 2008), para 42.

[36] *Do Carmo de Portugal e Castro Câmara v Portugal* App no 53139/11 (ECtHR, 4 October 2016), para 40.

Convention, which usually prevents them from replying even when provoked.[37] However, they may as such be subject to personal criticism, within the permissible limits, and not only in a theoretical and generic manner.[38] This threshold is reached when comments made against judges turn into destructive attacks that are essentially unfounded.[39] The overriding interest here is the need to maintain the proper functioning of the judicial system, which would be impossible without relations based on consideration and mutual respect among its various protagonists and without retaining the judiciary's authority.[40]

Against this backdrop, since an individual judge who has been criticised in the media is subject to a duty of discretion that in principle prevents them from responding in person,[41] there is a question as to who, among the members of the judiciary, can express themself in an official capacity to ensure that correct information is given concerning a particular matter.

The heads of courts and public prosecutors' offices are certainly under a legal duty to engage in public debate to correct fake news through the media, including on social networks, in accordance with Council of Europe recommendation Rec(2003)13. Any such communications must be made in a measured and precise manner to avoid unintended misinterpretations and must take account of any risk of prejudicing ongoing legal proceedings, the rights of the parties involved and the presumption of innocence.

The ECtHR specifically considered implementing Article 10 in the case of *Baka v. Hungary.*[42] Although this case did not involve any social networks, since the applicant had not used them to express his disputed opinion, it is nonetheless interesting how the Court interpreted the violation of Article 10 of the Convention, which was specifically applicable to the matter. In fact, the Court reiterated that Mr Baka not only had a right but was also under a duty as the President of the National Council of Justice to state his opinion on any legislative reform that affected the judiciary. His removal and the premature termination of his contract were found to amount to a disproportionate attack on the independence not only of the individual judge but also of the judiciary as a whole.[43]

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37 *Buscemi v Italy* App no 29569/95 (ECtHR, 16 September 1999).
38 *Morice v France* App no 29369/10 (ECtHR, GC, 23 April 2015).
39 *Prager* (n 34) para 34.
40 *Morice* (n 38) para 170
41 ibid para 128; *Kudeshkina v Russia* App no 29492/05 (ECtHR, 26 February 2009), para 86.
42 *Baka v Hungary* (n 25). In contrast to several previous rulings adopted *inter alia* by the Inter-American Court of Human Rights, which are quoted within the judgment itself, the ECtHR did not consider the independence of the judiciary itself, as part of the guarantee of a fair trial under Article 6 Convention as a key issue in resolving the case, given that the case was examined principally under Article 10.
43 At para 172 of the ruling the Grand Chamber mentioned the principles relating to the irremovability of judges apparent within the Court's case law on Article 6(1): *Fruni v Slovakia* App no 8014/07 (ECtHR, 21 June 2011), para 145; *Henryk Urban and Ryszard Urban v Poland* App no 23614/08 (ECtHR, 30 November 2010), para 53.

The Court held that this measure was not necessary or proportionate in a democratic society and that it could potentially create a chilling effect,[44] specifically by discouraging judges from publicly expressing their opinions and participating in the debate on issues concerning the judiciary, whereas it is crucial to ensure better and more open engagement between the judiciary and the general public.[45] Hence, according to the interpretation endorsed by the Grand Chamber, Article 10 applies not only to personal speech but also to individual speech in an official capacity.[46]

Since *Baka* concerned the court's president, one might ask whether a distinction should be drawn between ordinary judges and heads of courts in situations involving free speech in the media. The answer to this may depend, amongst other things, on the constitutional model of the judiciary adopted by the relevant national constitutional framework.[47] This question may be easier to answer in the affirmative in countries where a hierarchical model shapes the distribution of judicial power. On the other hand, in states where each judge is fully empowered by the Constitution[48] and embodies the entire judicial function, the answer may be less straightforward, depending on the specific circumstances.[49]

In any case, on account of their public roles, ordinary judges certainly enjoy some individual freedom of speech in an active sense, as they have the right to inform the public properly concerning issues relating to the functioning of the judicial system. Such speech falls within the public interest as it is essential in a democratic society.[50] It is also widely accepted that ordinary judges are subject to a professional duty to

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[44] On this aspect, see 'The Chilling Effect in Constitutional Law' (1969) 69 Columbia Law Review 808.

[45] See para 101 of the ruling: the Court held that the fear of sanction had a "chilling effect" on the exercise of freedom of expression and could risk discouraging judges from making critical remarks about public institutions or policies, for fear of losing their judicial office. See, *mutatis mutandis*, also *Wille v Liechtenstein* (n 21) para 50, and *Kudeshkina v Russia* (n 41) paras 98-100. This effect, which operates to the detriment of society, is also a factor relevant for the proportionality of, and thus the justification for, the sanction imposed on the applicant. See the chapter of Mohor Fadjiga in this volume.

[46] It is indeed interesting to read Judge Wojtyczek's opinion, which seeks to distinguish between the public and private role of the judge making the communication. See, in particular, para 4 of his opinion attached to the judgment. The Polish Judge criticises the findings of the Grand Chamber based on the application of Article 10 guarantees to the official speech, as, on his opinion, "it would mean that the manner in which a state organ speaks is to be considered a matter of personal freedom".

[47] *Harabin v. Slovakia* App no 58688/11 (ECtHR, dec, 20 November 2012).

[48] Article 107 of the Italian Constitution states that: "Judges may not be removed from office; they may not be dismissed or suspended from office or assigned to other courts or functions unless by a decision of the High Council of the Judiciary, taken either for the reasons and with the guarantees of defence established by the provisions concerning the organisation of Judiciary or with the consent of the judges themselves. The Minister of Justice has the power to originate disciplinary action. Judges are distinguished only by their different functions. The state prosecutor enjoys the guarantees established in the prosecutor's favour by the provisions concerning the organization of the Judiciary.".

[49] See *Buscemi v Italy* (n 37), paras 67-68.

[50] *July and SARL Libération v France* App no 20893/03 (ECtHR, 14 February 2008), para 67.

intervene in public debate when judicial independence is threatened by other branches of state or legislative or constitutional reforms.[51]

However, information that is sensitive within ongoing proceedings must not be made publicly available and in many states judges as individuals are prosecuted if they unduly reveal or publish case documents or details concerning the facts of a case.[52]

It is also important to mention a further specific aspect of freedom of speech of the judiciary: communication by an individual in their capacity as a speaker for an association of members of the judiciary, as a council member or a trade union official.[53] Such internal bodies play a pivotal role in ensuring judicial independence and, within the national judicial systems of many but not all member states of the Council of Europe, operate independently of their respective jurisdictions to guarantee, *inter alia*, respect for the rule of law and protection for individual rights.[54]

Given their collective representative capacity and status, resulting from their established activity of preserving the role of the judiciary vis-a-vis other branches of the democratic state and society, the freedom of expression enjoyed by them may in some specific cases be broader than that guaranteed to individual ordinary magistrates: they act as public watchdogs e.g. in issuing interviews or press releases concerning judicial reforms or other external initiatives that may have a potential impact on the independence of the

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[51] See Rafael Bustos Gisbert, 'Judicial Independence in European Constitutional Law' (2022) 18 European Constitutional Law Review 591, 620.

[52] This is the case in Italy, for instance, where Article 2(2)(u) of Legislative Decree no. 109/2006 establishes criminal liability for judges. The offence may be committed by various breaches of the duty of confidentiality, which is particularly serious in these cases where it is carried out through the mass media (newspapers, newspapers in general, television networks, websites). Germany is an interesting case, where a specific provision of the Criminal Code, Article 24, punishes the use of social media by judges in case of apprehension of bias. In this regard, see Jannika Jahn, 'Extrajudicial Use of Social Media by Judges in Germany" in Anja Schoeller-Schletter (ed), *Impartiality of Judges and Social Media: Approaches, Regulations and Results* (Konrad Adenauer Stiftung e V 2020). Another example can be found in a decision of the French Superior Judicial Council, Disciplinary Council, case p077, Prosecution, 29 April 2014.

[53] See, recently, *Miroslava Todorova v Bulgaria* App no 40072/13 (ECtHR, 19 October 2021), regarding sanctions imposed on the applicant, a judge and president of the Bulgarian union of judges.

[54] See ECJ 27 February 2018; Cases C-83/19 and C-896/19 *Associaçao Sindical dos Juízes Portugueses (ASJP)* [2018]: the case involved a preliminary ruling concerning the temporary reduction in the remuneration paid to the members of that court, in the context of Portugal's budgetary policy guidelines; Case C-896/19, *Repubblika v Il-Prim Ministru* [2021] concerned a preliminary ruling on the conformity with EU law of the provisions of the Constitution of Malta governing the procedure for the appointment of members of the judiciary. See again Case C-83/19, *Asociația 'Forumul Judecătorilor Din România'* [2021], Case C-127/19, *Asociația 'Forumul Judecătorilor Din România' and Asociația 'Mișcarea Pentru Apărarea Statutului Procurorilor'* [2021] and Case C-195/19 *PJ* v *QK,* Cases C-291/19 *SO* v *TP and Others*, Case C-355/19 *Asociația 'Forumul Judecătorilor din România', Asociația 'Mișcarea Pentru Apărarea Statutului Procurorilor' and OL* [2021] and Case C-397/19 *AX* v *Statul Român - Ministerul Finanțelor Publice* [2021]: they are all preliminary rulings regarding proceedings between legal persons or natural persons and authorities or bodies such as the Romanian Judicial Inspectorate, the Supreme Council of the Judiciary and the prosecutor's office attached to the high court of cassation and justice.

judiciary.[55] From this perspective, since it furthers the public debate on the rule of law itself, the freedom of expression of speakers from judicial associations deserves to be protected according to standards very close to those initially developed for the press. Indeed, professional organisations of judges are central actors within civil societies and their statements must benefit from a high level of protection since they are part of a debate on questions of public interest, particularly regarding the separation of powers and the independence of the judiciary.[56.]

A similar approach underpins whistleblowing by public servants, as considered in the landmark case of *Guja*[57] in which the ECtHR ruled that Moldova had breached Article 10 of the Convention when it dismissed a civil servant who had revealed information of public interest regarding attempts by high-ranking politicians to influence the judiciary. The Court therefore recognised that Article 10 applied to civil servants in general, including those who are not members of the judiciary,[58] according to a case-by-case approach, and found that there is little scope under Article 10(2) of the Convention for restrictions on debate concerning questions of public interest.[59] Indeed, in a democratic system, the acts or omissions of the government must be subject to close scrutiny not only by the legislative and judicial authorities but also by the media and public opinion. The public's interest in obtaining qualified information can sometimes be so strong that it can override even a duty of confidentiality imposed by law.[60]

No binding regulation applicable to the freedom of expression of judges on social networks

The individual activity carried out by members of the judiciary on social networks is not, generally, subject to any specific domestic regulation in most countries.[61] A distinction should be drawn between, on the one hand, communication on electronic networks such as blogs that are shared among members of a restricted community to exchange their respective views on professional legal and organisational issues and rulings (where the risks of inappropriate communication are low) and, on the other hand, general

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55 *Eminagaoglu v Turkey* App no 76521/12 (ECtHR, 9 March 2021), para 134.
56 *Sarisu Pehlivan v Turkey* App no 63029/19 (ECtHR, 6 June 2023) paras 41, 46.
57 *Guja v Moldova* App no 14277/04 (ECtHR, 12 February 2008).
58 See *Wille v Liechtenstein* (n 22) paras 41-42 and the ECtHR decision *Harabin v. Slovakia* (n 48).
59 See in part. § 74 of the *Guja v Moldova* (n 58), and, among other authorities, *Sürek v Turkey (no. 1)* App no 26682/95 (ECtHR, 8 July 1999), para 61 and Directive (EU) 2019/1937 of the European parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law.
60 See *Fressoz and Roire v France* App no 29183/95 (ECtHR, 21 January 1999); *Radio Twist, a.s. v Slovakia* App no 62202/00 (ECtHR,19 December 2006).
61 See respectively the chapters by Federica Casarosa on Italy a Jaroslaw Gwizdak on Poland, in this volume.

commercial networks, such as Facebook, YouTube, WhatsApp, Instagram, Snapchat, Telegram, Twitter (X), LinkedIn and TikTok, where several sensitive issues may arise. It is essential, where possible, to identify specific boundaries to judges' activities on broadly available social networks, and the regulatory tools adopted in pursuing this task have a massive influence on the final outcome.

New restrictions may be established both at the national level within legislation governing disciplinary liabilities[62] or criminal offences[63] and within international judicial decisions.[64] These include supranational legal sources that pursue the same task and aim to guide judges' actions in line with the dictates of decency and restraint, in a manner that protects the dignity of people involved in judicial proceedings.

It must be considered that the usage of punitive "criminal" rules in the area of free speech is often disproportionate regarding the legitimate aim pursued, as it may generate a chilling effect.[65] Moreover, criminal law emphasises for its scope and sanction the natural conflict between free expression, which deserves to be protected broadly in a democratic society, and other interests also protected by law. Therefore, the "civil" legal safeguard provided by balancing human and fundamental rights in accordance with the case law in Article 10 of ECHR and Article 11 of the Charter is more straightforward and effective in this specific domain.

Against this regulatory backdrop, alongside the "hard law" laid down by national criminal law and enforceable disciplinary liability codes, it is also important to refer to "soft law" measures[66] to identify the limits to freedom of expression. United Nations' legal sources are key in establishing their international legal status. Social media platforms did not yet exist when the 'Bangalore Principles of Judicial Conduct'

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62 See, for instance, the guidelines relevant for disciplinary cases adopted for all Italian administrative judges (who are not members of the ordinary judiciary but rather of a special judiciary) by the *Consiglio di Presidenza della Giustizia Amministrativa*: Consiglio di Presidenza della Giustizia Amministrativa, 'Delibera sull'uso dei mezzi di comunicazione elettronica e dei social media da parte dei magistrati amministrativi' (*giustizia.amministrativa*, 25 March 2021) <https://www.giustizia-amministrativa.it/-/delibera-sull-uso-dei-mezzi-di-comunicazione-elettronica-e-dei-social-media-da-parte-dei-magistrati-amministrativi-consiglio-di-presidenza-della-giust> accessed 2 April 2024.

63 Even national law, which differs from country to country, may be read in the light of international law in order to achieve a more harmonised understanding and interpretation: see, *ex multis*, the Council Framework Decision 2008/913/JHA of 28 November 2008 on combatting certain forms and expressions of racism and xenophobia by means of the criminal law.

64 See, among *alia*, United Nations Office on Drugs and Crime (UNODC), 'Non-Binding Guidelines on the Use of Social Medias by Judges' <https://www.unodc.org/res/ji/import/international_standards/social_media_guidelines/social_media_guidelines_final.pdf> accessed 2 April 2024; European Network of Councils for the Judiciary, 'Report on Public Confidence and the Image of Justice 2018-2019: Individual and Institutional Use of Social Media within the Judiciary' (*ENCJ*, 7 June 2019) <https://www.encj.eu/index.php/node/480> accessed 2 April 2024.

65 See *Belpietro v Italy* App no 43612/10 (ECtHR, 24 September 2013).

66 As is known, soft law is normally not considered to be made up of "rules" as it is not binding or enforceable before any court/authority. Soft law is comprised of principles, public declarations and agreements that are not legally binding.

and the related Commentary,[67] adopted in 2002, were first drafted; as a result, the documents do not make any reference to social networks. Nevertheless, several principles and paragraphs from the Commentary draw attention to judges' behaviour outside the courtroom and are highly relevant to this discussion[68] regarding the judiciary's integrity.

A more recent milestone is the "Doha Declaration" adopted by the UN Global Judicial Integrity Network entitled 'The risks and benefits of using social media by judges. [69] Its purpose is to identify and address some of the fundamental ethical implications for judiciary members regarding their online presence or use of social media, and to provide practical recommendations and guidelines for public prosecutors and judges on the daily ethical and responsible use of social media.[70] The aim of the 2020 Doha Meeting is clearly not to discourage the use of this innovative communication medium: indeed, any such measure would have been disproportionate.[71] It is possible to recognise a two-pronged approach to the issue: on the one hand, judicial offices are encouraged to be more open towards the public,[72] whereas, on the other hand, each judge as an individual is required to comply with the above-mentioned limitations. In this regard, the UN's 'Non-binding guidelines on the use of social media by Judges'[73] stress the need to build awareness among judges and public prosecutors concerning the use of social media,[74] with regard both to the content as well as the broad network used for disseminating news through digital platforms.[75]

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[67] 2002 Bangalore Principles of Judicial Conduct, as the universally recognised principles of judicial conduct, and the detailed 2007 Commentary on the Bangalore Principles. Further information concerning the Bangalore Principles and the Commentary on the Bangalore Principles is available AT 'Commentary on the Bangalore Principles of Judicial Conduct' (*UNODC*) <//www.unodc.org/unodc/en/corruption/tools_and_publications/commentary-on-the-bangalore-principles.html> accessed 2 April 2024. This document was adopted by the Judicial group on strengthening judicial integrity, within the scope of the United Nations. It develops the fundamental right to enjoy in full equality a fair and public hearing by an independent and impartial tribunal, in the determination of rights and obligations and of any criminal charge.

[68] *Ex multis,* see Commentary para 1.

[69] The Global Judicial Integrity Network was established in April 2018 in Vienna, Austria. The Doha Declaration on Judicial Integrity was adopted on February 2020 in Doha, Qatar. Accordingly, the Spanish Ethical Commission CGPJ Opinion (Consultation 10/2018), 25 February 2019, point 5, states that it is necessary to preserve the independence and appearance of impartiality, as well as to manage the confidence of society in the administration of justice.

[70] The Declaration engages with the ethical problems that may potentially arise from the use of social media by judges, including the possible creation of bias, prejudice, or conflict of interest, whether real or perceived, the current lack of formal guidance for judges, the need for general rules and guidelines on the use of social media by individual judges and the need for specific recommendations on how judges should conduct themselves.

[71] Session report template for substantive sessions launch of the Global judiciary integrity network (9-10th April 2018, United Nations Vienna), p. 8.

[72] One example in this regard is the communication campaign launched during the presidency of the former Constitutional Judge, Marta Cartabia, within the context of the Italian Constitutional Court. Therefore, also the guidelines adopted by the CEPEJ focus on this very aspect.

[73] United Nations Office on Drugs and Crime, implementation of the Doha Declaration.

[74] See ibid para 38, "Training".

[75] An interesting analysis on the US approach is provided by John Browning, 'Why Can't We Be Friends? Judges' Use of Social Media' (2014) 68 University of Miami Law Review 487.

The European Court of Human Rights followed a similar pattern in a specific internal resolution adopted in 2021, which stresses that judges as individuals shall proceed with the utmost care if using social media,[76] as well as in the 2021 'Guidelines on ethical usage of social media by judges and public prosecutors' adopted by the joint European Union and Council of Europe action, which aim to strengthen independence and accountability of the judiciary.[77]

In light of these considerations, it is now necessary to explore some rulings that appear to be paradigmatic and may help to draw a line by delimiting the exercise of this freedom by members of the judiciary online.

Social media and the judiciary in action: statements made in an official capacity or directly related to judicial functions

As regards the individual judge's freedom of expression within the context of the performance of institutional duties, or directly in relation to the exercise of judicial functions, the usage, place and timing of language will establish whether or not the subject addressed in the communication is relevant for ongoing judicial activity. This will establish whether it falls outside the scope of or is protected under Article 6(1) read in the light of Article 10 of the Convention, given that not only judicial impartiality but also its perception amongst the general public is important.[78]

Judges typically make statements in judgments and hearings, ideally expressing themselves in these venues in a relevant, correct, clear and understandable way. However, they could naturally feel driven to intervene outside of trials concerning issues they are currently dealing with or may deal with in the future within legal proceedings.[79] This type of information is broadly protected in the ECtHR case law where the relevant matter is in the public interest and concerns the proper and transparent operation of the judicial system itself.[80]

A distinction needs to be drawn between individual statements released in the context of a direct exercise of functions and the narrow – but not identical – situation where freedom of expression is exercised

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[76] ECtHR, Resolution on Judicial Ethics, adopted by the Plenary on 21 June 2021, Point VI.
[77] See also the comparative work of the CoE Venice Commission, on the Use of Social Media by Judges Discussion Guide for the Expert Group Meeting (5-7 November 2018, Vienna).
[78] *Denisov v. Ukraine* App no 76639/11 (ECtHR, 25 September 2018), para 63.
[79] Even if a matter of debate has political implications, this fact alone is not sufficient to prevent a judge from making a statement on the matter, see *Wille v Liechtenstein* (n 22) para 67.
[80] See *Kudeshkina v Russia* (n 41): the applicant was deprived of status as a judge after making public statements concerning political interference within the Russian judicial system; the Court found by a majority that Article 10 had been violated.

within an institutional setting, linked to the official scope of judicial activity. Both types of communication involve the judge as a public official and not as a private individual, although in different contexts.

The former scenario arises under specific circumstances where the judge is under a legal or ethical duty to disseminate information through social networks concerning legal reforms that may impact judicial independence or that concern procedures for establishing key facts that have been incompletely and inaccurately reported in the media.

The latter scenario may arise in a variety of situations and fora outside the scope of that duty and may involve for instance an interview given through a social network as an independent legal expert contributing to public debate, done prudently, or alternatively a post on digital social media that unduly discloses sensitive legal information.

In each member state of the Council of Europe any communication made in an official capacity needs to be balanced against the rights of the defence and the requirement for secrecy of the investigation or inquiry.[81] As a matter of principle, from a professional ethics point of view, public communications in which a judge "pontificates" on topical issues that concern the fairness of the proceedings[82] are inappropriate and are often formally sanctioned,[83] even if the declarations concerned were made on social media anonymously or under a pseudonym.[84] Usually, the competent authority responsible for disciplining any such improper action is the judiciary's self-government body, which is thus required to ensure the guarantees of independence outlined in the Strasbourg Court's ruling of *Di Giovanni*.[85]

In the same way, it is inappropriate for a judge to express personal opinions concerning the parties or defendants within judicial proceedings that he or she is dealing with or has dealt with. For instance, in a disciplinary decision by the French *Conseil supérieur de la magistrature*, the Council ruled on the disciplinary relevance of remarks concerning the office of the public prosecutor made by a judge during a hearing. Interestingly, the judge who made the comments did not personally use social networks. However, the

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81 See, for instance, for France, Article 10 *Ordonnance* of the 22 December 1958.
82 *Olujić v Croatia* App no 22330/05 (ECtHR, 5 February 2009), para 59.
83 Luca Longhi, 'I magistrati e l'uso dei social. Appunti sulla deontologia professionale di categoria nell'era della comunicazione di massa' (2019) 10 Diritto Pubblico Europeo - Rassegna online 192; Consultative Council of European Judges (CCEJ), 'Opinion No 7 on Justice and Society' (*CCJE*) pt C <https://www.coe.int/en/web/ccje/opinion-n-7-on-justice-and-society> accessed 2 April 2024; Venice Commission, 'Use of Social Media by Judges Deontological Rules or Instruction/Relevant Case-Law: Contribution by the Venice Commission to the Guidelines on Judges' Use of Social Media Prepared by the UNODC Globabl Judicial Integrity Network' (Council of Europe 2019) CDL-PI(2019)003 <https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2019)003-e> accessed 2 April 2024.
84 Pseudonyms should never be used to enable unethical behaviour on social media. In addition, the use of alias offers no guarantee that the real status will not become known, see UNODC, "Non-Binding Guidelines on the Use of Social Medias by Judges", <www.unodc.org>, visited 10 October 2023.
85 This is the case for the Italian Consiglio Superiore della Magistratura, see *Di Giovanni v. Italy* (n 13).

comments were published on social media on the blog of the defendant's lawyer and were also reported on Twitter (X).[86]

Statements may be punished by fines if they are not publicly shared or have limited reach on social networks, e.g., posted to closed WhatsApp groups only. Alternatively, they could constitute serious crimes if for instance a natural person is defamed on a widely used online medium such as Twitter (X) or if the statements concern specific matters protected by professional secrecy.[87]

While the Strasbourg Court has already ruled on several cases concerning the protection of human rights in the context of the usage of social networks, *Kozan*[88] was the first case decided on the use of social media by judges themselves. The facts concerned a disciplinary sanction imposed on the applicant, a serving Turkish judge, for having shared on Facebook a press article concerning a disciplinary procedure before the High Council of Judges and Prosecutors. It is interesting to note that the Facebook group concerned was closed, and all members were colleagues. Nonetheless, both the issue (an allegation of corruption) and the interference (a reprimand for sharing a press article on Facebook) were recognised by the Court to be matters of particular interest within public debate, since they were closely related to the independence of the judiciary vis-à-vis the government, with respect to events surrounding proceedings for suspected corruption and the executive's opposition to those proceedings.

The application, rooted in Articles 10 and 13 of the Convention, objected that freedom of speech on digital networks had been violated and that there was no effective domestic remedy to governmental interference. The Court ultimately held that the measure was not proportionate, as it was unnecessary in a democratic society. The disciplinary sanction exceeded the state's margin of appreciation given the magistrate's duties and responsibilities relating to his professional activity and judicial status. Indeed, disciplinary measures may entail severe consequences for the lives and careers of the members of the judiciary who are penalised and, as both the ECtHR and CJEU[89] have also pointed out, the review carried out in relation to the judge must thus be appropriate to the disciplinary nature of the decisions in question.

This case also provides an explicit confirmation of the relevance of the ethical duty incumbent upon an individual ordinary judge (in the specific case a judge specialising in criminal law) to become active on networks such as Facebook to inform and contribute to the debate on serious issues regarding the independence and effectiveness of the judicial system, and as result the rule of law, in the interest of all citizens. The ECtHR ruling Danilet v Romenia delivered on 20 February 2024 recently intervened on the use of Facebook by a judge, who had published two messages on his page and for this reason had

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[86]See French CSM, case p082, decision of 13 October 2015.
[87] See French CSM, case p077, decision of 29 April 2014, and case s212, decision of 30 April 2014.
[88] *Kozan v Turkey* App no 16695/19 (ECtHR, 1 March 2022).
[89] See Case C-791/19, *Commission v Poland* [2021], para 83 and the ECtHR case law mentioned therein.

been disciplinary sanctioned. The Section Panel decided (four to three) for the violation of Article 10 ECHR, with one concurring opinion attached and one dissenting opinion expressed by three judges. It is likely that the case will be accepted for further decision by the Grand Chamber. It is a significant confirmation that the matter is sensitive in several European Countries and complex for the fundamental rights at stake, needing to be carefully balanced.

The other side of the coin: private communications by individual judges

If, on the other hand, communication by the individual judge is not related to or incidental to ongoing crucial judicial reforms or legal activities that may potentially impinge upon the future competence of the judge, and is expressed in various social media fora, then the matter is likely to fall within the scope of "private life", protected under Article 8 of the Convention, read in conjunction with Article 10. From this perspective, discerning the limits to freedom of expression becomes even more delicate, and the case law on disciplinary liability is not homogeneous.[90] This is first because the phenomenon is not regulated in detail in most European countries, and indeed there is scant awareness of it; secondly, different ethical standards may apply, mainly depending upon the social context and on the different generations of magistrates involved in the use of social media.

The critical duality is reflected by a survey arranged by several European supreme courts, including the Italian Court of Cassation, which considered the use of social media more closely.[91] It addressed the issue of the specific usage of social media by judges by virtue of their active participation on social media platforms: this may be relevant in terms of the content they like and the groups they join, particularly

[90] See Mario Fresa, *La giustizia disciplinare: i magistrati ordinari: quali controlli sui controllori?* (Edizioni scientifiche italiane 2021); Mario Fresa, *Il Dibattito Pubblico Sui Processi e Sulle Questioni Di Giustizia. La Parola Dei Magistrati Tra Libertà Di Espressione, Obblighi Di Segreto e Dovere Di Riserbo* (Aracne 2019); Adriana Apostoli, *Implicazioni costituzionali della responsabilità disciplinare dei magistrati* (Giuffrè 2009).

[91] Corte Suprema di Cassazione, 'Risposte Della Corte Suprema Di Cassazione al Questionario Proveniente Dalla Corte Suprema Della Repubblica Ceca Su Le Attività Secondarie e l'uso Dei Social Media Da Parte Dei Magistrati' (1 October 2021) <https://www.dirittodelrisparmio.it/wp-content/uploads/2021/10/CASSAZIONE_QUESTIONARIO_SULLE_ATTIVITA_SECONDARIE_DEI_GIUDICI_REPUBBLICA_CECA_.pdf> accessed 2 April 2024.

those of a political nature. In most but not all European countries,[92] actions of this nature could undermine public confidence in the judge's impartiality or the impartiality of the judiciary in general.[93]

It is accepted that a judge's duty to comply with standards of professional ethics may influence their private life to a certain extent.[94] Turning to the most common cases, the use of the "like" button on social networks such as Facebook or "emojis" on WhatsApp is covered by Article 10 of the Convention[95] as current and popular forms of the exercise of freedom of expression online to approve content published by a third person. A case currently pending before the Strasbourg Court concerns the issue of whether being "friends" with third parties on Facebook may directly affect a judge's appearance of impartiality, which should result in his or her recusal in a specific case.[96] However, according to the French CSM Guidelines, the "friending" on social media of different users is not sufficient to establish automatically that the judge who exercised that freedom of expression on a social network is biased.[97]

In general, the rule of sobriety in terms of behaviour requires that certain aspects of private life remain confidential and not be revealed to the public. Otherwise, there is a risk that the necessary seriousness, composure and discretion that every magistrate, and therefore the judiciary as a whole, must respect vis-a-vis public opinion might be undermined.[98] Thus, even the failure to take prompt action to delete illegal comments posted by others on the "wall" of a Facebook account that is freely accessible to the public may be relevant. Recently, the Strasbourg Grand Chamber accepted[99] a referral against a Chamber judgement finding no violation of Article 10 of the Convention in a case involving the censure of a local councillor for having failed to take action in response to an abusive statement posted by a third party. It is important to be clear about the distinction between public and private profiles on social media and the fact that no protection is provided for "hate speech" according to Article 17 of the Convention.[100] This

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92 In Germany judges may be members of political parties but must – even during political activity – refrain from any action that could endanger public confidence in their independence. See Anne Sanders and Elisabeth Faltinat, 'Judges, Political Mandates and Judicial Independence in Germany: How to Deal with Radicalised Judges?' [2023] Verfassungsblog <https://verfassungsblog.de/judges-political-mandates-and-judicial-independence-in-germany/> accessed 2 April 2024.

93 See UNODC (n 65) para 21.

94 *Özpınar v Turkey* App no 20999/04 (ECtHR, 19 October 2010).

95 *Melike v Turkey* App no 35786/19 (ECtHR, 15 September 2021), para 44.

96 *Chaves Fernandes Figueiredo v. Switzerland* App no 55603/18 (ECtHR, pending).

97 See Conseil Supérieur de la Magistrature, 'Compendium of the Judiciary's Ethical Obligations' <http://www.conseil-superieur-magistrature.fr/compendium-judiciarys-ethical-obligations> accessed 2 April 2024.

98 *Panioglu v Romania* App no 33794/14 (ECtHR, 8 December 2020); *Guz v Poland* App no 965/12 (ECtHR,15 October 2020).

99 *Sanchez v France* App no 45581/15 (ECtHR, 2 September 2021); *Sanchez v France* App no 45581/15 (ECtHR, GC, 15 May 2023), which found that there had been no violation of Article 10.

100 See *M'Bala M'Bala v France* App no 25239/13 (ECtHR, 20 October 2015).

matter, along with the scope for positive obligations and hence for the requirement of immediate action by internet providers, is analysed further in the landmark *Delfi* ruling of the Court.[101]

It cannot be excluded that any activity on Facebook of a judge's close family member – such as a spouse – might, in certain circumstances, adversely affect the perception of the judge's impartiality.[102] The critical consideration, also in the light of the UN Principles of Judicial Conduct referred to above, is that from the standpoint of an objective observer, the judge sufficiently distances themself from statements made by a close relative on a social network.[103]

As this excursus has attempted to establish, it is still challenging to identify one single standard for all possible personal behaviour by judges on social networks, especially in situations involving conduct that is not explicitly related to professional matters but may have a potential impact on judicial impartiality and its perception by the public. However, some aspects appear to recur: the need to strike a fair balance between public and private figures, between speech and interactions, and between self-restraint and the need to use instruments that form part of the new digital *agora*.

Impartiality and independence of the courts are guaranteed by legal procedures and public scrutiny of decisions, not by the online screening of private life

Impartiality and independence are a duty and essential part of the status of a member of the judiciary. Due consideration for the ethical framework applicable to judges – the duties of impartiality, independence, discretion and respect for the public image of justice – is a key aspect of the meaning of "impartial and independent judge" protected by the Convention and by the right to an effective remedy and a fair trial enshrined by the Charter. Its implementation is dependent first and foremost on the professional activity of the individual judge and prosecutor as reflected by the reasons given in support of decisions and their content, but also on the person's behaviour in public and participation in social life, including when using social media for official and, to some extent, even private communications. However, the research suggests that asserting a general rule about what a judge can or should, or should not, do on social networks may be problematic. This is particularly the case about private communications as there may be significant generational differences in ethical values and social contexts.

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[101] *Delfi AS v Estonia* (n 17).
[102] *Rustavi 2 Broadcasting Company Ltd and Others v Georgia* App no 16812/17 (ECtHR, 18 July 2019).
[103] ibid para 344.

The highly fragmented scenario described above does not take the judicious use of social networks for granted and suggests a need to specifically adapt the standards used for other forms of expression. The current uncertainty might mislead members of the judiciary into feeling free to make almost any public statement if it is made in a private capacity, or into considering that they do not need to use social media at all, thereby isolating themselves from an essential and transparent part of modern democratic society and ultimately impoverishing public debate on relevant legal issues.

By contrast, a canon that defined once and for all (in)appropriate behaviour might interfere with the right to act freely and independently from outside influence. The greater the density of the rules applicable to judicial behaviour, the greater the risk that political players, other state bodies, or the judicial authorities may use them to discipline and exercise control over individual judges about their professional conduct.

According to established case law, criminal punishment within the area of freedom of expression proves in many cases to be disproportionate to the legitimate aim pursued by the government[104] and due to its nature and scope often does not take complete account of the natural interaction between free speech (as a paramount liberty to be carefully protected in democratic societies) and other human and fundamental rights enshrined by the Convention and the Charter. Parallel criminal and disciplinary proceedings may also be launched in relation to the exercise of freedom of expression by judges and prosecutors, and this may be liable to enhance the "chilling effect", endangering public debate on critical legal reforms and issues regarding the judicial system:[105] even if the criminal conviction is suspended there may still be interference with freedom of expression.[106]

In the authors' view, soft law and codes of conduct based on an innovative international comparative approach, in conjunction with national provisions, can improve protection for the freedom of expression of judges and prosecutors. At the same time, they may help to strike a fair balance between judges' free speech on social networks and the human and fundamental rights of others enshrined by the Convention and the Charter.

This result may be secured in different ways: first, guidelines developed by means of comparative analysis and adopted by respected international organisations may effectively help to draw a clear dividing line between generally accepted standards and grey areas. Secondly, through its persuasive strength, soft law can effectively contribute to achieving recognition for a consensus among relatively homogeneous European countries, or at least underscore trends that may help interpret national regulations. Thirdly, codes of conduct can in some cases even operate as an external source supplementing the relevant provisions

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[104] See *Sallusti v Italy* App no 22350/13 (ECtHR, 7 March 2019) and several judgments there quoted.
[105] *Żurek v Poland* App no 39650/18 (ECtHR, 16 June 2022).
[106] *Durukan and Birol v Turkey* Apps nos 14879/20 and 13440/21 (ECtHR, 3 October 2023).

on criminal or disciplinary liability, thus enabling a welcome balance to be struck between the rigidity of specific rules, which is necessary to ensure their foreseeability, and the need for some degree of elasticity. Rules need to be read in the light of ethical standards that change considerably across generations and social contexts as well as the ongoing technological revolution.

It could represent a significant achievement because the findings of this study stress the current lack of a clear framework for the use of social media that takes account of the need to respect private life in conjunction with free speech, and this situation affects the democratic participation in the public debate of judges as citizens. Moreover, the current uncertainty does not appear to be fully compliant with foreseeability requirements in relation to the usage of online tools and respect for private life laid down in the case law of the European Court of Human Rights, nor with the awareness of risks of online surveillance[107] and failures of data protection.[108] All such aspects are relevant for each citizen, although they may potentially undermine judges' status as impartial and independent authorities, resulting in long-standing consequences for democratic societies.

The publication online and even the collection of personal data regarding judges may appear to be a transparent instrument pursuing the legitimate aim of safeguarding the political neutrality and impartiality of judges themselves, as well as confidence in that impartiality, and of protecting the dignity of their duties. However, it should be regarded not only as an interference in the right of those involved to respect their private life and protect their personal data, but also as an action that does not comply with the principle of proportionality and thus infringes requirements arising under EU law. As the CJEU recently pointed out,[109] less intrusive means already exist for that purpose. These include specific procedures for recusal and the provision to the bodies responsible for ensuring compliance with professional rules, or for appointing benches of judges hearing individual cases, of information relating to certain activities carried out by judges outside their duties that might give rise to conflicts of interest.

The legal procedures established for recusal in advance of a judgment, and also for appeal against an existing judicial decision, coupled with scrutiny of the proceedings by media and public opinion, if relevant for democratic debate, cannot and must not be replaced with screening of judge's private life based on a review of their use of social networks in the past, nor using the publication online of the results of "*doxing*" to challenge an undesired decision. The danger for judicial impartiality and independence lies not in ideas expressed publicly and indifferently but in almost invisible, opaque, networks of interests.

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[107] See, for a detailed discussion of the principles of and case law on foreseeability and private life, *Big Brother Watch and Others v United Kingdom* Apps nos 58170/13, 62322/14 and 24960/15 (ECtHR, GC, 25 May 2021).
[108] For instance, see *M.D. and Others v Spain* App no 36584/17 (ECtHR, 28 June 2022), paras 61-64.
[109] Case C-204/21, *Commission v Poland* [2023], paras 297-298.