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**Revisiting the “tradition of silence” -**  
**A new approach to freedom of expression of judges**

**Team Austria**

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## 1 Introduction

*“As a lawyer and as a citizen, I’d always rather know what justices and judges think rather than have enforced silence and pretend they have no views. We are in a relatively new era of public statements by justices, and I applaud it.” (Chemerisky, 2016)<sup>1</sup>*

In line with the above-mentioned statement of Erwin Chemerisky, dean of Berkeley Law School, we will propose a new approach of how to deal with freedom of expression of judges in a more liberal and less restrictive way. Our approach differs from what we call the “tradition of silence” of judges, which has been promoted in many legal systems until today and is based upon many restrictions regarding free speech of judges within and outside their office. In a nutshell, we will argue that concepts such as the duty of discretion or other restrictions imposed on judges by legal statutes, regulations or codes of conduct render the participation of judges in public discourse and their exchange of views less transparent and procedural guarantees such as independence and impartiality less verifiable.

A judge inevitably has personal opinions. Adhering to the traditional understanding, it is paramount to “conceal” these opinions from the public, thereby distrusting the public to be able to distinguish between the professional level, where a judge has to fulfil her role and to apply the existing law as

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<sup>1</sup> Erwin Chemerisky, “Justices Have Free Speech Rights Too”, *The New York Times* (16.7.2016).

part of the judiciary, and the personal level, where she should be able to participate in democratic discourse as a citizen.

In Austria, the discussion on limits of judges' freedom of expression has been fostered by the high-profile criminal case of former minister Karl-Heinz Grasser, who had been charged with corruption. The husband of the judge trying Grasser's case and a judge himself, made several critical statements via Twitter expressing an open dislike of Grasser's role as a politician before the case was assigned to his wife in criminal court ("*Husband's tweet case*"). He tweeted "*still relevant*" in a comment to a song "Karl-Heinz", which includes lines such as "*when will you finally go to jail, Karl-Heinz (...)*."<sup>2</sup> Based on these tweets Grasser's lawyers accused the judge of being biased, even though the tweets were posted by her husband and not herself. The Higher Regional Court rejected Grasser's motion to take the judge off the case.<sup>3</sup>

These developments led to a vivid discussion in the general media and among the Austrian Association of Judges ("Österreichische Richtervereinigung") on public statements made by judges, especially in the context of the use of social media. The Austrian Association of Judges on an institutional level adheres to the "tradition of silence" in order to promote independence and impartiality of the judiciary and follows a rather cautious approach regarding the individual judges' freedom of expression. However, the Association itself is active in promoting the judges' rights and speaking out in the political debate.

In our opinion, social media has by now become part of our everyday lives and has changed our ways of communication and exchange of views. Many new challenges on how to deal with judges' freedom of expression have arisen due to the means of communication via social media; however, we will argue that the "tradition of silence" does not fit within these new patterns of communication nor the modern understanding of checks and balances within a representative democracy and should therefore be revisited. Judges should be able to participate in public discourse also via social media platforms as private individuals and should not be completely excluded from the cyberspace as social networking has been regarded as being within the ambit of the fundamental right to freedom of speech in several jurisdictions.<sup>4</sup>

We will therefore in a next step break down the discussion to the level of fundamental rights. The individual citizen's right to a fair trial under Art. 6 ECHR seems at first glance to lead to restrictions on a judge's right to freedom of expression under Art. 10 ECHR in the light of the "tradition of silence", which follows the presumption that the principles of independence and impartiality can only

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<sup>2</sup> „Wann geht der karlheinz endlich in hefn, der karlheinz wann muas der endlich ins loch“; *Kurier*, „Grasser blitzt mit Ablehnungsantrag gegen Richterin ab“ (7.12.2017), available at: <https://kurier.at/chronik/oesterreich/grasser-blitzt-mit-ablehnungsantrag-gegen-richter-in-ab/301.151.581>.

<sup>3</sup> Grasser appealed to the Supreme Court, which has not decided on this matter yet.

<sup>4</sup> *Eltis/Mersel*, Revisiting the limits of judicial expression in the digital age: striving towards proportionality in the cyberintimidation context, *National Journal of Constitutional Law* 38 (2018) 254.

be guaranteed by a silent judge. Subsequently, this paper will analyse the interplay between these two fundamental rights taking into account the ECtHR's jurisprudence on Art. 6 ECHR and Art. 10 ECHR, the international and national legal frameworks and national jurisprudence including disciplinary law. Finally, we will propose a Code of Conduct on freedom of expression of judges based on our more liberal approach.

## 2 Revisiting the “tradition of silence”

The “tradition of silence” exercised by judges, who should – according to this concept – only speak through their judgments and refrain from any other form of expression in their public function as well as in their private function, has been especially prevalent in common law countries. In mid-1950s Britain, Lord Russell of Liverpool was refused permission by the Lord Chancellor to publish his book “The Scourge of the Swastika”, a sensational history of Nazi war crimes as long as he continued to hold judicial office. The following year, the then Lord Chancellor Lord Kilmuir refused to permit senior judges to participate in a BBC radio programme on the subject of eminent judges of the past.<sup>5</sup> He was of the opinion that the judiciary should not get involved in broadcasts: “(...) *every utterance which [a judge] makes in public, except in the course of the actual performance of his judicial duties, must necessarily bring him within the scope of criticism. It would moreover, be inappropriate for the Judiciary to be associated with any series of talks or anything which could be fairly interpreted as entertainment.*” These so-called “Kilmuir rules” regarding the prohibition on judicial engagement with the media were abolished in 1987, but they are still an excellent example of how the “tradition of silence” was deeply anchored in the common law tradition.

The reasons for the silence of judges in common law as well as in civil law traditions have been manifold: avoiding the appearance of bias and prejudice, excluding grounds for recusal or disqualification of judges for off-bench expression (*iudex suspectus*), preserving the dignity of the office and guaranteeing the right to a fair trial under Art. 6 ECHR.

It is still uncontested nowadays that judges must refrain from any comments on pending cases before them. Regarding their private lives outside the office, what can and what cannot be said by judges, however, is not as clear-cut any more. The means of communications and the ways of expressing one's opinion have changed rapidly over the last decades. New challenges have arisen due to judges' social media usage on internet platforms such as Facebook and Twitter, ranging from smaller issues

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<sup>5</sup> Rubin, Judicial Free Speech versus Judicial Neutrality in Mid-Twentieth Century England: The Last Hurray for the Ancien Regime?, Law and History Review, Vol. 27, No. 2 (2009) 374-375.

whether judges can become online “friends” with attorneys<sup>6</sup> to bigger problems whether judges can counter cyber intimidation and besmirching of the judiciary.<sup>7</sup>

### 3 The right to a fair trial

The right to a fair trial (Art. 6 ECHR) states that in determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The most important facet regarding our topic is the right to be tried by an independent and impartial institution of decision-making. The two key concepts of independence and impartiality, which we will try to define in a first step, are closely linked.<sup>8</sup>

Independence has to be guaranteed through the separation of powers in relation to all other public institutions as well as to the procedural parties.<sup>9</sup> Appearances are also of importance, whereas the essential criterion is whether an objective observer would see no cause for concern about the judge’s conduct in the circumstances of the actual case.<sup>10</sup>

Judicial independence leads to the concept of judicial discretion, which is the power of the judiciary to make decisions based on the judge’s discretion. Judicial discretion can lead to a range of possible decisions and is only constrained by legislation.

Impartiality means the absence of prejudice or bias.<sup>11</sup> It is on the one hand measured in a subjective way, as subjective attitudes such as personal conviction and behaviour could lead to a biased decision, on the other hand in an objective way, as certain objective circumstances lead to doubts in the judge’s impartiality.<sup>12</sup> When following the subjective approach, the impartiality of a judge must be presumed until there is proof of the contrary.<sup>13</sup>

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<sup>6</sup> *Wilson*, Let’s Be Cautious Friends: The Ethical Implications of Social Networking for Members of the Judiciary, 7 Wash. J. L. Tech. Arts. 225 (2012) 225-236.

<sup>7</sup> *Eltis/Mersel*, National Journal of Constitutional Law 38 (2018), 247-277.

<sup>8</sup> ECtHR, Guide on Article 6 of the ECHR, 41, available at: [https://www.echr.coe.int/Documents/Guide\\_Art\\_6\\_criminal\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf).

<sup>9</sup> *Mosteanu and Others v. Romania*, No. 40756/06, 41508/07, 50806/07, 26 November 2013; *Sovtransavto Holding v. Ukraine*, No. 48553/99, 25 July 2002; *Beaumartin v. France*, No. 15287/89, 24 November 1994; *Sramek v. Austria*, No. 8790/79, 22 October 1984.

<sup>10</sup> *Clarke v. the United Kingdom*, No. 23695/02, 13 May 2008; *Sacilor Lormines v. France*, No. 65411/01, 9 November 2006; *Sramek v. Austria*, No. 8790/79, 22 October 1984; *Öhlinger/Eberhard*, Verfassungsrecht<sup>10</sup>, 445.

<sup>11</sup> *Wettstein v. Switzerland*, No. 33958/96, 21 March 2001; *Micallef v. Malta* [GC], No. 17056/06, 15 October 2009; *Nicholas v. Cyprus*, No. 63246/10, 9 January 2018.

<sup>12</sup> ECtHR, Guide on Article 6 of the ECHR, 45; *Öhlinger/Eberhard*, Verfassungsrecht<sup>10</sup> (2010), 445 f; *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], No. 55391/13, 57728/13, 47041/13, 11 November 2018.

<sup>13</sup> *Micallef v. Malta* [GC], No. 17056/06, 15 October 2009; *Buscemi v. Italy*, No 29569/95, 16 September 1999.

### 3.1 The right to a fair trial in selected case law of the ECtHR

In the case *Wettstein v. Switzerland*<sup>14</sup> the ECtHR ruled that there was an appearance of bias and therefore a violation of Art. 6 ECHR as two practicing lawyers who were part-time judges of an administrative court had been involved in legal cases against the applicant in the past. The ECtHR held that it follows a subjective as well as an objective approach when ascertaining impartiality. It found that there were no indicators for a subjective bias of the acting judges. As far as the objective approach is concerned, the ECtHR pointed out that “*What is at stake is the confidence which the courts in a democratic society must inspire in the public.*” Thus, the standpoint of the procedural parties regarding impartiality of the judges is important, but not decisive. The criterion is whether this fear is objectively justified such as in the above-mentioned case.

In the case *Micallef v. Malta*<sup>15</sup> the ECtHR stated that close family ties between the opposing parties’ barrister and the judge objectively justified the applicant’s fears that the presiding judge lacked impartiality although there had been no evidence for a subjective bias. The ECtHR emphasized that “*even appearances may be of a certain importance or, in other words, ‘justice must not only be done, it must also be seen to be done’. What is at stake is the confidence which the courts in a democratic society must inspire in the public. Thus, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw.*”

In the case *Nicholas v. Cyprus*<sup>16</sup> the son of one of the judges who had decided on the applicant’s case had been married to the daughter of a managing partner of the law firm representing the defendant. The ECtHR clarified that in the vast majority of cases concerning issues of impartiality it has focused on the objective test. It explained that “*in order that the courts may inspire in the public the confidence which is indispensable, account must also be taken of questions of internal organisation. The existence of national procedures for ensuring impartiality, namely rules regulating the withdrawal of judges, is a relevant factor. (...) In addition to ensuring the absence of actual bias, they are directed at removing any appearance of partiality and so serve to promote the confidence which the courts in a democratic society must inspire in the public.*”

In these three cases, subjective reasons for bias were not detectable nor questioned by the applicants. When regarding the ECtHR’s reasoning, the preconditions for impartiality were laid out in a very tangible way. The focus of the reasoning was on the objective approach as the ECtHR argued that the courts inspire a certain confidence in the legal system in democratic societies and that this confidence is at stake if there is an objectively justified fear of partiality. It also pointed out the importance of rules of withdrawal which have to be guaranteed under national procedure law.

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<sup>14</sup> *Wettstein v. Switzerland*, No. 33958/96, 21 March 2001.

<sup>15</sup> *Micallef v. Malta* [GC], No. 17056/06, 15 October 2009.

<sup>16</sup> *Nicholas v. Cyprus*, No. 63246/10, 9 January 2018.

### **3.2 The right to a fair trial in the Austrian national legal framework**

The right to a fair trial is embedded in various provisions under national procedure law. Criminal procedure law as well as civil and administrative procedure law include provisions concerning impartiality of judges and rules of withdrawal and recusal. In the interest of the credibility of the judiciary, the Austrian Supreme Court established a strict standard for impartiality.<sup>17</sup> It is sufficient for a party to prove that there are objectively justified reasons which lead to an appearance of partiality. The Supreme Court also held that, in the interest of the reputation of the judiciary, the standard of assessing impartiality has to be strict, but it should not lead to means for the procedural parties to reject judges who they consider inconvenient. A balanced procedure is guaranteed by the principle of a fixed allocation of cases.<sup>18</sup> This jurisprudence of the Austrian Supreme Court is in line with the jurisprudence of the ECtHR on Art. 6 ECHR.

As far as secondary employment beyond the public office is concerned, judges must avoid all kinds of employment that would lead to appearances of bias.<sup>19</sup>

To sum up, the Austrian national jurisprudence on impartiality is following the same approach as the ECtHR. It is obvious that the strict rules focusing on appearances of partiality being sufficient for causing a violation of Art. 6 ECHR may lead to interferences with the freedom of speech. Public statements by judges guaranteed by their fundamental rights under Art. 10 ECHR may cause appearances of partiality. In the “tradition of silence” this dilemma led to a restriction of judges’ right to free speech. In our opinion, it is questionable whether this approach balances the two fundamental rights adequately and gives the necessary weight to the judge’s own right of free speech in a liberal society.

### **3.3 Impartiality being guaranteed by procedural rules of withdrawal and recusal**

In our opinion, a judge – always outside of the courtroom and excluding pending cases – should within the given legal frameworks be able to express her opinions freely and openly and make use of her fundamental rights like any other citizen. Of course, it then might happen that a judge has to decide a case regarding certain issues on which she has expressed her opinion before in a certain way. The judge should in such a case recuse herself to avoid the appearance of bias and prejudice. Nevertheless, the approach of openness and transparency will lead to a better understanding of judges as citizens and will not diminish the citizens’ trust in the judicial system as will be elaborated on later. Even the ECtHR pointed out that the rules of recusal and withdrawal are important when regarding impartiality. As there are several procedural provisions governing the recusal and withdrawal of

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<sup>17</sup> Supreme Court, 22 November 2011, 4 Ob 186/11y.

<sup>18</sup> RIS-Justiz RS0109379.

<sup>19</sup> Decree of the Ministry of Justice, BMJ-Pr517.00/0004-Pr 6/2015.

judges in the national legal systems there are already well functioning rules that guarantee impartiality. Due to these rules, the judge has to recuse herself in certain circumstances and the parties have the right to file a motion for disqualification as well. In combination with the strict approach focusing on appearances, impartiality is already ensured in a very practicable way and it is questionable if judges should be constrained by the legislator or themselves via self-constraint on their free speech in order to avoid the appearance of bias.

A more openly exercised right to free speech of judges – also via social media, where their statements are even distributed among a larger public – would lead to more recusals by judges and more motions to disqualify judges by parties. Dealing with such recusals and withdrawals would not lead to any challenges for our legal system as we already have the procedural instruments on how to deal with such situations. Not every motion to disqualify would lead to actual withdrawal, as according to the Austrian Supreme Court's jurisdiction the rules of withdrawal cannot be interpreted as a means of getting rid of judges considered inconvenient by the parties. More withdrawals would lead to more rotation among judges regarding the cases assigned to them, which would also cause no problem for the legal system as there will be a sufficient number of other judges without appearances of partiality in the case in question. As long as those rotations are predetermined up front, like it is already done in the case assignment plan deriving from the fixed allocation of cases at each court, no breach of any fundamental right, especially not the right to a fair trial, will be constituted. One must keep in mind that recusals or motions to disqualify could lead to longer proceedings. However, in practice the decision on a recusal can be dealt with by the president of the court within a minimum of time.

Being aware of the importance of independence and impartiality of the judicial system from political or other influences, we think that these two valuable principles can be best achieved by transparency and not by restrictions. As the enactment of the rules of impartiality is also regarded as a process which ensures a certain confidence of the public in the functioning of the legal system as a whole, more transparency would encourage this confidence of the public. In a system following the “tradition of silence”, the procedural parties do not know the judge's opinion on general issues whereas in our model the judge might have expressed his opinion in a public way. An openly expressed statement having a negative impact on the appearances of the judges' impartiality would lead to a recusal of the judge herself. This would also ensure the public trust as the judge is seen to be acting within the legal framework. If the judge does not withdraw herself in such a case, the party has still the right to file a motion to disqualify her which might be granted if the statement really objectively justifies appearances of bias. This new approach might lead to a certain “cleansing effect” establishing a higher trust in transparency and the functioning of our legal system. Every time a judge recuses herself from a case the public trust is fostered, as the judiciary as a whole has shown that it is willing to uphold the

right to a fair trial and will comply with it even before one of the parties files a motion to disqualify the judge.

#### 4 Freedom of expression of judges

It is uncontested by various international, European and national legal frameworks that judges, as all other citizens, enjoy freedom of expression as a basic human right. However, immediate ethical and deontological exceptions are to follow on how judges must behave in a special way in order not to undermine principles that are considered more important than their individual human rights such as impartiality and independence of the judiciary or dignity of the office. These restrictions to judges' freedom of speech are considered to be necessary not only by legislatures, but also by judges themselves as the following examples of self-binding soft law documents will show.

The Universal Charter of the Judge, which was adopted by the International Association of Judges, states in Art. 3 (5): "*Judges enjoy, as all other citizens, freedom of expression. However, while exercising this right, they must show restraint and always behave in such a way, as to preserve the dignity of their office, as well as impartiality and independence of the judiciary.*" Furthermore, Art. 6 (2) and 6 (4) of the above-mentioned Charter require: "*The judge must refrain from any behaviour, action or expression of a kind effectively to affect confidence in his/her impartiality and independence. (...) He/she must avoid any possible conflict of interest.*"<sup>20</sup> Similarly, the Resolution on Judicial Ethics, adopted by the Plenary Court of the European Court of Human Rights in 2008, asks judges in Art. 1 to "*refrain from any activity or membership of an association, and avoid any situation, that may affect confidence in their independence*" and in Art. 2 to "*avoid conflicts of interest as well as situations that may be reasonably perceived as giving rise to a conflict of interest*" and goes on to request in Art. 6 that "*Judges shall exercise their freedom of expression in a manner compatible with the dignity of the office.*"<sup>21</sup>

The Consultative Council of European Judges (CCJE) highlights in Opinion No. 7 that judges should not express themselves in the press or make public statements in the press on cases they are in charge of.<sup>22</sup> In Opinion No. 3 the CCJE underlines that judges should not be isolated from the society in which they live in and that they should enjoy the fundamental rights and freedoms protected by the ECHR. However, a reasonable balance between the degree to which judges may be involved in

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<sup>20</sup> International Association of Judges, The Universal Charter of the Judge, available at: <https://www.iaj-ujm.org/universal-charter-of-the-judges/>. See similar provisions in Opinion No. 18 of the Consultative Council of European Judges on „The position of the judiciary and its relation with the other powers of state in a modern democracy“ at para 42, available at: <https://rm.coe.int/16807481a1>.

<sup>21</sup> European Court of Human Rights, Plenary Court, Resolution on Judicial Ethics, available at: [https://www.echr.coe.int/Documents/Resolution\\_Judicial\\_Ethics\\_ENG.pdf](https://www.echr.coe.int/Documents/Resolution_Judicial_Ethics_ENG.pdf).

<sup>22</sup> CCJE, Opinion No. 7 (2005) on „Justice and Society“ at para 34, available at: <https://www.coe.int/en/web/ccje/opinion-n-7-on-justice-and-society>.

society and the need for them to be and – maybe even more important as the question of appearance is always raised in these contexts – be seen as independent and impartial in the discharge of their duties must be struck.<sup>23</sup>

The jurisprudence of the ECtHR is in line with the premise that on the one hand judges, like all human beings, enjoy the right to freedom of expression enshrined in Art. 10 ECHR, whereas on the other hand it might be legitimate for the member states to impose a certain duty of discretion on judges regarding their judicial status.

#### **4.1 Freedom of expression of judges in the case law of the ECtHR**

In case of a member state's interference with the right of freedom of expression guaranteed by Art. 10 ECHR, this interference must generally be prescribed by law, it needs to serve a legitimate aim and it must be proportionate. The member states are granted a certain margin of appreciation concerning the freedom of expression of civil servants under the ECtHR's case law. However, any interference with the freedom of expression of a judge in particular calls for close scrutiny of the ECtHR.

In cases concerning judges and their right to freedom of expression under Art. 10 ECHR the ECtHR considers the judge's statement in question in the light of the special circumstances of the case such as the office held by the applicant, the content of the impugned statement, the context in which it was made and the nature and severity of the penalties imposed.<sup>24</sup>

In the most prominent recent case regarding free speech of judges, *Baka v Hungary*<sup>25</sup>, the Grand Chamber found a violation of Art. 10 ECHR. Judge Baka, in his capacity as the President of the Supreme Court and the President of the National Council of Justice (*office held by the applicant*), publicly criticised several controversial legislative and constitutional reforms in Hungary such as the reform of the lowering of the mandatory retirement age for judges from seventy to sixty-two (*content of the impugned statement*). He had an explicit legal obligation to express his opinion on parliamentary bills affecting the judiciary (*context in which the statement was made*). By changes of the constitution, Baka's six-year term of office was brought to a premature end and the Grand Chamber considered that the facts formed prima facie evidence of a causal link between Judge Baka's views expressed publicly in his professional capacity and the termination of his mandate (*severity of the penalties imposed*). The ECtHR highlighted the "chilling effect" on the exercise of freedom of expression and the risk of discouraging judges from making critical remarks on reforms concerning

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<sup>23</sup> CCJE, Opinion No. 3 (2002) on „Principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality“, at para 27, available at: <https://rm.coe.int/168070098d>.

<sup>24</sup> *Venice Commission*, „Report on the freedom of expression of judges“, adopted by the Venice Commission at its 103rd Plenary Session (Venice, 19-20 June 2015), CDL-AD(2015)018, at para 67.

<sup>25</sup> *Baka v. Hungary* [GC], No. 20261/12, 23 June 2016.

the judiciary for fear of losing their judicial office and held that the interference on Judge Baka's right to freedom of expression had not been necessary in a democratic society.

Another well-known case<sup>26</sup> regarding a high-ranking judge took place in Liechtenstein, where Judge Wille, the President of the Administrative Court (*office*), expressed his opinions on constitutional matters in a public lecture (*context*). He argued that the Constitutional Court was competent to decide on the "interpretation of the Constitution in case of a disagreement between the Prince (Government) and the Diet" (*content*). The Prince of Liechtenstein, who disagreed with the applicant's statement, informed Judge Wille after this lecture via a letter that he would not reappoint him as President of the Administrative Court (*penalty*). The ECtHR underlined that Judge Wille's opinion could not be regarded as an untenable proposition, since it was shared by a considerable number of lawyers in Liechtenstein. Furthermore, the lecture did not contain remarks on pending cases or severe criticism or insults to the Prince. Therefore, considering the above-mentioned criteria and the close scrutiny-test, the interference was not necessary in a democratic society and Art. 10 ECHR had been violated. In *Kudeshkina v. Russia*<sup>27</sup>, a judge at the Moscow City Court (*office*) gave interviews to newspapers and a radio station when running as candidate in a general election to the Russian Duma (*context*). She expressed doubts as to the independence of the Russian judiciary and alleged that "*instances of pressure on judges were commonplace*" (*content*) referring to her own experience in a certain case. Judge Kudeshkina was eventually not elected to the Duma and at the same time the President of the Moscow Judicial Council sought her removal from office claiming that she had behaved in a manner incompatible with the authority of a judge during the election campaign (*penalty*). The ECtHR found that the applicant had raised a very important matter of public interest which had to be open to free debate in a democratic society and that her statements were not entirely devoid of factual grounds. The ECtHR held that her right under Art. 10 ECHR had been violated, as the penalty of dismissal from judicial service was disproportionately severe and could have a "chilling effect" on judges wishing to participate in discussions on the effectiveness of the judicial system.

In all three above-mentioned cases the ECtHR considered the consequences of the interference for society as a whole and assessed whether the limitations had a "*chilling effect*" as well as the consequences for the individual judge such as financial consequences and the loss of their office. The question of whether the impugned statement could be seen as part of a public debate influenced the outcome of the ECtHR's assessment as well as the motive of the judge behind her statement or the appropriateness of the expressions.<sup>28</sup> In all three cases the judges expressed their opinions and concerns on important political matters of general public interest such as constitutional reforms

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<sup>26</sup> *Wille v. Liechtenstein* [GC], No. 28396/95, 28 October 1999.

<sup>27</sup> *Kudeshkina v. Russia*, No. 29492/05, 26 February 2009.

<sup>28</sup> *Dijstraka*, The Freedom of the Judge to Express his Personal Opinions and Convictions under the ECHR, Utrecht Law Review, Vol. 13 Iss. 1 (2017) p. 8-10.

affecting the judiciary, the system of checks and balances or the independence of the judiciary from governmental influence (“*high-profile cases*”).

So far, only a limited number of types of expressions of judges (“*high-profile cases*”) has been covered by the ECtHR’s jurisprudence. No case has been decided by the ECtHR on matters such as judges protesting in the streets in their robes, judges calling for a strike, judges expressing their opinions on social media such as Facebook or Twitter, judges being politically active in town councils or being members of associations (“*low-profile cases*”)<sup>29</sup>.

## 4.2 Freedom of expression of judges in the national legal frameworks

In various member states of the Council of Europe such as France, Germany or Italy there are no constitutional provisions concerning the freedom of expression of judges and no specific restrictions of expression of judges on a constitutional level neither.<sup>30</sup>

On a statutory level, however, most member states impose restrictions on the judges’ behaviour in general and on their right to freedom of expression in particular. These restrictions on the judges’ right to freedom of expressions concern statements made in the judge’s official and those made in her personal capacity.

### 4.2.1 The Austrian Example

Section 57 (3) of the Austrian Judiciary and Public Prosecution Act (RStDG<sup>31</sup>) reads as follows: “*Judges and prosecutors have to conduct themselves in and outside of office in a manner not endangering the confidence in the administration of justice or the reputation of their professions.*”

The “*Declaration of Wels*” (“*Welser Erklärung*”),<sup>32</sup> which is a self-binding Code of Conduct adopted by the Austrian Association of Judges, states in Art. 1 that judges are the guarantors of the rule of law and that fundamental rights are the foundation of their behaviour and their decisions. Art. 9 of the Declaration of Wels requires that judges also carefully and critically examine their behaviour and statements made outside of office in the private realm in order not to give way to the danger of appearances of partiality.

The Austrian Judiciary and Public Prosecution Act as well as the “*Declaration of Wels*” follow the “*tradition of silence*” and are concerned about the confidence of the public in the judiciary. Both want to avoid any appearance of partiality of judges. It is interesting to note that the self-binding Code of Conduct goes further than the legal provisions of the Austrian Judiciary and Public Prosecution Act

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<sup>29</sup> In *Maestri v. Italy*, No. 39748/98, 17 February 2004, the ECtHR found a violation of Art. 11 ECHR concerning a judge who had been a freemason. The Italian authorities imposed a disciplinary sanction on the judge.

<sup>30</sup> *Venice Commission*, at para 11-12.

<sup>31</sup> Richter- und Staatsanwaltschaftsdienstgesetz, BGBl. Nr. 305/1961.

<sup>32</sup> „*Welser Erklärung*“, available at: <https://richtervereinigung.at/ueber-uns/ethikerklaerung/>.

in requiring a self-imposed and therefore a more rigid self-restraint on judges' freedom of speech. Moreover, what poses a problem to the sanctioning of improper behaviour by judges is the vaguely formulated wording of section 57 (3) RStDG, which leaves much room to ex post interpretation by the disciplinary senate and the appellate court.

The Austrian disciplinary law states that a judge who violates her professional or official duty may be subjected to a disciplinary punishment.<sup>33</sup> In contrast to criminal offences, disciplinary law regulates no specific categories of offences ex ante.

We will illustrate the inconsistency arising from the vague wording of the legal framework by the following selection of case law.

#### Critical statements during public hearings:

The Supreme Court stated that when applying section 57 (3) RStDG one must always keep in mind that the conduct of the judge concerned must diminish the reputation of the judiciary as a whole in its professional capacity in order to constitute a disciplinary offence. Criticism towards another court aiming to stop influence from that court, be it unduly rough and coarse, is in principle not apt to diminish the reputation of the judiciary as a whole.<sup>34</sup>

In another ruling, the Supreme Court held that unseemly criticism from a judge on the professional capacity of other judges could constitute a disciplinary offence.<sup>35</sup>

A statement from a judge towards the presiding judge in an ongoing trial, that he "*sits in the trial for nothing*", constitutes a disciplinary offence, because it does not follow the judge's duty to be objective, even if he meant to address the issue of efficient trial management and over-excessive questioning by the presiding judge and the public prosecutor.<sup>36</sup>

#### Critical statements outside of office:

The Supreme Court also held that it unsettles the trust of the public in the judiciary if a judge implies that the judiciary as a whole or certain judges are bribable.<sup>37</sup>

A judge who advocated the monarchy as a form of government by singing the emperor's anthem was found guilty of a breach of official duties by the Austrian Supreme Court in 1921.<sup>38</sup>

Insulting statements from a judge out of office and with no relation whatsoever to his professional capacity, which were made in an understandable heat of the moment, were found not to be matters

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<sup>33</sup> § 101 RStDG.

<sup>34</sup> Supreme Court, 18 March 2002, Ds 8/01, RIS-Justiz, RS 0116181.

<sup>35</sup> Supreme Court, 4 March 2014, Ds 26/13, RIS-Justiz RS0129297.

<sup>36</sup> Supreme Court, 22 September 1997, Ds 5/97, RIS-Justiz RS0108406.

<sup>37</sup> Supreme Court, 1 July 1994, Ds 1/94. He called the judiciary a „*prostitute of politics*“.

<sup>38</sup> Supreme Court, 7 October 1921, Ds 24/21.

for disciplinary actions, although such statements might in principle be punishable under criminal law.<sup>39</sup>

As there are rather few published cases concerning free speech of judges,<sup>40</sup> we will now draw the attention to disciplinary law concerning public officials such as policemen. A policeman who communicated via WhatsApp in an inappropriate and aggressive way (he condemned the voters of a certain political party and insulted the public in general) was found guilty for committing a disciplinary offence. This conduct was considered to be harming the dignity of his office.<sup>41</sup> Another policeman who posted insulting comments about a refugee on Facebook was also found guilty for committing a disciplinary offence.<sup>42</sup> In these two cases the insulting and inappropriate content of the statements was crucial for the conviction.

#### Contact with the media:

Judges who maintain contact with the media concerning their own cases do not only breach their duty but also endanger the public confidence in the judiciary. Especially when the statement involves a certain evaluation of the parties' behaviour in court, the judge's comment constitutes a disciplinary offence.<sup>43</sup> Thus a judge who talks to the media about her cases (or who posts about those cases on social media) commits a disciplinary offence.

In another case a judge who had referred to his official position as president of a district court in a letter to the editor implicitly incited the public to commit crimes and encouraged criminals in an ironic way to commit their offences in a ruthless manner. He accused the Federal President of exercising his power of pardoning in a biased way in favour of perpetrators committing severe crimes. The Supreme Court ruled that this behaviour constitutes a breach of official duties.<sup>44</sup>

As these decisions show, it is difficult for a judge to determine in advance which statements might lead to a disciplinary offence. Decisions by the highest courts on disciplinary matters, interpreting the rather vague legal disciplinary provisions of the national legal framework, are often taken on a case-to-case basis. Thus, a potential collision with the principle of legal certainty arises.

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<sup>39</sup> Supreme Court, 21 September 1976, Ds 3/76, not in line with Supreme Court, 26.04.1982, Ds 5/81.

<sup>40</sup> Decisions of the first instance, the disciplinary senate, are not published in the RIS-database. Therefore we only have access to the Supreme Court's decisions regarding disciplinary law.

<sup>41</sup> Disciplinary Commission, 41041-DK/2017.

<sup>42</sup> Disciplinary Commission, 42018-DK/2017.

<sup>43</sup> Supreme Court, 17 April 2013, Ds 2/13, RIS-Justiz RS0128651.

<sup>44</sup> Supreme Court, 20 December 1976, Ds 8/76.

## 4.2.2 The German example

To illustrate that the uncertainty of what constitutes a disciplinary offence is not only limited to the Austrian legal framework, we will give a brief insight into the German legal system. The German Judiciary Act provides the same special obligations for judges under its section 39 as the above-mentioned Austrian Judiciary and Public Prosecution Act: *“(Preservation of independence): In and outside their office, as well as in political activities, judges have to conduct themselves in a manner not endangering the confidence in their independence.”*

The so-called principle of moderation (*“Mäßigungsgebot”*)<sup>45</sup>, a principle developed for duties of civil servants, is mainly relevant for conduct outside the office, when a judge should not mention her office when she expresses political opinions in public with the exception of legal questions. The judge must in particular not cause the impression of giving an official statement when expressing her private opinion.<sup>46</sup>

The German Association of Judges (*“Deutscher Richterbund”*) highlights the importance of moderation and restraint of judges both in office and otherwise in their recommendation concerning judicial ethics in Germany.<sup>47</sup> Judges should refrain from expressing themselves in such a way as to damage the trust and respect entrusted in the judiciary. The German Association of Judges, in contrast to the Austrian Association of Judges, has not yet adopted an Ethical Code of Conduct. The German Association of Judges, however, plans to adopt such a Code of Conduct in the near future, because in their opinion the German Judiciary Act is much too vague and offers no guidelines for judges on how to behave properly within office and in their free-time.<sup>48</sup>

## 5 Conclusion

### 5.1 Right to a fair trial

The right of an accused in criminal proceedings or of the parties of civil proceedings to be tried by an independent and impartial judge is no acceptable justification to limit the freedom of expression of an individual judge in any case she does not preside. The judiciary as a whole is responsible to organise the structure of the courts in a way that there are always judges available, who do not appear to be biased. There will always be judges who do not express their views in public on each and every topic. Therefore, the functioning of the judiciary will not suffer with regard to the right to a fair trial

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<sup>45</sup> See for instance the case BVerwG 1988 NJW 1748.

<sup>46</sup> *Karpen/Möller/Schwarz*, Freedom of Expression and the Administration of Justice in Germany, *European Journal of Law Reform*, Vol. IX, No. 1 (2007) 89.

<sup>47</sup> *Deutscher Richterbund*, Judicial Ethics in Germany (2018), available at: [https://www.drb.de/fileadmin/DRB/pdf/Ethik/1901\\_DRB-Broschuere\\_Richterethik\\_EN\\_Judicial\\_Ethics.pdf](https://www.drb.de/fileadmin/DRB/pdf/Ethik/1901_DRB-Broschuere_Richterethik_EN_Judicial_Ethics.pdf).

<sup>48</sup> *Jahn*, *Richterbund will Ethik-Kodex für gesamte Justiz*, available at: <https://rsw.beck.de/cms/?toc=njw.root&docid=387758>.

by fostering the right of judges to express their private opinions outside of their office. As mentioned before, the only consequence of more recusals or motions to disqualify a judge might be more extensive proceedings, which however in our opinion poses only a marginal problem.

## 5.2 Public trust

We believe that the public voicing of personal opinions by judges will not be detrimental to the public trust and therefore cannot be used to legitimise a limitation of the right of free speech of judges. In a modern society patterns of communication have changed. Topics that were formerly discussed in small groups or discussed in a two-way communication via letter or e-mail are now distributed on social media and reach a larger group of people including strangers or unknown recipients. It has become popular to present one's opinions openly to a larger public. Our new approach takes this changed pattern of communication and presentation into account and allows judges to participate in public debates just as everyone else.

In a representative democracy, the legislative branch is legitimized and held accountable by elections. Therefore, transparency is paramount to enable the people to make an informed choice and keep a representative democracy working as intended. The foundation of a representative democracy is the enlightened individual, who has the information needed to make an informed choice and the trust by the people in each individual to make an informed decision for herself.<sup>49</sup> Hence one of the pillars of a working democracy is the objective information of the public.

Regarding environmental matters, the European Union and many other states signed the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. In its preamble, the signatory states recognized the desirability of transparency in all branches of government, because transparency in decision-making and accountability strengthens the public support.<sup>50</sup> Based on this understanding, all signatory states were of the opinion that transparency in the decision-making process fosters the acceptance of democracy and decisions made within.

The same principle applies to the judiciary. Every judgment must state its reasoning and include an accurate assessment of evidence. The recipients of a decision must have the impression that it is the result of an exhaustive process and that the judge took into consideration all the information available,

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<sup>49</sup> Kant, Beantwortung der Frage: Was ist Aufklärung, Chapter one: *"Enlightenment is man's emergence from his self-incurred immaturity. Immaturity is the inability to use one's own understanding without the guidance of another. This immaturity is self-incurred if its cause is not lack of understanding, but lack of resolution and courage to use it without the guidance of another. The motto of enlightenment is therefore: Sapere aude! Have courage to use your own understanding!"* But to be able to use the own understanding, it is paramount, that information is available to the people.

<sup>50</sup> UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.

that she weighed all the factors in a reasoned and just manner and did not let the outcome be influenced by anything hidden or clandestine. The more the judge has laid open her decision-making process and the information she used – in a nutshell: everything which led to her judgment – the higher the acceptance for her decision and also for the judiciary as a whole will be.

The three above mentioned examples of democracy, the Aarhus Convention and judicial reasoning clearly show that transparency is a cornerstone of many well-functioning systems.

The “tradition of silence” does not facilitate the public trust. The (partly self-)imposed restrictions on the judges’ public voicing of opinions may lead to the impression that the judiciary has something to hide and is not willing to participate in the open public discourse. By participating in the public discourse, the judiciary is also able to counter the impression of those who think that the judiciary sits in its ivory tower and is detached from the “real” everyday life of the “common” people. Applying the reasoning from section 63 (2) RStDG, which states that a judge must refrain from making any reference to being a judge, when she engages in secondary employment, the above stated only applies to the behaviour of a judge outside of her office. When participating in the public discourse, the judge has to make clear that she makes that statement in her private capacity. If a judge is being publicly criticised in her professional capacity, there must be a way that she can take legal action or protect herself against wrongful accusations.

### **5.3 “*Husband’s tweet case*”**

When applying the outlined principles to the “Husband’s tweet case”, the husband of the judge trying ex-minister Grasser’s criminal case, who made several critical statements via Twitter already under the existing legal framework is not prohibited to post such statements. If the judge would have tweeted these statements herself, she would of course have been biased. Therefore, she would have had to recuse herself and would not have posed an obstacle to independence and impartiality of the Austrian judiciary.

## **6 Code of Conduct**

In conclusion, we are of the opinion that the “tradition of silence” must be revisited and replaced by a more liberal approach based on transparency. As we already highlighted in the sections above regarding the ECtHR’s case law (“*low-profile cases*”) and especially the Austrian and German disciplinary law, judges lack special rules of conduct on what kind of private statements are allowed and what kind of statements are prohibited either by legal provisions or by self-binding Codes of Conduct. Therefore, we will propose the following Code of Conduct for judges offering more clear-cut guidelines.

“Having regard to Art. 6 and 10 of the European Convention of Human Rights, which ensure the right to a fair trial and freedom of expression;

Taking into account the key principles of independence and impartiality of the judiciary as preconditions for the rule of law;

Considering the importance of the principle of transparency for a liberal democracy;

Considering the importance of the public’s trust and confidence in the judiciary;

The Austrian Themis team presents the following Code of Conduct on judges’ freedom of speech:

## **1. Freedom of expression**

Judges, as all other citizens, are entitled to the fundamental right of freedom of expression.

## **2. Limitations**

2.1. Judges shall exercise this fundamental right within the limits of criminal and civil law.

2.2. Judges shall not make public statements on pending cases that are attributable to them.

2.3. Judges shall not make public statements on cases known to them due to their public office.

2.4. Judges shall not make public statements in their professional capacity except on topics regarding the judicial system.

## **3. Private statements**

In their capacity as private citizens, judges are allowed to make any kind of statement which is not prohibited under Art. 2 (2)–(4) of this Code of Conduct, as long as they do not make any reference to their professional capacity or make it clear that it is their private opinion.

## **4. Disciplinary law**

Judges should not be subject to any disciplinary measures for statements other than those prohibited under this Code of Conduct.”

## **Explanatory Notes**

### Ad Article 1:

In line with the prevalent jurisprudence of the ECtHR and national courts as well as the Universal Charter of the Judge, this Article is a declaration of the legal *status quo*.

Ad Article 2 para 1:

Just like any other citizens judges must exercise the right to freedom of expression within the limits of criminal law. They are liable under civil law for cases such as private damage claims concerning injury of reputation.

Ad Article 2 para 2 and 3:

Due to the duty of official secrecy, judges are not allowed to comment on their pending cases or cases known to them due to their public function even after a decision has been rendered and become legally binding. This provision is based on *de lege lata*.

Ad Article 2 para 4:

In order to comply with the principles of independence, impartiality and dignity of the office, judges should not make any public statements while exercising their public function. Especially appointed judges are assigned to release press statements and are in charge of media coordination. This exemption should enable judges to introduce their professional experience into the public discourse and to allow objective criticism not only by professional representatives such as Associations of Judges.

Ad Article 3:

This Article constitutes the core of our liberal approach revisiting the “tradition of silence”. Apart from the above-mentioned limitations, judges as any other citizens are allowed to make any statements whatsoever. It is obvious that judges within office and outside of office have to act within the limits of criminal and civil law. To uphold the public trust in the judiciary, it is of utmost importance that every recipient of a judge’s private opinion knows of the private nature of the statement. Therefore judges must pay attention that the recipient understands that a statement was made in the judge’s private realm.

Ad Article 4:

In line with our criticism on the case-to-case basis of decisions regarding disciplinary offences, the vague wording of the disciplinary statutes and the nature of punishment as *ultima ratio* of behaviour control, no disciplinary action against judges should be taken when exercising their right to freedom of expression.

## 7 Bibliography

### Literature

- Dijkstra Sietske*, The freedom of the judge to express his personal opinions and convictions under the ECHR, *Utrecht Law Review*, Vol 13, Iss 1 (2017)
- Eltis Karen/Mersel Yigal*, Revisiting the limits of judicial expression in the digital age: striving towards proportionality in the cyberintimidation context, *National Journal of Constitutional Law* 38 (2018) 247-277
- Jahn Joachim*, Richterbund will Ethik-Kodex für gesamte Justiz
- Kant Immanuel*, Beantwortung der Frage: Was ist Aufklärung (1784)
- Karpen Ulrich/Mölle Nils/Schwarz Simon*, Freedom of Expression and the Administration of Justice in German, *European Journal of Law Reform*, Vol IX, No 1 (2007) 63-90
- Kurier*, „Grasser blitzt mit Ablehnungsantrag gegen Richterin ab“ (7.12.2017)
- Ministry of Justice (Austria)*, Decree, BMJ-Pr517.00/0004-Pr 6/2015
- Öhlinger Theo, Eberhard Harald*, *Verfassungsrecht*<sup>10</sup> (2016)
- Rubin Gerry R.*, Judicial Free Speech versus Judicial Neutrality in Mid-Twentieth Century England: The Last Hurrah for the Ancien Regime, *Law and History Review*, Vol 27 No 2 (2009) 373-412
- Venice Commission*, “Report on the freedom of expression of judges”, CDL-AD(2015)018 (2015)
- Wilson Aurora J.*, Let’s be cautious friends: The ethical implications of social networking for members of the judiciary, *Wash J.L Tech. & Arts* 225 (2012) 225-236

### Case law

#### ECtHR:

- Baka v. Hungary* [GC], No. 20261/12, 23 June 2016
- Beaumartin v. France*, No. 15287/89, 24 November 1994
- Buscemi v. Italy*, No 29569/95, 16 September 1999
- Clarke v. the United Kingdom*, No. 23695/02, 13 May 2008
- Kudeshkina v. Russia*, No. 29492/05, 26 February 2009
- Maestri v. Italy*, No. 39748/98, 17 February 2004
- Micallef v. Malta* [GC], No. 17056/06, 15 October 2009
- Mosteanu and Others v. Romania*, No. 40756/06, 41508/07, 50806/07, 26 November 2013
- Nicholas v. Cyprus*, No. 63246/10, 9 January 2018
- Ramos Nunes de Carvalho e Sá v. Portugal* [GC], No. 55391/13, 57728/13, 47041/13, 11 November 2018
- Sacilor Lormines v. France*, No. 65411/01, 9 November 2006

*Sovtransavto Holding v. Ukraine*, No. 48553/99, 25 July 2002

*Sramek v. Austria*, No. 8790/79, 22 October 1984

*Wettstein v. Switzerland*, No. 33958/96, 21 March 2001

*Wille v. Liechtenstein* [GC], No. 28396/95, 28 October 1999

### **Austria**

Disciplinary Commission, 41041-DK/2017

Disciplinary Commission, 42018-DK/2017

Supreme Court, 7 October 1921, Ds 24/21

Supreme Court, 20 December 1976, Ds 8/76

Supreme Court, 26 April 1982, Ds 5/81

Supreme Court, 1 July 1994, Ds 1/94

Supreme Court, 22 September 1997, Ds 5/97 RS0108406

Supreme Court, 28 February 1998, RS0109379

Supreme Court, 18 March 2002, Ds 8/01, RS0116181

Supreme Court, 22 November 2011, 4 Ob 186/11y

Supreme Court, 17 April 2013, Ds 2/13, RS0128651

Supreme Court, 4 March 2014, Ds 26/13, RS0129297

Supreme Court, 27 October 2014, Ds 3/14

### **Soft law**

*Austrian Association of Judges*, Welser Erklärung (2007)

*Consultative Council of European Judges*, Magna Carta of Judges (1999, updated 2017)

*Consultative Council of European Judges*, Opinion No. 3, “On the principles and rules governing judges’ professional conduct, in particular ethics, incompatible behaviour and impartiality” (2002)

*Consultative Council of European Judges*, Opinion No. 7, “Justice and Society” (2005)

*Deutscher Richterbund*, Judicial Ethics in Germany (2018)

*European Court of Human Rights*, Plenary Court, Resolution on Judicial Ethics (2008)

*European Court of Human Rights*, Guide on Article 6 of the Convention on Human Rights (2019)

*International Association of Judges*, The Universal Charter of the Judge (2010)

*United Nations Economic Commission for Europe*, Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters from 25.06.1998 (1998), 2161 UNTS 447