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## FREEDOM OF EXPRESSION OF JUDGES IN BOSNIA AND HERZEGOVINA\*

**Abstract:** *Freedom of expression is a fundamental human right protected by the major international human rights instruments and national constitutions. The right to freedom of expression is treated as one of the key elements of a democratic society and it can be considered essential to human dignity. However, this right is not absolute and it can, if certain preconditions are met, be subjected to limitations, as indicated by the provisions of the European Convention on Human Rights, as well as the case law of the European Court of Human Rights.*

*Judges also enjoy the right to freedom of expression. Although the participation of judges in debates on matters of public interest is considered very important, especially when it comes to the regulation of the status of judiciary, the nature of the judicial function dictates restrictions on the freedom of expression of judicial office holders in order to protect public confidence in the judicial branch of government and its reputation. Public expression of personal views may raise dilemmas regarding the impartiality of a judge. The paper will draw attention to the importance of protecting the freedom of expression of judges, but also to the issue of necessity and legitimacy of its restrictions. Legal provisions regulating the right to freedom of expression of judges in Bosnia and Herzegovina will be examined, as well as examples from the practice of disciplinary bodies relating to the exercise of the aforementioned right. Legislative solutions adopted in Bosnia and Herzegovina will be compared with provisions adopted in other countries and subjected to critical evaluation.*

**Keywords:** *freedom of expression, human rights instruments, judges, restrictions, impartiality, social networks, judicial ethics.*

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## 1. INTRODUCTION: THE VALUE OF FREEDOM OF EXPRESSION

Freedom of expression is a fundamental human right and one of the key elements of a democratic society. According to Matthew Kramer, the principle of freedom of expression is one of the cornerstones of liberal democracy and it should be considered absolute (as “always and everywhere binding”).<sup>1</sup> Kramer argues that the principle of freedom of expression imposes absolute restrictions on the purposes – the ends and means – that can legitimately be pursued by a government through any measures that prohibit types or instances of communicative conduct.<sup>2</sup> However, it is only weakly absolute. This means that the requirements of the principle of freedom of expression will not always and everywhere be more stringent than any possible countervailing moral requirements.<sup>3</sup>

Freedom of expression occupies a special place within liberal political thought. One of the most famous liberal defences of this freedom was offered by John Stuart Mill, whose “work on freedom of expression has had enormous influence on philosophical research and has long been a pillar of the undergraduate curriculum”<sup>4</sup> (Haworth described it as “the classic version of the classical defence”, and “the fullest, the most coherently argued, and the most influential” defence of free speech)<sup>5</sup>. In *On Liberty* Mill attributed both instrumental and non-instrumental (intrinsic) value to freedom of expression. Freedom of expression is instrumentally valuable because it presents the most reliable means of producing true beliefs.<sup>6</sup> This rationale for freedom of expression was echoed by Justice Oliver Wendell Holmes in his dissent in *Abrams v. United States*, when he famously claimed that the best test of truth is free trade in the marketplace of ideas.<sup>7</sup> Freedom of expression, according to Mill, is also needed to keep true beliefs from becoming dogmatic. Such Mill’s claim reflects his view “that freedoms of thought and discussion are necessary conditions for fulfilling our natures as progressive beings”.<sup>8</sup> Mill’s argument is not simply that freedom of expression is valuable as a means of realization of public knowledge or true beliefs. Beneath the instrumental form of his

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<sup>1</sup> Matthew Kramer, *Freedom of Expression as Self-Restraint*, Oxford University Press, Oxford 2021, 1.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*, 2.

<sup>4</sup> Daniel Halliday, Helen McCabe, “John Stuart Mill on Free Speech”, *The Routledge Handbook of Applied Epistemology* (eds. David Coady, James Chase), Routledge, London – New York 2019, 71.

<sup>5</sup> Alan Haworth, *Free Speech*, Routledge, London – New York 1998, 3.

<sup>6</sup> David Brink, “Millian principles, freedom of expression, and hate speech”, *Legal Theory* 7.2/2001, 122.

<sup>7</sup> *Ibid.*, 123.

<sup>8</sup> *Ibid.*, 125.

argument is “a belief that participation in public discourse is necessary to the development of the individual as a rational agent and a commitment to a way of life that involves reasoned judgment and the effort to discover truth through discussion with others”.<sup>9</sup>

According to Richard Moon, all arguments for protecting freedom of expression “seem to focus on one or a combination of three values: truth, democracy, and individual autonomy”.<sup>10</sup> Although some theories emphasize one value over the others, most accounts assume that freedom of expression must be protected because of the contribution it makes to all three values. As Moon points out: “Freedom of expression, like other important rights, is supported by a number of overlapping justifications.”<sup>11</sup>

Many authors emphasize the importance of freedom of expression to individual self-realization. Ronald Dworkin, who conceives of autonomy as a right to moral independence, argues that any government restriction on a person’s freedom of speech, on the grounds that his/her ideas are ignoble or wrong, would amount to disrespecting that person’s autonomy.<sup>12</sup> The relevance of the freedom of expression for the self-realization of an individual (for the protection of his/her autonomy) points to the connection between the aforementioned freedom and the value of human dignity. But freedom of expression can also result in the violation of human dignity (both of other persons and of the person exercising his/her right to free expression). As Weinrib points out, commenting on the justification of the hate speech prohibition, „[h]ate speech may be limited because it seeks to use rights that are founded in the value of human dignity in a manner that denies the dignity of others, and the capacity of others to hold rights, including the right to free expression“.<sup>13</sup>

Jeremy Waldron, one of the leading contemporary legal theorists, warns that unrestricted freedom of expression can cause harm to the dignity of individuals. According to Waldron, utterances that assail the basic dignity of the members of the community can be legitimately prohibited (such legal prohibitions can be morally justified), but not those utterances that merely cause offense to other individuals.<sup>14</sup>

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<sup>9</sup> C.L. Ten, *Mill on Liberty*, Clarendon Press, Oxford 1980, 124, quoted in Richard Moon, *The Constitutional Protection of Freedom of Expression*, University of Toronto Press, Toronto – Buffalo – London 2000, 12.

<sup>10</sup> R. Moon, 8.

<sup>11</sup> *Ibid.* In Moon’s opinion, the different accounts of the value of freedom of expression rest on common ground, since they are based on a common recognition that human agency emerges in communicative interaction (*Ibid.*).

<sup>12</sup> Jacob Weinrib, “What is the Purpose of Freedom of Expression”, *University of Toronto Faculty of Law Review*, 67/2009, 178-179.

<sup>13</sup> J. Weinrib, 187.

<sup>14</sup> Jeremy Waldron, *The Harm in Hate Speech*, Harvard University Press, Cambridge, MA, 105-143, quoted in M. Kramer, 251.

## 2. THE RIGHT TO FREEDOM OF EXPRESSION: INTERNATIONAL AND NATIONAL STANDARDS

Considering the importance of this freedom, it is not surprising that the majority of major international human rights instruments recognize the right to freedom of expression. According to Article 19 of the Universal Declaration of Human Rights (UDHR): “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”<sup>15</sup> The right to freedom of expression is also protected in other UN human rights instruments. Article 5d(viii) of the International Convention on the Elimination of All Forms of Racial Discrimination guarantees the right of every person to enjoy, without racial or ethnic discrimination, the right to freedom of opinion and expression.<sup>16</sup> Article 19 para. 2 of the International Covenant on Civil and Political Rights (ICCPR) states: “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”<sup>17</sup> This paragraph protects all forms of expression and the means of their dissemination, including spoken, written, and sign language, and non-verbal expressions through artworks.<sup>18</sup> Article 19 para. 3 of the ICCPR stipulates that the exercise of rights provided for in para. 2 “carries with it special duties and responsibilities”. Therefore, freedom of expression may be subjected to certain restrictions, but these limitations shall only be such as are provided by law and are necessary: (a) for respect of the rights or reputations of others, and (b) for the protection of national security, public order, or public health or morals. Article 13 para. 1 of the UN Convention on the Rights of the Child (CRC), modelled on the ICCPR wording of the aforementioned right, states: “The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print,

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<sup>15</sup> *The Universal Declaration of Human Rights*, United Nations (1948), <https://www.un.org/en/about-us/universal-declaration-of-human-rights>, 04.11.2022.

<sup>16</sup> *The International Convention on the Elimination of All Forms of Racial Discrimination*, United Nations (1965), <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-elimination-all-forms-racial>, 04.11.2022.

<sup>17</sup> *The International Covenant on Civil and Political Rights*, United Nations (1966), <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>, 04.11.2022.

<sup>18</sup> *General Comment No. 34, Article 19, Freedoms of opinion and expression. UN Doc. CCPR/C/GC/34*, Article 11, UN Human Rights Committee (2011), <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no34-article-19-freedoms-opinion-and>, 04.11.2022.

in the form of art, or through any other media of the child's choice.”<sup>19</sup> Paragraph 2 of this article contains the same list of reasons for the legitimate restriction of the right to freedom of expression as the ICCPR.

Freedom of expression is also protected by regional human rights instruments. The European Convention on Human Rights (ECHR) guarantees the right to freedom of expression in Article 10 para. 1, which states: “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.”<sup>20</sup> Freedom of expression belongs to the group of so-called “qualified rights”, for which the ECHR envisages legitimate restrictions. The scope of permissible restrictions on freedom of expression is defined in Article 10 para. 2. Such restrictions are only acceptable to the extent that they are prescribed by law, pursue a legitimate purpose listed in Article 10(2), and are deemed necessary in a democratic society. The list of purposes that can serve as a basis for legitimate restriction on freedom of expression includes the following reasons: the protection of the interests of national security, territorial integrity or public safety, the prevention of disorder or crime, the protection of health or morals, the protection of the reputation or rights of others, the prevention of the disclosure of information received in confidence, and the preservation of the authority and impartiality of the judiciary. As the freedom of expression is not absolute, “the crucial difficulty of its application and limitation lies in balancing competing rights and interests in order to determine what information needs or ought to be part of the public debate and thus benefits democracy, and what information causes unallowable harm to individuals and/or society and thus should be necessarily restricted or sanctioned in a democratic society”.<sup>21</sup>

The African Charter on Human and People's Rights (ACHPR) provides for freedom of expression in Article 9 para. 2, which states: “Every individual shall have the right to express and disseminate his opinions within the law.”<sup>22</sup> This provision has been criticised because of its “clawback clause” (“within the law”) which does not specify the circumstances under which national restrictions on the freedom of expression would be permissible (as opposed to derogation clauses

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<sup>19</sup> *The Convention on the Rights of the Child*, United Nations (1989), <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>, 08.11.2022.

<sup>20</sup> *The European Convention of Human Rights* (1950), <https://www.ustavnisud.ba/en/european-convention-on-human-rights>, 08.11.2022.

<sup>21</sup> Dirk Voorhoof, Hannes Cannie, “Freedom of Expression and Information in a Democratic Society”, *International Communication Gazette* 72.4-5/2010, 408.

<sup>22</sup> *The African Charter on Human and People's Rights* (1981), <https://www.achpr.org/legal-instruments/detail?id=49>, 08.11.2022.

that explicitly provide circumstances in which rights may be restricted, and define non-derogable rights)<sup>23</sup>. The extensive use of “clawback clauses” in the ACHPR is considered a weakness of the African human rights system because they tend “to give the states too much autonomy which may allow them to violate human rights with impunity”.<sup>24</sup> The American Convention on Human Rights (ACHR) also guarantees the right to freedom of expression in its Article 13 (“Freedom of Thought and Expression”). According to para. 2 of this article: “The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure: a) respect for the rights or reputations of others; or, the protection of national security, public order, or public health or morals.”<sup>25</sup> The first part of this provision is based on the concept of prior restraint, deeply rooted in American law, where the first amendment to the United States (US) Constitution creates a strong presumption against any “preventive” limits on free speech.<sup>26</sup>

The relevance of freedom of expression has also been acknowledged in the case law of regional courts of human rights. The ECtHR expressed the view that freedom of expression constitutes “one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment” (*Paloma Sanchez and Others v. Spain, Lingens v. Austria*).<sup>27</sup> The right to freedom of expression imposes positive as well as negative obligations on the contracting states. The negative duty of the contracting states with respect to freedom of expression is the duty not to interfere with the exercise of this right. If the ECtHR determines that there is a state’s interference with the exercise of the right to freedom of expression (a potential violation of a negative obligation), “the analysis then proceeds to Article 10(2), where the Court begins by inquiring as to whether the interference has been “prescribed by law”<sup>28</sup> (the Court will also consider whether the interference was proportionate to the legitimate aim and whether it is necessary in a democratic society). For example, the ECtHR held that the suspension/prohibition of publication constituted a violation of the applicants’

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<sup>23</sup> Richard Gittleman, “The African Charter on Human and Peoples’ Rights: A Legal Analysis”, *Virginia Journal of International Law*, Vol. 22.4/1982, 692.

<sup>24</sup> Charles R.M. Dlamini, “Towards a regional protection of human rights in Africa: the African Charter on Human and Peoples’ Rights”, *Comparative and International Law Journal of Southern Africa*, 24.2/1991, 202.

<sup>25</sup> *The American Convention on Human Rights* (1969), chromeextension://oemmnadbldboieb-fnladdacb\_dfmadm/https://treaties.un.org/doc/publication/unts/volume%201144/volume-1144-i-17955-english.pdf.

<sup>26</sup> William A. Schabas, *The European Convention on Human Rights: A Commentary*, Oxford University Press, Oxford 2015, 452.

<sup>27</sup> W. Schabas, 450-451.

<sup>28</sup> W. Schabas, 453.



freedom of expression, since such a measure was not proportionate to the legitimate aims pursued and necessary in a democratic society (*Cumhuriyet Vakfi and Others v. Turkey*)<sup>29</sup>. The Court also found a violation of Article 10 in the case of the prohibition of the circulation, distribution, and sale of a book on the Basque culture (*Association Ekin v. France*)<sup>30</sup>.

In some instances, however, the contracting states also have positive obligations to secure the effective exercise of freedom of expression. For example, Turkey was held to have a positive obligation to investigate and provide protection when journalists and staff of a newspaper that supported the Kurdistan Workers Party were victims of violence and threats (*Özgür Gündem v. Turkey*). The ECtHR has also examined the obligation to protect freedom of expression in the employment context (*Wojtas-Kaleta v. Poland*) and where the exercise of free speech may infringe upon private property rights (*Appleby and Others v. the United Kingdom*). Positive obligations may also require the State to facilitate access to various media (*Centro Europa 7 S.R.L. and di Stefano v. Italy*).<sup>31</sup>

The contracting states enjoy a certain “margin of appreciation” (the space for manoeuvre) when prescribing restrictions on freedom of expression. The extent of the state’s margin of appreciation in the cases of judges who claim the protection under Article 10 of the ECHR is related to the capacity of the judge as a civil servant.<sup>32</sup> As the ECtHR stated in *Wille v. Lichtenstein*, “whenever civil servants’ right to freedom of expression is in issue the “duties and responsibilities” referred to in Article 10 §2 assume a special significance, which justifies leaving to the national authorities a certain margin of appreciation in determining whether the impugned interference is proportionate to the above aim.”<sup>33</sup> In *Pitkevich v. Russia*, the ECtHR acknowledged the special position of judges as civil servants whose duties typify the specific activities of the public service, although “the judiciary is not part of the ordinary civil service”.<sup>34</sup>

In cases related to freedom of expression of judges, the ECtHR “has established several criteria to distinguish between, on the one hand, their spheres of legitimate independence and freedom and, on the other, disciplinary sanctions due to the fact that a judge did not respect his obligations, for example of impartiality,

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<sup>29</sup> *Cumhuriyet Vakfi and Others v. Turkey*, Application no. 28255/07, ECtHR (2014), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-126797%22%5D%7D>, 08.11.2022.

<sup>30</sup> *Association Ekin v. France*, no. 39288/98, ECtHR (2001), <https://www.lawpluralism.unimib.it/en/oggetti/153-association-ekin-v-france-no-39288-98-e-ct-hr-third-section-17-july-2001>, 08.12.2022.

<sup>31</sup> W. Schabas, 453.

<sup>32</sup> Sietske Dijkstra, “The Freedom of the Judge to Express his Personal Opinions and Conventions under the ECHR”, *Utrecht Law Review*, 13.1/2017, 5.

<sup>33</sup> *Wille v. Lichtenstein*, quoted in *Ibid*.

<sup>34</sup> *Pitkevich v. Russia*, quoted in *Ibid*.

neutrality, confidentiality and secrecy of deliberation”.<sup>35</sup> In some instances, the ECtHR has denied a violation of the right to freedom of expression under Article 10 of the ECHR. In *Pitkevitch v. Russia*, a judge had prayed publicly during court hearings, had discussed moral and religious issues in court, and promised a favourable outcome of their court proceedings to litigants if they joined her church. Since such conduct had called into question her impartiality and had undermined the authority of the judiciary, the ECtHR found that her removal from office was justified as proportionate to a legitimate aim.<sup>36</sup> According to the ECtHR, judges are required to exercise maximum discretion in respect of cases with which they deal in order to preserve their image as impartial judges. The ECtHR found violation of Article 6, para. 1 in several cases concerning judges who expressed their opinions in the press (*Buscemi v. Italy*, *Lavents v. Latvia*, *Olujić v. Croatia*).<sup>37</sup> The imperative of discretion applies even in those cases where a judge seeks to reply in response to criticisms voiced in media (e.g., *Buscemi v. Italy*).<sup>38</sup>

According to the ECtHR, judges are not prevented from making political statements and participating in public debates. However, they should show restraint in exercising their freedom of expression when the authority and impartiality of the judiciary are likely to be called into question.<sup>39</sup> In *Wille v. Lichtenstein*, the applicant, the President of the Lichtenstein Administrative Court, claimed that a letter from the Prince of Lichtenstein announcing his intention not to reappoint him to the post of public office represented retaliation for the previous exercise of freedom of expression by the applicant (a public lecture the applicant held on the powers of the Constitutional Court). The ECtHR held that the Prince’s letter constituted an interference with the exercise of the applicant’s right to freedom of expression, and that the aforementioned interference cannot be justified as necessary

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<sup>35</sup> María Elósegui, „The Independence of the Judiciary in the Jurisprudence of the European Court of Human Rights”, *The Rule of Law in Europe: Recent Challenges and Judicial Responses* (eds. María Elósegui, Alina Miron, Iulia Motoc), Springer, Cham 2021, 72.

<sup>36</sup> Anja Seibert-Fohr, „Judges’ Freedom of Expression and Their Independence: An Ambivalent Relationship”, *The Rule of Law in Europe: Recent Challenges and Judicial Responses*, 97.

<sup>37</sup> Dijkstra, 12. As the ECtHR stated in *Buscemi v. Italy*: „The Court stresses, above all, that the judicial authorities are required to exercise maximum discretion with regard to the cases with which they deal in order to preserve their image as impartial judges. That discretion should dissuade them from making use of the press, even when provoked. It is the higher demands of justice and the elevated nature of judicial office which impose that duty. The Court considers ... that the fact that the President of the court publicly used expressions which implied that he had already formed an unfavourable view of the applicant’s case before presiding over the court that had to decide it clearly appears incompatible with the impartiality required of any court, as laid down in Article 6 §1 of the Convention.” *Buscemi v. Italy*, Application no. 29569/95, EctHR, 1999, <https://jurinfo.jep.gov.co/normograma/compilacion/docs/pdf/CASE%20OF%20BUSCEMI%20v.%20ITALY.PDF>, 08.11.2022.

<sup>38</sup> A. Seibert-Fohr, 97.

<sup>39</sup> *Ibid*, 99.



in a democratic society. The Court therefore found that there has been a violation of Article 10 of the ECHR.

In *Baka v. Hungary*<sup>40</sup>, the applicant, who served as the President of the Hungarian Supreme Court and the National Council of Justice, publicly expressed his views on a number of legislative reforms concerning the judicial branch of government. The ECtHR found that the applicant's removal as President of the Supreme Court had constituted a violation of his right to freedom of expression under Article 10 of the ECHR. In this judgement, the ECtHR applied a narrow margin of appreciation since the judge's expression of views was a part of an important public debate. The Court 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>41</sup>. In its *Todorova v. Bulgaria*<sup>42</sup> judgement (2021), the ECtHR once again stressed the fundamental importance of freedom of expression on issues of public concern, such as the functioning of the justice system, or the protection of judicial independence. In the aforementioned case, the Court found that disciplinary proceedings and sanctions against a judge, who served as the President of the Bulgarian Union of Judges, in retaliation for her criticism of the Supreme Judicial Council and the executive represented an interference with the applicant's right to freedom of expression.

The right to freedom of expression is also protected in many national constitutions. The most recent data show that more than 60 countries have freedom of expression provisions in their constitutions.<sup>43</sup> For example, Article 26 para. 1 of the Constitution of the Slovak Republic states: "Freedom of expression and the right to information shall be guaranteed."<sup>44</sup> According to Article 21.1 of the Constitution of Italy: "Anyone has the right to freely express their thoughts in speech, writing, or any other form of communication."<sup>45</sup> Article 5 para. 1 of the German constitution states: "Every person shall have the right freely to express and disseminate his opinions in speech, writing, and pictures and to inform himself

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<sup>40</sup> *Baka v. Hungary*, Application no. 20261/12, ECtHR (2016), <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-163113%22%5D%7D>, 08.11.2022.

<sup>41</sup> *Ibid*, para. 171.

<sup>42</sup> *Todorova v. Bulgaria*, Application no. 40072/13, ECtHR (2021), <https://hudoc.echr.coe.int/fre#%7B%22display%22:%5B%22documentcollectionid%22:%5B%22GRANDCHAMBER%22,%22CHAMBER%22%5D,%22itemid%22:%5B%22002-13441%22%5D%7D%7D>, 08.11.2022.

<sup>43</sup> Robert Trager, Donna L. Dickerson, *Freedom of Expression in the 21st Century*, Pine Forge Press, Thousand Oaks – London 1999, 92.

<sup>44</sup> Constitution of the Slovak Republic, <https://www.prezident.sk/upload-files/46422.pdf>, 08.11.2022.

<sup>45</sup> Constitution of the Italian Republic, [https://www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf), 08.11.2022.

without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films are guaranteed.”<sup>46</sup> The existence of explicit constitutional provisions guaranteeing the right to freedom of expression confirms the importance attributed to this right within modern societies and legal orders. However, national constitution-makers also recognized the fact that freedom of expression cannot be absolute. For example, Article 5 para. 2 of the German Constitution provides the possibility of the restriction of freedom of expression.<sup>47</sup> Even in those countries whose constitutions do not contain explicit provisions on the right to freedom of expression, the importance of the aforementioned right has been emphasized in the case law of the highest judicial bodies. In Australia, although its constitution does not contain an explicit guarantee of freedom of expression, the High Court of Australia has held in a number of decisions from the early 1990s that a freedom of political communication must be implied in the federal Constitution.<sup>48</sup>

### 3. FREEDOM OF EXPRESSION OF JUDGES: INTERNATIONAL AND NATIONAL STANDARDS

International documents on judicial ethics stipulate that the right to freedom of expression also belongs to judges. Principle 8 of the UN Basic Principles on the Independence of the Judiciary (UN Basic Principles) states: “In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.”<sup>49</sup> The right of judges to freedom of expression is also stressed in the Bangalore Principles of Judicial Conduct, elaborated by the Judicial Integrity Group in 2001 and revised at the 2002 Round Table Meeting of Chief Justices held at The Hague on November 25-26, 2002 (a document described as “the Magna Charta of the judicial ethics on global stage”)<sup>50</sup>.

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<sup>46</sup> Basic Law for the Federal Republic of Germany, <https://www.btg-bestellservice.de/pdf/80201000.pdf>, 08.11.2022.

<sup>47</sup> Article 5 para. 2 of the German Constitution states: “These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right of personal honour.”

<sup>48</sup> Eric Barendt, “Freedom of Expression”, *The Oxford Handbook of Comparative Constitutional Law* (eds. Michel Rosenfeld, András Sajó), Oxford University Press, Oxford 2012, 892.

<sup>49</sup> *The Basic Principles on the Independence of Judiciary*, UN (1985), <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-independence-judiciary>, 08.11.2022.

<sup>50</sup> Jörg Philipp Terhechte, “Judicial Ethics for a Global Judiciary – How Judicial Networks create their own codes of conduct”, *German Law Journal* 10.4 /2009, 512.

Principle 4 (“Propriety”) states that a judge, like any other citizen, is entitled to freedom of expression. Like the UN Basic Principles, the Bangalore Principles also point to a higher standard of conduct that is required of judges when exercising the aforementioned right. In exercising the right to freedom of expression, “a judge shall always conduct himself or herself in such manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary” (Principle 4.6). This document also contains the prohibition on commenting on pending cases. According to Principle 2.4: “A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process, nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue.” Article 4.3 of the European Charter on the Statute for Judges states: “Judges must refrain from any behavior, action or expression of a kind effectively to affect confidence in their impartiality and their independence.”<sup>51</sup> According to Article 19 of the Recommendation Rec(2010)12: “Judges: independence, efficiency and responsibilities”, adopted by the Committee of Ministers of the Council of Europe on 17 November 2010: “Judges should exercise restraint in their relations with the media.”<sup>52</sup>

The relevance of exercising the right to freedom of expression of judges is also recognized in Opinion no. 3<sup>53</sup> of the Consultative Council of European Judges (CCJE) on ethics and liability of judges, adopted in 2002. As stressed in para. 27 of the Opinion: “Judges should not be isolated from the society in which they live, since the judicial system can only function properly if judges are in touch with reality.” Judges enjoy, as all other citizens, the fundamental rights and freedoms protected, in particular, by the European Convention on Human Rights (including the right to freedom of expression). However, such activities may jeopardise their impartiality or independence. Therefore, “[a] reasonable balance ... needs to be struck between the degree to which judges may be involved in society and the need for them to be and to be seen as independent and impartial in the discharge of their duties” (para. 28). As stated in para. 30 of the Opinion, judges should show restraint in the exercise of public political activity. However, they should be allowed to participate in certain debates concerning national judicial policy. Judges should be able to be consulted and play an active part in the preparation of legislation concerning the status of judiciary and the functioning of the judicial system (para. 34). According to para. 50(viii), judges “should show circumspection in their relations with the media, maintain their independence and impartiality by

<sup>51</sup> European Charter on the Statute for Judges, <https://rm.coe.int/16807473ef>, 09.11.2022.

<sup>52</sup> Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe: „Judges: independence, efficiency and responsibilities“ (<https://rm.coe.int/16807096c1>)

<sup>53</sup> Opinion no. 3 on ethics and liability of judges, CCJE, 2002, <https://rm.coe.int/16807475bb>, 09.11.2022.

refraining from any personal exploitation of any relations with the media and from making any unjustified comments on the cases they are dealing with”.

At its 23<sup>rd</sup> plenary meeting held on 30 November – 02 December 2022, the CCJE adopted Opinion no. 25 on freedom of expression of judges<sup>54</sup>. The Opinion acknowledges the legal and ethical duty of a judge to speak out in order to safeguard the rule of law and democracy at the domestic as well as at European and international level, but also emphasizes that judges should show restraint in exercising their right to freedom of expression (para. 4). The Opinion stresses the need to strike a balance between the fundamental right of an individual judge to freedom of expression and the legitimate interest of a democratic society to maintain public confidence in the judiciary (para. 31). As stated in para. 37 of the Opinion, a judge must display “a detached, unbiased, impartial, open-minded and balanced attitude” in his/her public statements (especially if a potential link exists with pending or ongoing cases). However, in his/her professional activities, a judge has the right to make constructive and respectful comments regarding decided cases (para 40). According to para. 42, a judge should refrain from making use of the media with respect to his/her own cases, even if provoked. However, when a judge or his/her judgement is a target of the unfair public criticism, the associations of judges, the council for the judiciary and/or the court president have an institutional duty to clarify the facts to preserve the image of an authoritative, independent and impartial judiciary (para. 42). The Opinion also stipulates the judges’ obligation of professional confidentiality (para. 43). According to para. 46 of the Opinion, judges, “subject to preserving their impartiality and independence ... should be permitted and even encouraged to participate in discussions on the law for informative and educational purposes and to express views and opinions on weaknesses in the application of the law and improving the law, as well as the legal system”. Since direct involvement of a judge in partisan party politics can raise doubts as to the separation of powers and his/her independence and impartiality, even in cases where his/her membership in a political party is allowed, a judge should refrain from any political activity that might compromise his/her independence or impartiality, or the reputation of the judiciary (para IX.4). The Opinion also deals with the current issue of social media communication by judges. As stated in para. 66, a judge may use social media like any other citizen. However, the social media usage raises new challenges and ethical concerns regarding the propriety of the content posted. For that reason, a judge is required to exercise special caution in his/her social media communication. As pointed out in para. 70 of the Opinion, social media communication is often fast and pointed, and although actions, such as “liking” or forwarding information presented by others, may

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<sup>54</sup> Opinion no. 25 on freedom of expression of judges, CCJE (2022), <https://www.coe.int/en/web/ccje/ccje-opinions-and-magna-carta>, 12.12.2022.

appear relatively small or casual, they qualify as regular expressions of a judge's opinion. In para. 76 of the Opinion, the CCJE emphasizes "the importance of training all judges on social media applications and the ethical implications of using them in personal and professional contexts".

The exercise of the right to freedom of expression of judges is also regulated in national legislations (relevant provisions are stipulated either by national laws or ethical codes of judicial conduct). Traditionally, judges have been expected to show considerable restraint in the exercise of their freedom of expression.<sup>55</sup> These restraints apply not only to the official conduct of judges, but also when they act in their private capacity. The German Judiciary Act incorporates a duty of moderation ("Mäßigungsverbot") which is relevant for judicial conduct outside the office (Section 39).<sup>56</sup> Many national laws and codes of judicial ethics prohibit giving comments on the merits of pending proceedings, as well as disclosing confidential information concerning disputes.<sup>57</sup> For example, the Bulgarian Judiciary System Act<sup>58</sup> stipulates in Article 211(2) that: "Judges ... shall be obligated to keep as official secret the information of which they have gained knowledge while on service and which affects the interests of citizens, legal entities and the state." Article 212 of the same law prohibits judges from sharing in advance of the judgement any views on the cases assigned to them, as well as any views on cases not assigned to them.

The issue that raises particular controversies is whether judges should be allowed to become members of political organizations/parties and participate in their political activities. A comparative analysis shows that the permissibility of political activity/party membership of judges is regulated differently in different national legislations. In many countries, it is expressly prescribed by law that judges cannot be members of political parties. For example, Article 195(6) of the Bulgarian Judiciary System Act stipulates that a judge may not be a member of a political party, coalition or organization with a political goal, nor shall he/she be involved in political activity. According to Article 94(1) of the Law on Courts of the Republic of Croatia: "A judge must not be a member of a political party, nor engage in political activity."<sup>59</sup> In some countries, the ban on membership of judges

<sup>55</sup> A. Seibert-Fohr, 91.

<sup>56</sup> *Ibid.*, 92. The Section 39 of the German Judiciary Act states: "Both while performing and not performing their official duties, including political activities, judges are to conduct themselves in such a manner that confidence in their independence is not jeopardised." (The German Judiciary Act, [https://www.gesetze-im-internet.de/englisch\\_drjg/englisch\\_drjg.html](https://www.gesetze-im-internet.de/englisch_drjg/englisch_drjg.html), 12.12.2022)

<sup>57</sup> A. Seibert-Fohr, 91.

<sup>58</sup> The Judiciary System Act of the Republic of Bulgaria, [http://www.vss.justice.bg/en/root/f/upload/5/judiciary\\_system\\_act.pdf](http://www.vss.justice.bg/en/root/f/upload/5/judiciary_system_act.pdf), 12.12.2022.

<sup>59</sup> The Law on Courts of the Republic of Croatia, *Official Gazette*, no. 28/13, 33/15, 82/15, 82/16, 67/18, 126/19, 130/20, 21/22, and 60/22.

in political parties is explicitly stipulated in the constitution (see, e.g., Article 100 of the Constitution of North Macedonia)<sup>60</sup>. On the other hand, judges in some countries have the right to engage in political activities, including the possibility of becoming a political party member. In the US, judges can be members of political parties; moreover, in some states, where judges are elected by citizens, information about party affiliation is indicated on ballots, along with the names of judicial candidates.<sup>61</sup> In Germany, it is also not forbidden for judges to be members of political parties.<sup>62</sup> In Switzerland, where judges are elected by legislative bodies, the selection and election of judges is based on an informal agreement between the political parties, depending on the party strength. As a result, party membership or at least ideological closeness to the party endorsing the candidate play important role in the judicial selection process. Only in the smallest Swiss cantons, where judges are elected by plebiscite, do the political parties seem to have little or no influence on the judicial election process.<sup>63</sup>

Some authors differentiate between two kinds of political participation of judges: passive and active. Passive political engagement is reduced to the membership of judges in political parties or professional associations connected to them. The second form of participation implies the active (working) participation of judges in the activities of such organizations.<sup>64</sup> In Germany, the leading political parties are linked to professional associations that bring together members of the legal profession. Among them, the oldest is the Social Democratic working group of lawyers (*Arbeitsgemeinschaft sozialdemokratischer Juristen – ASJ*), founded in 1947, which gathers members of the Social Democratic Party (SPD) coming from all sectors of the legal professions, including judges.<sup>65</sup> It is not uncommon for political parties to form bodies (committees) that deal with matters in the field of justice, whose members may also be non-party figures. The association of judges with political parties can take different forms, which do not necessarily require party membership.

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<sup>60</sup> Constitution of the Republic of North Macedonia, [https://www.sobranie.mk/the-constitution-of-the-republic-of-macedonia-ns\\_article-constitution-of-the-republic-of-north-macedonia.nspix](https://www.sobranie.mk/the-constitution-of-the-republic-of-macedonia-ns_article-constitution-of-the-republic-of-north-macedonia.nspix), 12.12.2022.

<sup>61</sup> David Klein, Lawrence Baum, “Ballot Information and Voting Decisions in Judicial Elections”, *Political Research Quarterly* 54.4/2001, 710-711; Attila, Badó, “Fair” Selection of Judges in Modern Democracies”, *A Fair Trial and Judicial Independence: Hungarian Perspectives* (ed. Attila Badó) (pp. 27-58), Springer, Cham- Heidelberg, New York, Dordrecht, London 2013, 39-40.

<sup>62</sup> A. Badó, 45.

<sup>63</sup> Regina Kiener, “Judicial independence in Switzerland”, *Judicial Independence in Transition* (ed. Anja Siebert- Fohr), Springer, 2012, 414-415.

<sup>64</sup> Peter Gilles, “Germany: Judicial Independence and the Involvement of Judges in Party Politics and Trade Union Activities”, *Judicial Independence: The Contemporary Debate* (eds. Shimon Shetreet, Jules Dechenes), Martinus Nijhoff Publishers, Dordrecht – Boston – Lancaster 1985, 96.

<sup>65</sup> P. Gilles, 97.



There are several reasons for prohibiting the party membership/activities of judges. If political parties can influence the election of judges, the risk of electing politically suitable judges increases and calls into question the impression of the impartiality of the election process (and, consequently, the impression of impartiality of elected judges). Even when judges are elected by high judicial councils, if part of the members of these bodies is chosen by authorities of other branches of government, the impression of favoring (or obstructing) candidates based on their party affiliation may be created. Such a risk is especially present in the so-called “new” democracies, where there is a gap between the formally guaranteed independence of the judiciary and how judicial bodies function in practice (or, at least, how the functioning of judicial bodies is perceived by the public). Party membership of a judge could be a basis for filing a motion for his/her recusal, whether he/she is charged with favoritism to a party colleague or animosity toward a party member from an opposing political bloc. Considering the importance of preserving the impression of independence and impartiality of judicial proceedings, the ban on membership in political parties for judges can be considered justified. The question remains whether and to what extent the formal prohibition of party membership ensures the political neutrality of judicial office holders, i.e. prevents the influence of political preferences of a judge on decisions he/she makes.

One of the controversial issues is the use of electronic social media by judges, which raises new challenges and dilemmas. The current controversies related to the social media communication by judges will be illustrated with two examples. The first example refers to an American judge who accepted a “friend” request on his *Facebook* profile from one of the parties in custody proceedings (the communication was not disclosed to the other party or his counsel). In the period leading up to the decision, a “friend” (a child’s mother), who was eventually awarded full custody, commented on several of the judge’s posts (the judge did not respond to her comments). Also, during the disputed period, the information about the mother’s *Facebook* activities may have appeared in the “*Newsfeed*” system on the judge’s profile, including the sharing of posts related to cases of domestic violence (which the party believed to be in her favour). The Court of Appeals of the State of Wisconsin found that the aforementioned communication represented the violation of the ban on *ex parte* communication.<sup>66</sup> The decision of the Court of Appeals was upheld by the Wisconsin Supreme Court.<sup>67</sup> The second example refers to the case of a criminal judge in Germany, who posted a picture on his publicly accessible *Facebook* page, on which he could be seen with the following T-shirt imprint:

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<sup>66</sup> *Miller v. Carroll*, The court of Appeals of the State of Wisconsin, 2019, <https://law.justia.com/cases/wisconsin/court-of-appeals/2019/2017ap002132.html>, 12.12.2022.

<sup>67</sup> *In re the Paternity of B. J. M.: Miller v. Carroll*, The Wisconsin Supreme Court, 2020, (доступно <https://law.justia.com/cases/wisconsin/supreme-court/2020/2017ap002132.html>, 12.12.2022.

“We give your future a home–prison.” He also posted some other comments that could be considered inappropriate. According to the Federal Court of Justice, this statement raised reasonable apprehension of bias of the judge.<sup>68</sup> In some European countries, judiciaries have responded to these new challenges by drafting guidelines for judicial conduct with respect to the use of social media (e.g., England, France).<sup>69</sup>

#### 4. LEGAL FRAMEWORK OF THE FREEDOM OF EXPRESSION OF JUDGES IN BOSNIA AND HERZEGOVINA

Freedom of expression in Bosnia and Herzegovina (B&H) is protected by the Constitution of B&H, as well as by entity<sup>70</sup> constitutions. According to Article II(3h) of the Constitution of B&H<sup>71</sup>, all persons within the B&H territory shall enjoy the freedom of expression. Article II para. 2 of the B&H Constitution stipulates that the ECHR and its Protocols shall directly apply in B&H and they shall have priority over all other law. According to Article 25 of the Constitution of the Republic of Srpska<sup>72</sup>: “Freedom of thought and affiliation, conscience and conviction, as well as of public expression of opinion shall be guaranteed.” The RS Constitution also provides for the freedom of press in Article 26 para. 1. The freedom of speech and the press, as well as the freedom of thought, conscience, and belief, are protected by Article 2(1i) of the Constitution of the Federation Bosnia and Herzegovina<sup>73</sup> (FB&H). According to Article 13 para. 4 of the Statute of the Brcko District<sup>74</sup> (BD), all persons shall be entitled within the territory of the District to all the rights and freedoms accorded to them by the ECHR, and those rights and freedoms shall prevail over all other law. Article 17 para. 1 of the BD Statute stipulates that all District institutions shall respect freedom of information. All BD officials are

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<sup>68</sup> Jannika Jahn, “Social Media Communication by Judges: Assessing Guidelines and New Challenges for Free Speech and Judicial Duties in the Light of the Convention”, *The Rule of Law in Europe: Recent Challenges and Judicial Responses*, 145.

<sup>69</sup> J. Jahn, 146.

<sup>70</sup> Bosnia and Herzegovina, as a complex state, comprises two entities: the Republic of Srpska and the Federation of Bosnia and Herzegovina. Brcko District is a third territorial unit that enjoys broad legislative autonomy.

<sup>71</sup> Constitution of Bosnia and Herzegovina, [https://www.ustavnisud.ba/public/down/USTAV\\_BOSNE\\_I\\_HERCEGOVINE\\_engl.pdf](https://www.ustavnisud.ba/public/down/USTAV_BOSNE_I_HERCEGOVINE_engl.pdf), 08.12.2022.

<sup>72</sup> Constitution of the Republic of Srpska, *Official Gazette of Republic Srpska*, no. 6/92, 8/92, 15/92, 19/92, 21/92, 28/94, 8/96, 13/96, 15/96, 16/96, 21/96, 21/02, 26/02, 69/02, 31/03, 98/03, 115/05, 117/05, 48/11.

<sup>73</sup> Constitution of the Federation of Bosnia and Herzegovina, *Official Gazette of the Federation of Bosnia and Herzegovina*, no. 1/94, 13/97, 16/02, 22/02, 52/02, 60/02, 18/03, 63/03, 9/04, 20/04, 33/04, 71/05, 72/05, 88/08.

<sup>74</sup> The Statute of the Brcko District of Bosnia and Herzegovina, <https://skupstinabd.ba/images/dokumenti/ba/statut-brcko-distrikta.pdf>, 08.12.2022.

required to ensure public access to the District's activities, public documents, decisions and official meetings by providing information in a timely, accurate and thorough manner (Article 17 para 1 of the BD Statute).

Relevant provisions for the exercise of the right to freedom of expression in B&H (and its legitimate restrictions) are contained in defamation laws, adopted at entity level, which regulate civil liability for harm caused to the reputation of a natural or a legal person by communicating to a third party false facts about a person, while identifying that person (Article 1 para. 1 of the RS Law on Protection against Defamation<sup>75</sup>, Article 1 of the FB&H Law on Protection against Defamation<sup>76</sup>, Article 1 of the BD Law on Protection against Defamation<sup>77</sup>).

One of the essential elements of freedom of expression is the right to access information. As emphasized by the UN Human Rights Committee, Article 19 para. 2 of the ICCPR embraces the right to access information held by public bodies.<sup>78</sup> Such status/relevance of the right to access information has been confirmed by the ECtHR<sup>79</sup>, as well as in the practice of national courts<sup>80</sup>. In B&H, at the B&H level, there is the Law on Freedom of Access to Information<sup>81</sup>, which in Article 4(b) establishes that, in accordance with legal restrictions, every person has the right to access information that is under the control of public authorities, and that public authorities have a corresponding obligation to disclose such information. Similar provisions are contained in the RS Law on Freedom of Access to Information<sup>82</sup> and the FB&H Law on Freedom of Access to Information<sup>83</sup>.

<sup>75</sup> The Law on Protection against Defamation of the Republic of Srpska, *Official Gazette of the Republic of Srpska*, no. 37/2001.

<sup>76</sup> The Law on Protection against Defamation of the FB&H, *Official Gazette of the FB&H*, no. 59/2002, 19/2003 and 73/2005.

<sup>77</sup> The Law on Protection against Defamation of the Brcko District, *Official Gazette of the Brcko District*, no. 14/2003.

<sup>78</sup> UN Human Rights Committee. (2011). General Comment No. 34, Article 19, Freedoms of opinion and expression. UN Doc. CCPR/ C/GC/34, Article 18.

<sup>79</sup> In *Társaság a Szabadságjogokért v. Hungary* (2009), the ECtHR declared "that the human right to freedom of expression gives rise to a right to information held by public authorities when the requester needs the information to contribute to public debate and the public authority, in essence, has monopoly control of the information" (Sandra Coliver, "The Right of Access to Information Held by Public Authorities", *Regardless of Frontiers: Global Freedom of Expression in a Troubled World* (eds. Lee C. Bollinger, Agnès Callamard, Columbia University Press, New York 2021, 66). In *Magyar v. Helsinki* (2016), the Grand Chamber affirmed the 2009. judgement (*Ibid*).

<sup>80</sup> Roy Peled, Yoram Rabin, "The constitutional right to information", *Columbia Human Rights Law Review*, 42/2010.

<sup>81</sup> The Law on Freedom of Access to Information, *Official Gazette of Bosnia and Herzegovina*, no. 28/00, 45/06, 102/09, 62/11, and 100/13.

<sup>82</sup> The Law on Freedom of Access to Information, *Official Gazette of the Republic of Srpska*, no. 20/01.

<sup>83</sup> The Law on Freedom of Access to Information, *Official Gazette of the FB&H*, no. 32/01 and 48/11.

The B&H Law on the High Judicial and Prosecutorial Council (HJPC Law) does not explicitly mention the freedom of expression of judges, but does provide for the protection of judicial immunity. As stated in Article 87, para 1 of the B&H HJPC Law: “A judge or prosecutor shall not be prosecuted, arrested or detained, nor be subject to civil liability for opinions expressed or decisions taken within the scope of official duties.”

The B&H HJPC Law contains several provisions relevant to exercising the freedom of expression of judges. According to Article 82, para 3 of the HJPC Law: “A judge ... may not be a member of any organization that discriminates on the basis of race, colour, sex, sexual orientation, religious affiliation or ethnic origin or national affiliation, nor may he contract the use of facilities belonging to such organizations, and must withdraw from such organizations immediately after becoming aware of their conduct.” Article 82 (para.2) of the HJPC Law stipulates that judges shall not be members of political parties and their bodies, or foundations and associations connected to political parties. The legislator went a step further, demanding that judges should refrain from participating in public events that are connected to political parties. This means that judges should not participate in public forums organized by political parties, or speak at political party rallies (even if it is emphasized that the judge appears as a non-partisan person). Therefore, the B&H HJPC Law explicitly prohibits both active and passive party engagement of judges.

The right of judges to freedom of expression is regulated in more detail by the B&H Code of Judicial Ethics (CJE), adopted by the HJPC. Article 4.3 of the Code states: “A judge, as any other citizen, has the right to freedom of expression, thought, conscience, religion, association and assembly, but in exercising these rights, he should always behave in such a way as to preserve the dignity of the judge’s position, the impartiality and independence of the judiciary.” The CJE also stipulates that judges should not display any religious, political, national or other affiliation during the performance of their official duties (Article 4.4 of the CJE).

The B&H CJE does not allow judges to comment pending cases. According to Article 2.4 of the CJE: “A judge should not make any comments in public or in private, both in relation to the case in which he acts or in which he could act, and also to the cases of another judge, which could justifiably raise doubts about his impartiality or could represent undue influence.” On the other hand, the CJE emphasizes the duty of judges to participate in public debates on judicial reforms and other relevant legal issues. A judge may publicly express his/her views and opinions for the purpose of improving law and the legal system, and comment on social phenomena, but taking into account the principles of judicial impartiality and independence (Article 2.4a).

Relevant provisions on the right to freedom of expression of judges are also contained in the entity laws on courts (the ban on disclosing confidential infor-

mation<sup>84</sup>, the prohibition of displaying religious, political, national or other affiliation during the performance of official judicial duties<sup>85</sup>).

The B&H HJPC Law prescribes several disciplinary offences related to the exercise of the right to freedom of expression. According to Article 56(15) of the HJPC Law, a judge shall be disciplined for “making any comment, while a proceeding is pending in any court, that might reasonably be expected to prejudice or interfere with a fair trial or hearing, or failing to take reasonable steps to maintain and ensure similar abstention on the part of the staff at the court who are subject to his/her authority”. Article 56(4) provides that a judge shall be disciplined if he/she discloses confidential information acquired in a judicial capacity. One of the disciplinary offences prescribed by the HJPC Law is the behaviour inside or outside the court that undermines the dignity of judicial office (Article 56(22)). In some instances, the HJPC disciplinary bodies have imposed disciplinary measures on judges for the aforementioned offences. In its Decision no. 04-02-897-3/2013<sup>86</sup>, the Second Degree Disciplinary Commission of the HJPC publicly reprimanded a judge because he repeatedly made inappropriate statements and comments in public and in the media about pending cases and publicly expressed doubts about the legality of the official actions undertaken.

## 5. CONCLUSION

Judges, like all other citizens, enjoy the right to freedom of expression and can make a valuable contribution to public debates on the status of the judiciary and other relevant issues of the functioning of a legal order. On the other hand, in order to protect the independence and impartiality of the judiciary, it is justified to put certain restrictions on the exercise of the aforementioned right (such as the prohibition of the party membership of judges, or other forms of their political engagement, which should be considered justified).

In order to protect judicial independence, it is necessary to prescribe clear rules regulating the right to freedom of expression of judges, including the explicit recognition of the aforementioned right in laws regulating the status of judges. The B&H HJPC Law does not expressly prescribe the right to free expression of

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<sup>84</sup> Article 61 of the RS Law on Courts – unofficial refined text (<https://www.vladars.net/sr-sp-cyrl/vlada/ministarstva/mpr/Documents/закон%20о%20судовима%20рс,%20интегрални%20текст-.pdf>, 12.12.2022); Article 54 of the Law on Courts of the FB&H (*Official Gazette of the FB&H*, no. 38/2005, 22/2006, 63/2010, 72/2010 – correction, 7/2013, 52/2014, and 85/2021); Article 63 of the BD Law on Courts (*Official Gazette of the BD*, no. 12/20 – refined text).

<sup>85</sup> Article 13 para. 1 of the RS Law on Courts, Article 13 para. 1 of the Law on Courts of the FB&H, Article 14 of the BD Law on Courts.

<sup>86</sup> *Decision no. 04-02-897-3/2013*, <https://vstv.pravosudje.ba/vstvfo/B/141>, 08.11.2022.

judges, which should be amended as part of future changes of this act. The restrictions on the freedom of expression of judges established by the B&H HJPC Law and the B&H CJE can be considered justified, including the prohibition of political engagement of judges (active as well as passive). Disciplinary offenses of judges prescribed by the B&H HJPC Law provide a basis for sanctioning inappropriate communication of judicial office holders, as confirmed by the practice of the HJPC disciplinary bodies.

Given that the use of social media by judges has become increasingly widespread, and that it creates numerous dilemmas related to the appropriateness of such a form of communication, it is necessary to define clear guidelines on the aforementioned issues. Therefore, one of the steps that the HJPC of B&H should take in the upcoming period is to adopt guidelines regarding the social media communication of judges or to supplement the B&H CJE with corresponding provisions, as has already been done in some European countries. The issues associated with the social media communication of judges also need to be given proper attention within the process of the continuous education of judicial office holders.

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## Слобода судијског изражавања у Босни и Херцеговини

**Сажетак:** Слобода изражавања представља фундаментално људско право, заштићено основним међународним инструментима о људским правима и националним уставима. Право на слободу изражавања претвара се као један од кључних елемената демократској друштва и од суштинској је значаја за остваривање људској дигности. Међутим, наведено право нема апсолутни карактер и може се, под одређеним условима, подвргнути ограничењима, на шта указују и одредбе Европске конвенције о људским правима, као и пракса Европској суда за људска права.

Судије иако ће уживају право на слободу изражавања. Иако се учешће судија у расправама о питањима од јавној интереса сматра веома значајним, нарочито када је у питању регулисање стања судства, природа судијске функције налаже ограничавање слободе изражавања носилаца судијске функције, у циљу очувања повјерења јавности у судску власт и њеној улога. Јавно изражавање личних ставова може изазвати дилеме у погледу нејачинствености судије. У раду ће бити указано на значај заштите слободе изражавања судија, али и на неопходност и легитимност њеној ограничавања. Истицаће се законске одредбе којима се регулише право на слободу изражавања судија у Босни и Херцеговини, као и примјери из праксе дисциплинских органа који се односе на остваривање наведеној права. Законска рјешења усвојена у Босни и Херцеговини биће упоређена са одредбама усвојеним у другим земљама и подвргнути критичкој евалуацији.

**Кључне речи:** слобода изражавања, инструменти за заштиту људских права, судије, ограничења, нејачинственост, друштвене мреже, судијска етика.

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