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**Promotion and protection of all human rights, civil,  
political, economic, social and cultural rights,  
including the right to development****Independence of judges and lawyers****Report of the Special Rapporteur on the independence of judges and  
lawyers\****Summary*

In the present report, submitted pursuant to Human Rights Council resolution 35/11, the Special Rapporteur on the independence of judges and lawyers focuses on the exercise of the rights to freedom of expression, association and peaceful assembly by judges and prosecutors, both offline and online. While judges and prosecutors enjoy the fundamental rights and freedoms enshrined in human rights instruments, as public officials, they have special duties and responsibilities that justify the introduction of specific restrictions on their fundamental freedoms. The key is to strike an appropriate balance between the rights of judges and prosecutors and the legitimate interest of the national authorities in protecting the independence, impartiality and authority of their institutions.

Throughout the report, the Special Rapporteur documents various forms of interference with the exercise of fundamental freedoms by judges and prosecutors. Not all disciplinary measures adopted against judges and prosecutors in these cases can be regarded as being necessary in a democratic society to maintain public trust in the judiciary or the public prosecution. In some cases, these sanctions appear to be an expedient to punish the individual judge or prosecutor for the opinions expressed or the action taken in the exercise of his or her duties. In others, the severity of the sanction also has a “chilling effect” on other members of the judiciary or public prosecution, who may be discouraged from expressing critical views out of fear of being subjected to punitive measures.

In the light of the existing international and regional standards and the jurisprudence of regional courts and mechanisms, the Special Rapporteur offers some recommendations to State authorities on how to strike a fair balance between the fundamental rights of individual judges and prosecutors and the legitimate interests of the State. The recommendations also provide guidance to individual judges and prosecutors on how to exercise their fundamental freedoms in a way that is consistent with the dignity of their profession and the independence and impartiality of their office.

\* The annex is being circulated in the language of submission only.



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## Contents

	<i>Page</i>
I. Introduction .....	3
II. Overview .....	3
III. Legal standards.....	4
A. International standards.....	4
B. Regional standards.....	5
C. Professional standards and ethics.....	7
IV. Freedom of expression .....	7
V. Freedom of assembly and association .....	11
VI. Political rights .....	13
VII. Social networks and the activities of judges and prosecutors.....	15
VIII. Conclusions .....	16
IX. Recommendations .....	17
Annex	
List of respondents .....	20

## I. Introduction

1. This is the third report submitted by the Special Rapporteur on the independence of judges and lawyers, Diego García-Sayán, pursuant to Human Rights Council resolution 35/11.
2. In the present report, the Special Rapporteur focuses on the exercise of the rights to freedom of expression, association and peaceful assembly by judges and prosecutors, both offline and online, and aims at identifying the kinds of restrictions to which judges and prosecutors may legitimately be subject in a democratic society to achieve a legitimate aim, such as maintaining the authority of their office and the independence and impartiality of the judiciary.
3. In preparing the present report, the Special Rapporteur sent out a questionnaire, calling for contributions from States, international and regional human rights mechanisms, professional associations of judges and prosecutors, and civil society. At the time of writing, the Special Rapporteur has received 43 responses. He expresses his gratitude to all States and non-State actors that contributed to the preparation of the report (see annex for a list of respondents). The questionnaire and the submissions are available on the website of the Office of the United Nations High Commissioner for Human Rights.<sup>1</sup>
4. The Special Rapporteur thanks the Human Rights Clinic of the Human Rights Research and Education Centre of the University of Ottawa for its continuous support in the research and drafting of the present report.

## II. Overview

5. At times, judges and prosecutors are subjected to disciplinary sanctions, including suspension and removal from office, for exercising their right to freedom of expression, alone or in association with others, in a courtroom or on a social media platform. In the vast majority of cases, disciplinary proceedings are initiated on the basis of an alleged violation of the duties that judges and prosecutors are bound to fulfil in their capacity as civil servants, in particular the obligation to exercise restraint in the exercise of their fundamental freedoms so as to preserve the dignity of their office and the impartiality and independence of the judiciary. In some of these cases, however, the interference with the exercise of their fundamental freedoms cannot be regarded as necessary in a democratic society to pursue a legitimate aim, such as maintaining public trust in the judiciary or the public prosecution.
6. Social media occupy a significant place in the daily lives of people all over the world, including judges and prosecutors. They represent a formidable tool for outreach and public education, and can contribute to strengthening public trust in the judiciary. However, their use may give rise to new challenges and ethical concerns, relating to the propriety of the content posted, the unintended demonstration of bias or interest or unintended consequences arising from the interaction of judges and prosecutors with third parties.
7. Since the inception of the mandate, the Special Rapporteur has addressed several cases where disciplinary measures imposed on judges (and to a lesser extent, prosecutors) appeared to be an expedient to punish the judge for the opinions expressed or the action taken in the exercise of his or her profession. In some circumstances, the severity of the sanction also had a “chilling effect” on other members of the judiciary or public prosecution, who were discouraged from expressing critical views out of fear of being subjected to punitive measures. Most of these cases were addressed through the communications procedure.<sup>2</sup>

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<sup>1</sup> See [www.ohchr.org/EN/Issues/Judiciary/Pages/ExpressionAndAssociation.aspx](http://www.ohchr.org/EN/Issues/Judiciary/Pages/ExpressionAndAssociation.aspx).

<sup>2</sup> See, for example, AL PHL 6/2018; AL BRA 6/2018; AL KOR 3/2018; and AL MDA 21/2018. These communications are available from <https://spcommreports.ohchr.org/Tmsearch/TMDocuments>.

8. It is increasingly accepted that judges and prosecutors are entitled to exercise the rights to freedom of expression, belief, association and assembly, as well as political rights, on an equal basis with others. Nevertheless, it is also clear that the exercise of these rights may be subject to specific restrictions aimed at preserving the dignity of their office and, in the case of judges, the independence and impartiality of courts and tribunals.

9. The aim of the present report is to offer practical guidance to State authorities in striking a fair balance between the fundamental rights of individual judges and prosecutors and the legitimate interest of a democratic State in ensuring the independence, impartiality and authority of its civil service. It also aims to offer a practical tool to judges and prosecutors to assist them in taking their own decisions on how to exercise their fundamental freedoms, whether online or offline, in a way that is consistent with the dignity of their profession and the independence and impartiality of their office.

### III. Legal standards

#### A. International standards

10. A number of instruments adopted at the international level include provisions on the exercise of fundamental freedoms by judges and prosecutors.

11. The Basic Principles on the Independence of the Judiciary provide that members of the judiciary, like other citizens, are entitled to freedom of expression, belief, association and assembly (principle 8), and are free to form and join professional associations to represent their interests, to promote their professional training and to protect their status (principle 9).<sup>3</sup> The Basic Principles also acknowledge that, in the light of their special duties and responsibilities, judges should show restraint in exercising these rights and always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary (principle 8).

12. The Bangalore Principles of Judicial Conduct provide extensive guidance for judges on the kind of conduct that is to be expected from them in order to maintain their independence, integrity and impartiality and enhance public confidence in the judicial system. Principle 4.6 is an almost verbatim restatement of principle 8 of the Basic Principles. Principle 4.13 provides that judges may form or join associations of judges or participate in other organizations representing the interests of judges.

13. The *Commentary on the Bangalore Principles of Judicial Conduct* lists a number of activities that are incompatible with judicial office and provides that, as a general principle, judges should not be involved in public controversies. It also identifies a number of situations in which a judge may properly speak out about matters that are politically sensitive (for instance, in order to comment on legislation and policies that directly affect the operation of the courts, the independence of the judiciary, or fundamental aspects of the administration of justice).<sup>4</sup>

14. The Universal Charter of the Judge contains two provisions concerning the exercise of freedom of expression. Article 3-5 provides that judges have the right to freedom of expression (with the same limitations identified in principle 8 of the Basic Principles) and the right to join professional associations to defend their legitimate interests and their independence. In accordance with article 6-2, judges are required to be impartial – and to be seen as impartial – in the exercise of their duties, to perform their duties with restraint and attention to the dignity of the court and of all persons involved and to refrain from any behaviour, action or expression that may affect confidence in their impartiality and independence.

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<sup>3</sup> Questions relating to the establishment, composition and functions of judicial councils or similar independent and autonomous bodies are dealt with in a previous report specifically devoted to this issue (A/HRC/38/38).

<sup>4</sup> United Nations Office on Drugs and Crime (UNODC), (Vienna, September 2007), paras. 134–140.

15. The Guidelines on the Role of Prosecutors contains two provisions on the exercise of fundamental freedoms by prosecutors. In the Guidelines, it is acknowledged that prosecutors, like other citizens, are entitled to freedom of expression, belief, association and assembly, and it is pointed out that in exercising these rights, prosecutors should always conduct themselves “in accordance with the law and the recognized standards and ethics of their profession” (guideline 8). The Guidelines also provide that prosecutors have the right “to join or form local, national or international organizations and attend their meetings” (guideline 8) and the right “to form and join professional associations or other organizations to represent their interests, to promote their professional training and to protect their status” (guideline 9).

## B. Regional standards

16. A number of regional instruments contain provisions similar to those included in the Basic Principles on the Independence of the Judiciary and the Guidelines on the Role of Prosecutors.

17. While expressly recognizing the right of judges to form and join professional associations (para. 25), the Council of Europe recommendation of 17 November 2010 entitled “Judges: independence, efficiency and responsibilities” does not include a specific provision on the exercise of freedom of expression. The Council recommends, however, that judges exercise restraint in their relations with the media (para. 19) and that their engagement in activities outside their judicial mandate is compatible with their impartiality and independence (para. 21). The European Charter on the statute for judges also contains detailed provisions on the exercise of freedom of expression (art. 4.3) and extrajudicial activities (art. 4.2).

18. With regard to prosecutors, in its recommendation of 6 October 2000 on the role of public prosecution in the criminal justice system, the Council of Europe recommends that member States take measures to ensure that public prosecutors have an effective right to freedom of expression, belief, association and assembly, and provides that the exercise of these rights “can only be limited in so far as this is prescribed by law and is necessary to preserve the constitutional position of the public prosecutors” (para. 6).

19. The Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA<sup>5</sup> Region, adopted in 1995, provide that judges have the right to exercise their fundamental freedoms “to the extent consistent with their duties as members of the judiciary” (principle 8); they are also free to form and join judicial associations to represent their interests, promote their professional training and protect their independence (principle 9).

20. The Statute of the Iberoamerican Judge recognizes that the “legitimate right to the freedom of expression and information” (art. 3), as well as the right to form professional associations “apart from exceptions established by the Constitution or legislation of each country” (art. 36).

21. Regional human rights courts and mechanisms in Europe and the Inter-American system have also contributed to clarifying the way in which judges and prosecutors can exercise their fundamental freedoms and the extent of permissible limitations aimed at safeguarding the dignity of their profession and the independence and impartiality of the judiciary.

22. The European Court of Human Rights has developed a vast jurisprudence on the balance between judicial freedom of expression and the need to safeguard the independence and impartiality of the courts.<sup>6</sup> The European Court has considered the issue from two

<sup>5</sup> Law Association for Asia and the Pacific.

<sup>6</sup> See Sietske Dijkstra, “The freedom of the judge to express his personal opinions and convictions under the ECHR”, *Utrecht Law Review*, vol. 13, No. 1 (January 2007); and Jorge Antonio Climent Gallart, “La jurisprudencia del TEDH sobre la libertad de expresión de los jueces”, *Revista Boliviana de Derecho*, No. 25 (2018) (in Spanish).

different points of view. In the first category of cases, the Court considered complaints from judges about alleged violations of their right to freedom of expression and, to a lesser degree, freedom of assembly and association and freedom of thought, conscience and religion. The second category of cases includes complaints from parties to a case or defendants in criminal proceedings concerning the alleged lack of independence or impartiality of the judges.

23. The Consultative Council of European Judges adopted an opinion on the standards of conduct applicable to judges that provides useful guidance on legitimate restrictions on the right to freedom of expression. In its opinion, the Council recognizes that, since the exercise of the fundamental rights and freedoms protected by the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) may jeopardize the impartiality or even the independence of the judge concerned, “a reasonable balance therefore needs to be struck between the degree to which judges may be involved in society and the need for them to be and to be seen as independent and impartial in the discharge of their duties”. In order to ascertain whether a restriction on the fundamental freedom of a judge is consistent with the requirements of articles 9 to 11 of the European Convention on Human Rights, the question to be asked is “whether, in the particular social context and in the eyes of a reasonable, informed observer, the judge has engaged in an activity which could objectively compromise his or her independence or impartiality”.<sup>7</sup>

24. The Consultative Council of European Prosecutors recognized that prosecutors enjoyed the right to freedom of expression and association in the same manner as other members of society, and pointed out that in exercising these rights, “they must take into account the duty of discretion and be careful not to jeopardise the public image of independence, impartiality and fairness which a prosecutor must always uphold”.<sup>8</sup>

25. The European Commission for Democracy through Law (Venice Commission) has dealt with the exercise of fundamental freedoms by judges and prosecutors in a number of reports and opinions relating to individual member States.<sup>9</sup> In a report specifically devoted to this issue, the Commission concluded that the guarantees of freedom of expression extend also to civil servants, including judges, but the specificity of the duties and responsibilities that are incumbent on judges and the need to ensure the impartiality and independence of the judiciary are considered legitimate aims in order to impose specific restrictions on the exercise of their freedoms.<sup>10</sup>

26. The Inter-American Court of Human Rights and the Inter-American Commission on Human Rights have reached similar conclusions. The Inter-American Court has established that ownership of the right to freedom of expression cannot be confined to a specific profession or group of persons, or to the realm of freedom of the press.<sup>11</sup> The Court dealt with the exercise of fundamental freedoms by judges in an emblematic case concerning four judges who had been dismissed as a result of their action in favour of the re-establishment of democracy in Honduras following a coup d'état. The Court ruled that the rights of those judges had been violated considering that “in situations where there is a breakdown of institutional order following a coup d'état, the relationship between these rights is even clearer, especially when they are all exercised at the same time in order to protest against actions by the public authorities that are contrary to the constitutional order,

<sup>7</sup> Opinion No. 3 to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality (19 November 2002), para. 28.

<sup>8</sup> Opinion No. 9 (2014) on European norms and principles concerning prosecutors (17 December 2014), para. 100.

<sup>9</sup> See, for example, 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 (CDL-AD(2018)017), paras. 123–132; and opinion on legal certainty and the independence of the judiciary in Bosnia and Herzegovina (CDL-AD(2012)014), paras. 80–81.

<sup>10</sup> “Report on the freedom of expression of judges” (June 2015), paras. 80–81.

<sup>11</sup> *Donoso v. Panama*, judgment of 27 January 2009, para. 114.

and to reclaim the return to democracy. Protests and related opinions in favour of democracy should be ensured the highest protection".<sup>12</sup>

27. The Inter-American Commission has stated that, as public officials, judges and prosecutors enjoy a right of freedom of expression "that is quite broad" but, at the same time, "subject to special restrictions" aimed at safeguarding the independence and impartiality of the judiciary.<sup>13</sup>

### C. Professional standards and ethics

28. Codes of professional conduct play an important role in providing practical guidance to judges and prosecutors on how to exercise their human rights and fundamental freedoms in a way that preserves the dignity of their office and the independence and impartiality of the judiciary.

29. In a number of States that responded to the questionnaire, professional associations have developed codes of professional conduct or guidelines to help judges and prosecutors to act, in the discharge of their professional functions, in accordance with predefined ethical standards and the duties and responsibilities intrinsic to their functions.<sup>14</sup> In some cases, the same code is applicable to both judges and prosecutors.<sup>15</sup>

30. Some of these codes contain specific provisions on the exercise of fundamental freedoms and political rights, and identify the restrictions that judges and prosecutors may be subject to in order to preserve their independence and impartiality, the honour and dignity of their office, and the public confidence in the system of administration of justice.<sup>16</sup> Only a few ethical codes provide guidance for judges and prosecutors on the use of modern technologies<sup>17</sup>

## IV. Freedom of expression

31. The right to freedom of expression is enshrined in many international and regional treaties.<sup>18</sup> The Human Rights Committee has observed that freedom of expression forms the basis for the full enjoyment of a wide range of other human rights, including the rights to freedom of religion, assembly, association, participation in public affairs and the effective exercise of the right to vote.<sup>19</sup>

32. International and regional standards on freedom of expression have a similar structure: in the first paragraph it is recognized that "everyone" has the right to freedom of opinion and expression, while in the second paragraph it is stipulated that, in order to be legitimate, restrictions on this right must be prescribed by law, serve a legitimate aim and be necessary in a democratic society. In some of these standards it is expressly recognized that the exercise of this freedom "carries with it special duties and responsibilities".<sup>20</sup>

33. These special duties and responsibilities have a special significance in cases concerning the freedom of expression of judges and prosecutors. As civil servants, judges

<sup>12</sup> *López Lone et al. v. Honduras*, judgment of 5 October 2015, para. 160.

<sup>13</sup> "Guarantees for the independence of justice operators: towards strengthening access to justice and the rule of law in the Americas" (December 2013), para. 172.

<sup>14</sup> Australia, Azerbaijan, Bulgaria, Croatia, Hungary, Slovenia, Sweden and United Kingdom of Great Britain and Northern Ireland (Northern Ireland only).

<sup>15</sup> Bosnia and Herzegovina, Bulgaria and Romania.

<sup>16</sup> Australia and Slovenia.

<sup>17</sup> Australia and United Kingdom (Northern Ireland and Scotland only).

<sup>18</sup> For example, the International Covenant on Civil and Political Rights (art. 19); the European Convention on Human Rights (art. 10); the American Convention on Human Rights (art. 13); and the African Charter on Human and Peoples' Rights (art. 9).

<sup>19</sup> General comment No. 34 (2011) on freedoms of opinion and expression, paras. 4 and 20.

<sup>20</sup> International Covenant on Civil and Political Rights (art. 19 (3)). See also European Convention on Human Rights (art. 10 (2)).

and prosecutors are bound by “a duty of loyalty, reserve and discretion” to their employer,<sup>21</sup> and are expected to “show restraint in exercising their freedom of expression in all cases where the authority and impartiality of the judiciary are likely to be called in question”.<sup>22</sup> The duty of loyalty and discretion requires that “the dissemination of even accurate information is carried out with moderation and propriety”.<sup>23</sup>

34. The European Court of Human Rights observed that the prominent role occupied by the judiciary in a democratic society justifies leaving to the national authorities “a certain margin of appreciation” in determining whether a restriction on civil servants’ right to freedom of expression is compatible and proportionate to the aim of maintaining the authority and impartiality of the judicial system.<sup>24</sup>

35. However, in a recent judgment, the European Court affirmed that, in view of the growing importance attached to the principles of the separation of powers and the independence of the judiciary, any interference with the freedom of expression of a judge “calls for close scrutiny”, and concluded that “the applicant’s position and statements, which clearly fell within the context of a debate on matters of great public interest, called for a high degree of protection for his freedom of expression and strict scrutiny of any interference, with a correspondingly narrow margin of appreciation being afforded to the authorities of the respondent State”.<sup>25</sup>

36. It is against this background of the “margin of appreciation” that human rights courts and mechanisms test whether the interference meets the three conditions laid down in treaty provisions on freedom of expression.

### **Restrictions on the right to freedom of expression**

37. The first condition is that the interference must be provided by law. The term “law” may include various forms of regulations. To be characterized as a law, a norm should be accessible to the persons concerned and formulated with sufficient precision to enable them to regulate their conduct and foresee the consequences which a given action may entail. The Inter-American Court of Human Rights established that “the requirement of law (*reserva de ley*) in cases of interference in the realm of freedom is essential to the legal protection and full existence of human rights”<sup>26</sup> and pointed out that the term “laws” does not mean any legal norm, but rather general normative acts adopted by the legislative body constitutionally foreseen and democratically elected, according to the procedures established in the Constitution. In two cases concerning disciplinary measures imposed on Italian judges as a result of their membership of the Freemasons, the European Court of Human Rights concluded that the European Convention on Human Rights had been violated because the interference had not been prescribed by law.<sup>27</sup>

38. The second condition is that the interference with the exercise of freedom of expression should serve a legitimate aim. In most cases concerning restrictions on the freedom of expression of judges adjudicated by the European Court, the legitimate aim on which the interference is based is the maintenance of the authority and impartiality of the judiciary, sometimes combined with the protection of the rights of others. The need to preserve the dignity of the judicial office and the impartiality and independence of the judiciary is expressly mentioned in the Basic Principles and the Bangalore Principles as aims that may justify restrictions on the exercise of freedom of expression by judges.

<sup>21</sup> For example, European Court of Human Rights, *Kudeshkina v. Russia* (application No. 29492/05), judgment of 26 February 2009, para. 85.

<sup>22</sup> European Court of Human Rights, *Wille v. Liechtenstein* (application No. 28396/95) judgment of 28 October 1999, para. 64.

<sup>23</sup> *Kudeshkina v. Russia*, para. 93.

<sup>24</sup> For example, *Kudeshkina v. Russia*, para. 82; and *Wille v. Liechtenstein*, para. 61.

<sup>25</sup> *Baka v. Hungary* (application No. 20261/12), 23 June 2016, paras. 171 and 175.

<sup>26</sup> “The Word ‘Laws’ in Article 30 of the American Convention on Human Rights”, advisory opinion, 9 May 1986, para. 24.

<sup>27</sup> *N.F. v. Italy* (application No. 37119/97), judgment of 2 August 2001, paras. 24–32; and *Maestri v. Italy* (application No. 39748/98), judgment of 17 February 2004, paras. 30–42.



39. The third condition is that the interference must conform to the strict tests of necessity and proportionality. In its general comment No. 34 (paras. 22 and 34), the Human Rights Committee points out that restrictive measures must conform to the principle of proportionality, be appropriate to achieve their protective function, be the least intrusive instrument among those that might achieve their protective function and be proportionate to the interest to be protected. The principle of proportionality has to be respected, not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law. In the case law of the European Court of Human Rights, an interference is deemed necessary in a democratic society when it responds to a “pressing social need” and is “proportionate to the legitimate aim pursued”.<sup>28</sup>

### **Jurisprudence of regional human rights courts**

40. The jurisprudence of regional human rights courts and mechanisms offers invaluable guidance in defining the limits to which judges and prosecutors are subject when exercising their freedom of expression. In particular, the case law of the European Court of Human Rights shows that, in assessing whether the national authorities have struck a fair balance between the right to freedom of expression of the individual judge and the legitimate interest of the authorities to protect the authority and the impartiality of the judiciary, the impugned statement should be considered in the light of all the concrete circumstances of the case as a whole. In this assessment, a number of factors are taken into account, 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 two cases, the high-ranking position held by the applicant within the judiciary was one of the essential factors taken into account by the European Court in assessing whether, in view of the specific duties and responsibilities inherent to that status, the applicant had infringed his duty of loyalty and discretion through the opinion he expressed.

41. In *Baka v. Hungary*, the President of the Supreme Court of Hungary complained that the early termination of his mandate following the views he expressed on various legislative and constitutional reforms affecting the judiciary violated his right to freedom of expression. In reaching the conclusion that the premature termination of the applicant’s mandate had been in breach of article 10 of the Convention, the European Court attached a particular importance to the office held by the applicant and considered that, in his professional capacity as President of the Supreme Court and of the National Council of Justice, the applicant had not only the right, but also the duty, to express his opinion on legislative reforms affecting the judiciary (para. 168). In *Wille v. Liechtenstein*, the high-ranking status of the applicant within the judiciary led the European Court to the same conclusion (para. 64).

42. The content of the impugned statement and the context in which it is delivered assume special relevance with regard to cases concerning the exercise of freedom of expression as part of a public debate.

43. In the *Wille* case, the Court considered that, although the applicant’s lecture concerned matters of constitutional law, which inevitably had political implications, that element alone should not prevent the applicant from making a statement on that matter (para. 67). In *Kudeshkina v. Russia*, which deals with the dismissal of a judge following her fierce criticism of the judiciary in the media, the Court considered that the applicant had raised “a very important matter of public interest, which should be open to free debate in a democratic society” and recalled that, in its case law, it had attributed particular importance to the unhindered exercise of freedom of speech by candidates in the context of electoral debate (para. 94).

44. In *López Lone et al. v. Honduras*, the Inter-American Court of Human Rights recognized that freedom of expression had to be guaranteed not only with regard to the dissemination of information and ideas that were received favourably or considered inoffensive or indifferent, but also those that the State or any sector of the population considered objectionable. It also underscored that “opinions relating to a coup d’état are of

<sup>28</sup> See, for example, *Baka v. Hungary*, para. 158.

great public interest and have the highest level of protection under the American Convention” and stated that the “legitimate protection of the principles of judicial independence and impartiality cannot be premised on the notion that a judge must remain silent on public issues” (paras. 157 and 165).

45. The motive for making a statement is also relevant in the assessment made by the European Court of Human Rights concerning the proportionality of the interference.<sup>29</sup> In the *Baka* case, the Court expressed the view that the applicant’s statements, which clearly fell within the context of a debate on matters of great public interest, “did not go beyond mere criticism from a strictly professional perspective” (para. 171). In the *Wille* case, the Court observed that there was no evidence to conclude that the applicant’s lecture contained any remarks on pending cases, severe criticism of persons or public institutions or insults of high officials or the Prince (para. 67). On the other hand, “an act motivated by a personal grievance or a personal antagonism or the expectation of personal advantage, including pecuniary gain, would not justify a particularly strong level of protection”.<sup>30</sup>

46. The nature and severity of the penalties imposed are factors to be taken into account when assessing the proportionality of any interference with the freedom of expression. In the *Kudeshkina* case, for example, the European Court of Human Rights considered that the loss of the judicial office was the strictest available penalty that could be imposed in the disciplinary proceedings (para. 98). In a number of cases, the Court also considered the “chilling effect” that the penalty imposed on the applicant was likely to have on other judges, who might be discouraged from participating in future debates on legislative reforms affecting the judiciary and more generally on issues concerning the independence of the judiciary.<sup>31</sup> The Inter-American Court of Human Rights reached a similar conclusion in the *López Lone* case (para. 176).

47. Human rights courts and mechanisms have also contributed to clarifying the extent to which judges and prosecutors may express their views on cases sub judice or, more in general, through the press.

48. Judges and prosecutors should always refrain from making any comment that might affect the outcome of proceedings or the fair trial of any person or issue before them. The jurisprudence of the European Court of Human Rights shows that the opinions expressed by the judge on a pending case and the tone and content of his or her decision may lead to a violation of the right to a fair trial. In *Kyprianou v. Cyprus*, for example, the Court found that the tone and words used in a verdict concerning a contempt of court case were too emotional, and concluded that the court “had failed to satisfy the requirement of impartiality under both the objective and subjective tests”.<sup>32</sup>

49. The Consultative Council of European Judges observed that judges have to show circumspection in their relations with the press and be able to maintain their independence and impartiality. This means that, as a general rule, they should refrain from any unjustified comments on the cases they are dealing with or which are pending before other judges.<sup>33</sup> If the media or interested members of the public criticize a decision, a judge should avoid answering such criticism by writing to the press or responding to journalists’ questions. A judge should only answer the legitimate expectations of the citizens through clearly motivated decisions.<sup>34</sup>

50. The European Court of Human Rights has dealt with a number of cases concerning judges who expressed their opinions on the media.<sup>35</sup> The Court stressed that in order to preserve their image as impartial judges, judicial authorities “are required to exercise

<sup>29</sup> Venice Commission, “Report on the freedom of expression of judges”, para. 75.

<sup>30</sup> *Kudeshkina v. Russia*, para. 95.

<sup>31</sup> *Baka v. Hungary*, paras. 167 and 173; *Wille v. Liechtenstein*, para. 50; and *Kudeshkina*, para. 99.

<sup>32</sup> Application No. 73797/01, 15 December 2005, para. 122.

<sup>33</sup> Consultative Council of European Judges, Opinion No. 3, para. 40.

<sup>34</sup> UNODC, *Commentary on the Bangalore Principles*, paras. 74–75.

<sup>35</sup> See *Buscemi v. Italy* (application No. 29569/95), judgment of 16 September 1999; *Lavents v. Latvia*, (application No. 58442/00), judgment of 28 November 2002; *Olujić v. Croatia* (application No. 22330/05), judgment of 5 February 2009.

maximum discretion with regard to the cases with which they deal”, and should refrain “from making use of the press, even when provoked”.<sup>36</sup> In these cases, the Court concluded that the expressions used by the judges implied that they had already formed an unfavourable view of the applicant’s case, in violation of the right to a fair trial of the applicant.

51. In most countries that responded to the questionnaire, the Constitution includes general provisions on the right to freedom of expression but not specific provisions on the exercise of freedom of expression by judges and prosecutors.

52. National legislation or codes of ethics developed by professional associations of judges and prosecutors provide more guidance. In most cases, national legislation only contains general provisions concerning the conduct and behaviour of the judge or the prosecutor within and outside the courtroom. When legal or ethical provisions refer directly to freedom of expression, they generally recognize that the right to freedom of expression may be subject to such restrictions as may be necessary to safeguard the honour and dignity of the office of judges and prosecutors and the independence and impartiality of the judiciary.

53. The most common restriction on the exercise of freedom of expression derives from the principle of confidentiality, according to which judges and prosecutors are bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings.<sup>37</sup> In order to maintain the perception of independence and impartiality, judges and prosecutors must also refrain from expressing their views or opinions in relation to cases currently or previously before the court, especially through the media.<sup>38</sup>

54. In some countries, national legislation and ethical codes contain express provisions that judges and prosecutors may participate in public discussions concerning the law, the judiciary or the administration of justice, or express their views on these issues in the media. In these cases, they must endeavour to ensure that their views and their overall conduct are in conformity with their duties and responsibilities as civil servants, and show restraint in exercising their freedom of expression in all cases where the authority and impartiality of the judiciary are likely to be called into question.<sup>39</sup>

55. States’ submissions to the Special Rapporteur provide limited information on cases where judges and prosecutors have been subjected to legal or disciplinary proceedings in relation to the exercise of their right to freedom of expression.<sup>40</sup> Submissions from civil society organizations, on the other hand, refer to several cases from Bulgaria, Egypt, Morocco, the Philippines, Poland and the Republic of Moldova.

## V. Freedom of assembly and association

56. In international and regional treaties it is recognized that everyone has the rights to freedom of association and peaceful assembly, and that no restrictions may be placed on the exercise of these rights other than those prescribed by law and necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.<sup>41</sup>

<sup>36</sup> *Buscemi v. Italy*, para. 67.

<sup>37</sup> Submissions from Bolivia (Plurinational State of), Bulgaria, Burundi, Colombia, Croatia, Guatemala, Montenegro, Slovenia and Sweden.

<sup>38</sup> Submissions from Croatia, Guatemala, Hungary, Lithuania, Montenegro, the Republic of Korea, Romania, Serbia, Slovenia and the United Kingdom (Scotland only).

<sup>39</sup> Bulgaria, Croatia, Montenegro and Slovenia.

<sup>40</sup> Lithuania, Netherlands, Republic of Korea and Slovenia.

<sup>41</sup> See International Covenant on Civil and Political Rights (arts. 21–22); European Convention on Human Rights (art. 11); American Convention on Human Rights (arts. 15–16); and African Charter on Human and Peoples’ Rights (arts. 10–11).

57. Existing standards for judges and prosecutors provide that they should not be isolated from the society in which they live and should remain generally free to engage in the extra-professional activities of their choice. However, since such activities may jeopardize the dignity of their office or even their independence and impartiality, a reasonable balance needs to be struck between the degree to which judges and prosecutors may be involved in society and the need for them to be, and to be seen as, independent and impartial in the discharge of their duties. In the last analysis, the question must always be asked whether, in the particular social context and in the eyes of a reasonable observer, a judge or prosecutor is engaged in an activity that could objectively compromise his or her independence or impartiality.<sup>42</sup>

58. The European Court of Human Rights has only considered two complaints concerning the right to freedom of association and peaceful assembly of judges or prosecutors. In both cases, the Court found a violation of the right because the restriction was not prescribed by law, and did not enter into the question of whether a judge's membership of the Freemasons was compatible with the principle of judicial independence and impartiality (see para. 37 above).

59. The Inter-American Court of Human Rights considered the compatibility of restrictions on the right to freedom of association in the *López Lone* case (para. 186).<sup>43</sup> It noted that the dismissal of three judges as a result of their participation in public protests against a coup d'état affected their membership in the Association of Judges for Democracy, since only judges and justices on active duty could be members of the Association, and constituted an undue restriction of the right to freedom of association of the applicants.<sup>44</sup>

60. The *Commentary on the Bangalore Principles* (paras. 127, 135, 167–168 and 176) contains useful guidance on the issue of judges' membership in various organizations. A judge may be a member of a trade union or non-profit organization; however, there is no consensus at the international level on whether a judge has the right to be member of a political party (see paras. 65–75 below). Also, it would not be appropriate for a judge to hold membership in any organization that discriminates on the basis of race, religion, gender, national origin, ethnicity or sexual orientation, because such membership might give rise to the perception that the judge's impartiality is impaired.

61. It is permissible for judges and prosecutors to participate in peaceful demonstrations to defend their professional interests (e.g., to advance and protect the conditions of service and salaries) or to protest against a reform of the justice system that may undermine the independence of the judiciary and the separation of powers.

62. In cases where judges and prosecutors consider it a moral duty to speak, for example to express opposition to war or to demand action on environmental degradation, it is generally permissible for them to participate in peaceful demonstrations.<sup>45</sup> In the *López Lone* case (paras. 148, 153 and 174), the Inter-American Court considered that at times of grave democratic crises judges had not only the right but also the duty to speak up in favour of the restoration of democratic order, alone and in association with other judges, and that the norms that ordinarily restricted the right of judges to participate in politics were not applicable to their actions in defence of the rule of law.

63. The responses to the questionnaire show that in many countries judges and prosecutors have the right to create or join professional associations to protect the interests of their members and the independence and impartiality of the judiciary, and the right to form or join any other associations that do not detract from the dignity of their office, interfere with their official duties or otherwise cast doubts as to their independence and impartiality. However, national legislation generally provides that the right of peaceful assembly and association of judges and prosecutors may be subject to specific restrictions,

<sup>42</sup> Consultative Council of European Judges, Opinion No. 3, paras. 27–28.

<sup>43</sup> *López Lone et al. v. Honduras*, para. 186.

<sup>44</sup> See also *Escher et al. v. Brazil*, judgment of 6 July 2009, para. 173.

<sup>45</sup> See UNODC, *Commentary on the Bangalore Principles*, para. 140.

aimed at protecting the honour of the office and the independence and impartiality of the judiciary.

64. In the majority of countries that responded to the Special Rapporteur's questionnaire, judges and, to a lesser extent, prosecutors, cannot be members of political parties, attend political gatherings or participate in public demonstrations and protests (see para. 73 below). In some countries, they cannot be members of trade unions,<sup>46</sup> commercial companies or cooperatives<sup>47</sup> or organizations that practice invidious discrimination.<sup>48</sup> In other countries, the Constitution or national legislation include specific limitations on the right of judges and prosecutors to participate in strike actions.<sup>49</sup>

## VI. Political rights

65. Political rights are intimately linked to the exercise of the rights to freedom of expression, peaceful assembly and association. In explaining the links between them, the Human Rights Committee pointed out that those fundamental freedoms represented essential conditions for the effective exercise of the right to vote and had to be fully protected.<sup>50</sup> The Inter-American Court of Human Rights acknowledged that those rights, taken as a whole, made the democratic process possible.<sup>51</sup>

66. Except for the exercise of the right to vote, the participation of judges and prosecutors in political activities poses some dilemmas. As citizens, judges and prosecutors are allowed to exercise their political rights on an equal basis with other citizens. However, in order to preserve public confidence in the judicial system, it is widely accepted that judges should show restraint in the exercise of public political activity. Even in cases where their membership of a political party or their participation in public debate is not expressly prohibited, it is necessary for judges and prosecutor to refrain from any political activity that may compromise their independence or jeopardize the appearance of impartiality.

67. In defining the appropriate degree of involvement of the judiciary in public debate, two factors need to be taken into account. The first is whether the judge's or prosecutor's involvement could reasonably undermine confidence in his or her impartiality. The second is whether such involvement may unnecessarily expose the judge or the prosecutor to political attacks or be inconsistent with the dignity of his or her office. If either is the case, the judge or the prosecutor should avoid such involvement.

68. This does not mean that judges and prosecutors should refrain from expressing their views on any issue that may have political implications.

69. In general terms, judges and prosecutors are allowed to make comments in defence of fundamental human rights and the rule of law, or to participate in activities or debates concerning national judicial policy or the administration of justice in the country. Judges and prosecutors should also be consulted and play an active part in the preparation of legislation concerning their status and, more generally, the functioning of the judicial system. Even on such occasions, however, they must be careful to avoid, as far as possible, entanglements in public controversies that may reasonably be seen as politically partisan.

70. With regard to direct involvement in politics, the Venice Commission expressed the view that judges should not put themselves into a position where their independence or impartiality could be questioned, noting that that was the reason why many States restricted the political activities of judges.<sup>52</sup> In relation to prosecutors, the Commission considered that, as civil servants, prosecutors should not hold other State offices or perform any

<sup>46</sup> Bulgaria, Colombia, Italy and Latvia.

<sup>47</sup> Bulgaria, Hungary, Lithuania and Slovenia.

<sup>48</sup> Bosnia and Herzegovina and Hungary.

<sup>49</sup> Albania, Colombia and Latvia.

<sup>50</sup> General comment No. 25 (1996) on participation in public affairs and the right to vote, para. 12.

<sup>51</sup> *López Lone et al. v. Honduras*, para. 160.

<sup>52</sup> "Report on the independence of the judicial system: part I – the independence of judges", March 2010, para. 62.

functions that would be found inappropriate for judges, and should avoid public activities that would conflict with the principle of their impartiality.<sup>53</sup>

71. This means that, in general terms, a judge or a prosecutor is expected to leave behind and put aside political affiliations or partisan interests when he or she takes the judicial oath or affirmation to perform judicial duties with independence and impartiality. While membership in a political party is not as such incompatible with their office, partisan political activity or out-of-court statements concerning issues of public controversy may undermine the impartiality of judges or prosecutors and lead to public confusion about the nature of the relationship between the judiciary and the executive or the legislative branches. Where a judge's spouse is an active politician, the judge must remain sufficiently detached from the activities of his or her spouse to ensure that there is not a public perception that he or she is endorsing a political candidate.<sup>54</sup>

72. The involvement of judges and, to a lesser extent, prosecutors in certain political activities within the legislative or executive branches of power poses a particular problem. At the core of the concept of judicial independence is the theory of the separation of powers, that is, the idea that in a modern democratic State the judiciary should function independently of the legislature and the executive branches of power. For this reason, a judge's duties are deemed to be "incompatible with certain political activities, such as membership of the national parliament or local council".<sup>55</sup> Consequently, a judge or a prosecutor cannot accept full-time employment at a high, policymaking level in the executive or legislative branch while on active service. He or she would have to resign from the judiciary before taking up new functions in the executive or legislative branch of power.

73. In the majority of countries that responded to the questionnaire, judges cannot openly express their political views, be members of political parties, participate in political gatherings or undertake any political activity that may undermine their independence or affect the public trust in the judiciary.<sup>56</sup> In some cases, constitutional or legislative provisions expressly provide that judges cannot become members of legislative or executive bodies at the national or local level.<sup>57</sup> Similar restrictions apply to prosecutors.<sup>58</sup>

74. In other countries, however, judges have the right to engage in politics and stand as candidates in political elections. In Slovenia, for example, judges can be members of political parties and stand as candidates for certain political offices; in the event of being elected or appointed to such office, the rights and duties deriving from their judicial office are suspended. The Venice Commission, in its report on the freedom of expression of judges (paras. 29 and 47–48), offers additional examples of countries (i.e., Austria, Germany and Sweden) where judges can actively engage in politics and stand as candidates in political elections.

75. In some submissions respondents provided specific examples of disciplinary proceedings against judges for their views and opinions expressed on issues of a political nature.<sup>59</sup> The Helsinki Foundation for Human Rights and the Open Dialogue Foundation referred to several cases where judges and prosecutors expressing critical views on the reform of the judiciary in Poland or on the situation of the judiciary in the Republic of Moldova had been subjected to disciplinary proceedings.

<sup>53</sup> "Report on European standards as regards the independence of the judicial system: part II – the prosecution service", March 2010, para. 62.

<sup>54</sup> UNODC, *Commentary on the Bangalore Principles*, para. 38 (c).

<sup>55</sup> *Ibid.*, para. 135.

<sup>56</sup> Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Burundi, Colombia, Costa Rica, Croatia, El Salvador, Hungary, Ireland, Latvia, Lithuania, Montenegro, Poland, Republic of Korea, Romania, Serbia, Turkey and United Kingdom.

<sup>57</sup> Hungary, Ireland, Lithuania, Montenegro, Republic of Korea, Serbia, Slovenia, Turkey and United Kingdom (Northern Ireland only).

<sup>58</sup> Azerbaijan, Bosnia and Herzegovina, Bulgaria, Honduras, Hungary, Latvia and Serbia.

<sup>59</sup> Bulgaria, Costa Rica and Poland.

## VII. Social networks and the activities of judges and prosecutors

76. The influence of new media culture in redefining communication and practices regarding personal information-sharing raises unique and interesting questions for courts. In the global era, use of social media platforms is part of most people's day-to-day activities.

77. Social media represent a formidable tool for outreach and public education, and can contribute to strengthening public trust in the judiciary. However, the use of social media raises new challenges and ethical concerns relating to the propriety of the content posted, the unintended demonstration of bias or interest or unintended consequences arising from the interaction of judges and prosecutors with third parties.

78. International instruments do not contain any guidance on how judges and prosecutors could exercise their freedoms online. However, it is widely accepted that the same rights that people have offline must also be protected online, in particular freedom of expression.<sup>60</sup> In practice, this means that justice operators should, therefore, refrain from taking part in any activity that could compromise the dignity of their office or cause conflicts of interest that could hamper public confidence in the justice system (A/HRC/26/32, para. 58).

79. To date, human rights courts and mechanisms have not had the opportunity to clarify the kind of conduct that is expected from a judge or a prosecutor in the exercise of his or her freedom of expression on social media. In accordance with international standards, judges and prosecutors are subject to more severe restrictions than others in their professional and private life and conduct. However, it would be unreasonable to expect them to retreat from public life altogether. The complete isolation of a judge or a prosecutor from the community in which they live is neither possible nor beneficial,<sup>61</sup> and a blanket instruction to judges and prosecutors to simply "stay off social media" is neither justified nor realistic in the current digital age.

80. The behaviour of judges and prosecutors on social media is visible to the public. Any comment or statement posted by a judge or a prosecutor should reaffirm the people's faith in the judiciary and be consistent with the dignity of his or her office and with the independence and impartiality of the judiciary. As civil servants, judges and prosecutors must ensure that the expression of their personal views and convictions does not adversely affect their official duties, reflect poorly on their status as civil servants or call into question their impartiality or their duties of loyalty and responsibility to their office. In expressing their views and opinions online, they should always respect and honour their office, and strive to maintain and enhance confidence in the judicial system. They should refrain from any online activity that may harm the public trust in the judiciary, or raise doubts as to its independence and impartiality.

81. Caution is recommended for a judge when engaging in any electronic communication, including communications by text or email, or when participating in online social networking sites or otherwise posting material on the Internet, given the accessibility, widespread transmission and permanence of electronic communications and material posted on the Internet. The same principles that govern a judge's ability to socialize in person, on paper, or over the telephone should apply to electronic communications, including the use of the Internet and social networking sites.

82. For prosecutors, this changing landscape poses similar challenges. Media guidelines for prosecutors from civil law and common law traditions have been developed in several countries. The common thread in these communication guidelines is to prevent the dissemination of incomplete or inaccurate information that would undermine public confidence in the public prosecution.

<sup>60</sup> Human Rights Council resolution 38/7.

<sup>61</sup> UNODC, *Commentary on the Bangalore Principles*, para. 31.

83. Only a few countries have developed specific legislation or ethical standards to regulate the conduct of judges and prosecutors on social media.<sup>62</sup> In some countries, professional associations of judges and prosecutors have carried out a number of activities to raise awareness of the risks associated with the exercise of their freedom of expression online, particularly on social media.<sup>63</sup> Other countries have started updating their legal codes and forming ethical bodies to flesh out the issue of the participation of members of the judiciary on social media.

84. Relevant groups, such as the Global Judicial Integrity Network, have published valuable guidelines and are working on training programmes on the nature of social media and the ethical responsibilities that apply to judges and prosecutors.<sup>64</sup>

85. States' submissions to the Special Rapporteur provide limited information on cases where judges and prosecutors have been subjected to legal or disciplinary proceedings in relation to the exercise of their right to freedom of expression online. In the Netherlands and Slovenia, judges were subjected to disciplinary measures for making improper comments on their Twitter accounts. In the Republic of Korea, a number of judges were suspended from office for making critical remarks on the judiciary's internal communication network regarding appointment processes or decisions adopted by other courts.

## VIII. Conclusions

86. **In the Basic Principles on the Independence of the Judiciary, the Bangalore Principles of Judicial Conduct and the Guidelines on the Role of Prosecutors, among other international standards, it is recognized that, like other citizens, judges and prosecutors are entitled to exercise their rights to freedom of expression, belief, association and assembly on an equal basis with others. The exercise of these freedoms, however, carries special responsibilities and duties. As civil servants, judges and prosecutors should show restraint in exercising these rights, and always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.**

87. **Regional human rights courts and mechanisms in Europe and the Inter-American system have contributed to clarifying the limits to which judges and prosecutors may be subject in the exercise of these freedoms. This jurisprudence focuses on the exercise of freedom of expression by judges but can be applied, mutatis mutandis, to the exercise of other fundamental freedoms and to prosecutors.**

88. **Codes of professional conduct produced by professional associations have also contributed to the development of detailed self-regulatory standards that help judges and prosecutors to make their own decisions when confronted with ethical choices in their professional and personal lives. However, only a limited number of ethical codes address issues related to the use of social media. The lack of appropriate guidance has led to an increase in the number of "accidental" breaches of professional standards of conduct by judges and prosecutors. At the national level, a growing number of professional associations are developing guidelines and providing training opportunities to their constituencies on issues relating to the use of social media.**

89. **In the present report, the Special Rapporteur shows that, as public officials, judges and prosecutors have special duties and responsibilities that justify the introduction of specific restrictions on their fundamental freedoms. However, such restrictions are only legitimate when provided by law and when they are necessary in a democratic society to pursue a legitimate aim, such as the protection of the independence, impartiality and authority of their institutions.**

<sup>62</sup> Australia, Albania, Hungary, Montenegro, Slovenia and United Kingdom (Northern Ireland and Scotland only).

<sup>63</sup> Azerbaijan, Bulgaria, Costa Rica, Lithuania and Republic of Korea.

<sup>64</sup> See UNODC, "Social media, a new platform for judges around the world".



90. There may be situations in which a judge, as a member of society, considers that he or she has a moral duty to speak out. The jurisprudence of regional courts has established that in situations where there is a breakdown of constitutional order, judges may even have a duty to speak out in favour of the restoration of democracy and the rule of law.

91. Throughout the report, the Special Rapporteur has documented various forms of interference with the exercise of fundamental freedoms by judges and prosecutors. Not all disciplinary measures adopted against them can be regarded as necessary in a democratic society to maintain public trust in the judiciary or the public prosecution. In some cases, these sanctions appear to be an expedient to punish the individual judge or prosecutor for the opinions expressed or the action taken in the exercise of his or her duties. In some circumstances, the severity of the sanction also has a chilling effect on other members of the judiciary or public prosecution, who may be discouraged from expressing critical views out of fear of being subjected to punitive measures.

## **IX. Recommendations**

92. In the light of existing international and regional standards outlined in the report, and taking into account the jurisprudence of regional human rights courts and mechanisms, the Special Rapporteur would like to offer the following recommendations.

### **Development and implementation of national standards**

93. National legislation on the organization and functioning of the judiciary and the public prosecution should include specific provisions recognizing that judges and prosecutors are entitled to exercise the right to freedom of expression, belief, association and assembly, as well as political rights, on an equal basis with others, and that the exercise of these rights can only be subject to those restrictions that appear necessary in a democratic society to maintain the authority of the judiciary or the public prosecution, as well as the independence and impartiality of individual judges and prosecutors.

94. Professional associations of judges and prosecutors should include specific provisions in codes of conduct, where these exist, or otherwise develop specific guidelines on the exercise of fundamental freedoms by judges and prosecutors. Such standards should serve as self-regulatory standards that help judges and prosecutors to make their own decisions on how to exercise their human rights and fundamental freedoms in a manner consistent with the dignity of their office and the independence and impartiality of the judiciary or the prosecution service. As such, these principles should remain separate from the disciplinary rules applicable to judges and prosecutors, in the sense that failure to observe such principles should not automatically constitute a disciplinary infringement.

95. The Special Rapporteur considers that judges and prosecutors themselves are best placed to determine the scope and content of legal and ethical norms on the exercise of their fundamental freedoms and political rights. Accordingly, national legislation and ethical standards should be developed through an open and transparent process involving judges, prosecutors and their representative organizations. Existing international standards relating to the exercise of fundamental freedoms and the jurisprudence of regional human rights courts and mechanisms should be taken into account in the development and implementation of such principles.

96. Judges and prosecutors should receive adequate training on ethical principles relating to the exercise of their fundamental freedoms, both in relation to their profession and with regard to outside activities. Such training should include, in particular, practical guidance on the use of social media.

97. The Special Rapporteur encourages professional associations of judges and prosecutors to establish consultative and advisory bodies that advise judges and prosecutors whenever they have uncertainties as to whether a given activity in the private sphere is compatible with their responsibilities and duties as civil servants. Such advisory bodies should be separate from the bodies responsible for imposing disciplinary sanctions.

98. Any charge or complaint against judges or prosecutors relating to the exercise of their fundamental freedoms should be brought before an independent authority, such as a judicial or prosecutorial council, or a court. Disciplinary proceedings should be determined in accordance with the law, the code of professional conduct and other established standards and ethics.

99. Removal from office should only be imposed in the most serious cases of misconduct, as provided in the professional code of conduct, and only after a due process hearing granting all guarantees to the accused.

100. Decisions in disciplinary proceedings should be subject to an independent review.

#### Freedom of expression

101. In exercising their freedom of expression, judges and prosecutors should bear in mind their responsibilities and duties as civil servants, and exercise restraint in expressing their views and opinions in any circumstance when, in the eyes of a reasonable observer, their statement could objectively compromise their office or their independence or impartiality.

102. As a general principle, judges and prosecutors should not be involved in public controversies. However, in limited circumstances they may express their views and opinions on issues that are politically sensitive, for example when they participate in public debates concerning legislation and policies that may affect the judiciary or the prosecution service. In situations where democracy and the rule of law are under threat, judges have a duty to speak out in defence of the constitutional order and the restoration of democracy.

103. Judges and prosecutors should show circumspection in their relations with the press. They should always refrain from comments on the cases they are dealing with, and avoid any unjustified comments that may call their impartiality into question.

104. Judges and prosecutors should be cautious when using social media. When posting on social media, they should take into account that anything they publish becomes permanent, even after they delete it, and may be freely interpreted or even taken out of context. When making anonymous comments on the Internet, judges should always be mindful that there are various ways to identify the person who posted the comment.

105. Any personal information or photograph shared on social media should be modest and decent. Judges and prosecutors should always refrain from making partisan political comments, and never post anything that may conflict with the dignity of their office or otherwise affect the judiciary or the prosecution service as an institution.

106. Judges and prosecutors may use Twitter; however, since a Twitter account identifies them as a judge or a prosecutor, it should only be used for informational and educational purposes and for activities connected with their work.

#### Freedom of assembly and association

107. Judges and prosecutors have the right to freedom of peaceful assembly. In exercising this right, they should bear in mind their responsibilities and duties as civil servants, and exercise restraint whenever their participation in a peaceful demonstration could be regarded as being incompatible with the authority of their

institution or inconsistent with their duty to be, and to be perceived as, independent and impartial.

108. Judges and prosecutors have the right to form and join professional organizations to protect their professional interests. They can also be members of other organizations, provided that their membership of these associations does not compromise the dignity of their office or their independence and impartiality.

#### **Political rights**

109. The Special Rapporteur acknowledges that there is no general international consensus on whether judges and, to a lesser extent, prosecutors should be free to participate in politics or not.

110. As citizens, judges and prosecutors are entitled to exercise their political rights on an equal basis with other citizens. However, judges and prosecutors should show restraint in the exercise of public political activity, in order to preserve the independence of the judiciary and the separation of powers.

111. Even in cases where their membership of a political party or their participation in public debate is not expressly prohibited, it is necessary for judges and prosecutors to refrain from any political activity that might compromise their independence or jeopardize the appearance of impartiality.

112. With regard to direct involvement in politics, the Special Rapporteur is of the view that judges and prosecutors should avoid any partisan political activity that may undermine their impartiality or be inconsistent with the principle of the separation of powers.

## **Annex**

### **List of respondents**

#### **States**

Albania  
Argentina  
Armenia  
Australia  
Azerbaijan  
Bolivia (Plurinational State of)  
Bosnia and Herzegovina  
Bulgaria  
Burundi  
Colombia  
Costa Rica  
Croatia  
El Salvador  
Guatemala  
Honduras  
Hungary  
Iraq  
Ireland  
Italy  
Latvia  
Lebanon  
Lithuania  
Mexico  
Montenegro  
Netherlands  
Nicaragua  
Poland  
Republic of Korea  
Romania  
Russian Federation  
Serbia  
Slovenia  
Sweden  
Turkey  
United Kingdom of Great Britain and Northern Ireland (Northern Ireland and Scotland only)

**Civil society organizations**

Association of prosecutors (Bulgaria)

Helsinki Foundation for Human Rights (Poland)

International Commission of Jurists

Judges' Union (Bulgaria)

Open Dialogue Foundation

**Intergovernmental organizations**

European Commission for Democracy through Law (Venice Commission)

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