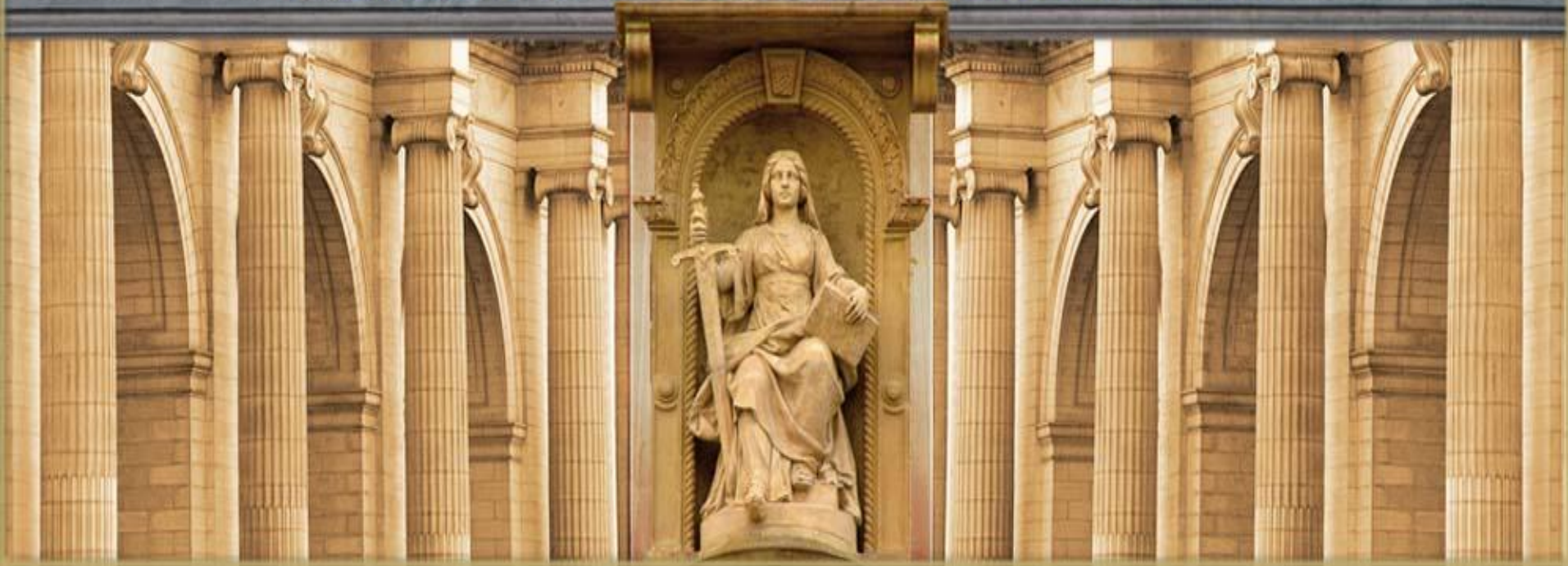


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„Should a judge engage in activities concerning the Rule of law? Review of international standards”

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1. Introduction – redefinition of the judge role. Past and present



Past:

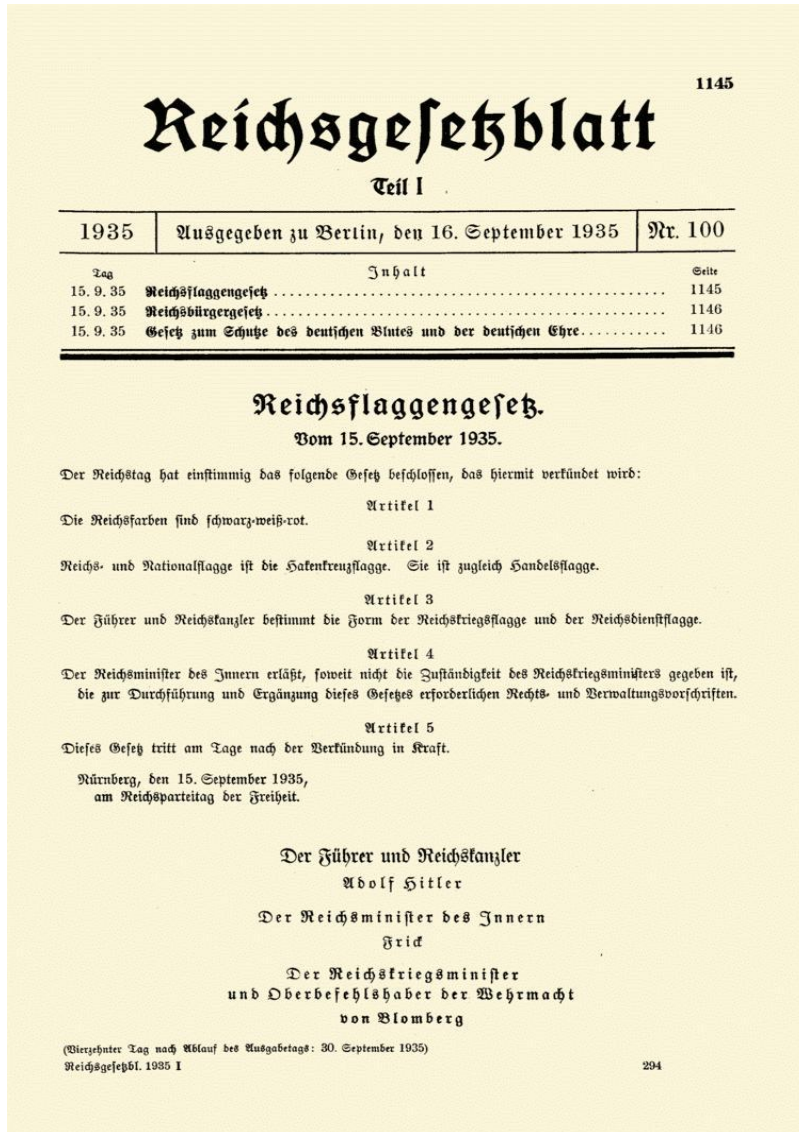
Vision of the Montesquieu:

*„Les juges de la nation ne sont que la **bouche qui prononce les paroles de la loi**, des êtres inanimés, qui n'en peuvent modérer ni la force ni la rigueur”.*

Montesquieu, De l'Esprit des lois, livre Xi, chapitre VI (1748).

*Judges as "only the **mouth that pronounces the words of the law**, inanimate beings who can moderate neither its force nor its rigour".*

1. Introduction – redefinition of the judge role. Past



Past:

One of the consequences of this approach to the rule of law in relation to judges, led to the understanding of the

state ruled by law

only in **formal aspect**, as the state of laws - **Gesetzesstaat**, in which the judges only exercise law, and do not have the power to interpret it. By reducing the rule of law only to this aspect, the state which pass and exercise blatantly contravenes the sense of morality, may be also classified as a state rule by law.

Example: the Nuremberg Laws of 1935; Nürnberger Rassengesetze

1. Introduction – redefinition of the judge role. Present



Present – ongoing redefinition of the judge role.

Causes:

- appearance of the conception of human rights;
- increasing complexity of legal regulations, as an effect of social, economical and technological changes;
- increasing international interdependence which undermine traditional dualism between national and international law – appearance of multicentric system of legal sources .

Example: EU law

1. Introduction – redefinition of the judge role. Present

- Ergo, judges today have to resolve much more complex matters than before. They become guardians of human rights and international obligations of the state. This is particularly evident in the case of EU law, since the burden of ensuring effective judicial protection lies with national courts, which, according to the CJEU jurisprudence, are “Community Courts of General Jurisdiction” (judgment of the Court of First Instance of 10 July 1990, case T-51/89, *Tetra Pak Rausing SA v Commission of the European Communities*, § 42). Therefore, The concept of independence presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions (CJEU judgment of 27.2.2018 r., *Associação Sindical dos Juizes Portugueses*, C-64/16, § 44).

2. International standards

- It should be emphasized that in this area there are no uniform international and European standards, as these issues are regulated by states themselves, either by legislation or by codes of ethics of judges. At international level, there is no legal act of a hard law that would regulate in detail the rules for the participation of judges in public life. The most important conventions included in the catalog of human rights acts guarantee the right to a fair trial (eg Article 14 of the International Covenant on Civil and Political Rights, Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms - ECHR), but they also sometimes apply to the status of a judge.

2. International standards

- Despite the lack of hard legal instruments, there are several international documents referring to the status of a judge, and included in the so-called "soft international law" (soft law). This is an extremely unhappy name, a blurring notion of the law. What makes up the concept of soft law? Apart from the doubts concerning the nature of soft law acts, it should be stated that they are not legally binding for states, although their observance is an element of good custom and civilization standards, and their non-compliance may expose the state to various decentralized sanctions in the international law system. In particular, the degree of legitimization of a given soft law standard in the "eyes" of its addressee, that is the entity applying the law, is significant. Legitimized, or accepted, soft law standard can sometimes be much more effective than the illegitimate hard law norm.

2. International standards - most important documents

- Basic Principles on the Independence of the Judiciary, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985
- Universal Charter of the Judge, approved by the member associations of the International Association of Judges in 1999
- Magna Carta of Judges (Fundamental Principles) summarising and codifying the main conclusions of the Opinions of the Consultative Council of European Judges, advisory body of the Council of Europe
- Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe to member states on judges: independence, efficiency and responsibilities

2. International standards - most important documents

- Opinion no. 3 of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality
- The Bangalore Principles of Judicial Conduct 2002 – The Bangalore Draft Code of Judicial Conduct 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002)
- Commentary on The Bangalore Principles of Judicial Conduct, September 2007, United Nations Office on Drugs and Crime
- European Charter on the statute for judges, Council of Europe, Strasbourg, 8 - 10 July 1998
- Opinions of the European Commission for Democracy through Law - better known as the Venice Commission

3. General conclusion – judge as an ordinary citizen

- „Judges freely carry out activities outside their judicial mandate including those which are the embodiment of their rights as citizens. This freedom may not be limited except in so far as such outside activities are incompatible with confidence in, or the impartiality or the independence of a judge, or his or her required availability to deal attentively and within a reasonable period with the matters put before him or her. The exercise of an outside activity, other than literary or artistic, giving rise to remuneration, must be the object of a prior authorization on conditions laid down by the statute.”
- European Charter on the statute for judges, Council of Europe, Strasbourg, 8 - 10 July 1998, point 4.2.

3. General conclusion – judge as an ordinary citizen

Similarly:

- „8. 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.”
- Basic Principles on the Independence of the Judiciary, point 8.

3. General conclusion – judge as an ordinary citizen

As a rule, the judge is therefore treated like other citizens. This is extremely important because in the discussion on the admissible standards of public behavior of the judge, two extreme positions seem to dominate. The first of them, which can be called the "**judge in the glass tower**", incorrectly defines the judge's independence and demands that the judge be a person cut off from society in an ideal variant devoid of political convictions, worldview and social activism, not manifesting his religion. This anachronistic approach from the time before the development of the concept of human rights denies judges the rights and freedoms of other people and citizens. It is unsustainable nowadays.

3. General conclusion – judge as an ordinary citizen

In turn, a different position, which can be described as an "**activist judge**" is typical of authoritarian states in which there is no division of power, the judge is only a public official who is obliged to publicly support the official state ideology. International documents mean that the judge should be treated like other citizens in the exercise of rights and freedoms, but they allow the necessary restrictions in this regard. It is interesting to justify this position.

3. General conclusion – judge as an ordinary citizen

27. 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. Moreover, as citizens, judges enjoy the fundamental rights and freedoms protected, in particular, by the European Convention on Human Rights (freedom of opinion, religious freedom, etc). They should therefore remain **generally free to engage in the extra-professional activities of their choice.**

Opinion no. 3 of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality

3. General conclusion – judge as an ordinary citizen

Complete isolation neither possible nor beneficial

31. How independent of society is a judge expected to be? The vocation of a judge was once described as being “something like a priesthood”. The complete isolation of a judge from the community in which the judge lives is neither possible nor beneficial.

- Commentary on The Bangalore Principles of Judicial Conduct

3. General conclusion – judge as an ordinary citizen

Contact with the community is necessary

32. If a judge is not to be sealed hermetically in his or her home after working hours, the judge will be exposed to opinion shaping forces, and may even form opinions as a consequence of exposure to friends, colleagues, and the media. Indeed, knowledge of the public is essential to the sound administration of justice. A judge is not merely enriched by knowledge of the real world; the nature of modern law requires that a judge “live, breathe, think and partake of opinions in that world”. Today, the judge’s function extends beyond dispute resolution. Increasingly, the judge is called upon to address broad issues of social values and human rights, to decide controversial moral issues, and to do so in increasingly pluralistic societies. A judge who is out of touch is less likely to be effective. Neither the judge’s personal development nor the public interest will be well served if the judge is unduly isolated from the community he or she serves. Legal standards frequently call for the application of the reasonable person test. Therefore, a judge should, to the extent consistent with the judge’s special role, remain closely in touch with the community.

4. Possible situations where judge may engage activities concerning the Rule of law even when they fall outside of their judicial activities

- Public appearance – political statements;**
- Public appearance – discussion about the law**
- Engagement in different kind of associations**
- Participation in legal education**

4. Public appearance – political statements

Freedom of expression and association

8. 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.*
9. Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence.

Basic Principles on the Independence of the Judiciary

4. Public appearance – political statements

“The individual freedom of judges is an item for permanent discussions. The Concept seems to set high standards when it states that ‘judges ... may not perform political activities, may not be party members ...’. Based on past experience, it is easy to understand the concern expressed. It should be added that in some other European states the private life of judges is not restricted in such a way.”
CDL(1995)73rev, Opinion on the regulatory concept of the Constitution of the Republic of Hungary, §10

“**[Judges] may not be members of political parties or participate in political activities.**”
CDL-AD(2005)003, Joint Opinion on a Proposal for a Constitutional Law on the Changes and Amendments to the Constitution of Georgia by Venice Commission and OSCE/ODIHR, §104

“Moreover, **judges should not put themselves into a position where their independence or impartiality may be questioned. This justifies national rules on the incompatibility of judicial office with other functions and is also a reason why many states restrict political activities of judges.**”
CDL-PI(2015)001 , CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges, §62

4. Public appearance – political statements

“[...] [A] judge should first resign before being able to contest political office, because if a judge is a candidate and fails to be elected, he or she is nonetheless identified with a political tendency to the detriment of judicial independence.”

CDL-AD(2008)039, Opinion on the Draft Amendments to the Constitutional Law on the Status of Judges of Kyrgyzstan, §45

“[...] [I]t is unclear whether the prohibition [for a judge] of ‘speaking in support or against any political party’ should be understood as a complete ban on expressing views on any political matter, including the functioning of the justice system. The ECtHR pointed out the ‘chilling effect’ that the fear of sanctions such as dismissal has on the exercise of freedom of expression, for instance for judges wishing to participate in the public debate on the effectiveness of the judicial institutions. Consequently, should the expression ‘speaking in support or against any political party’ be interpreted as including speech on the functioning of the judicial system, the fact that this may lead to dismissal would constitute a disproportionate interference.”

CDL-AD(2014)018, Joint opinion of the Venice Commission and OSCE/ODIHR on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic, §34

4. Public appearance – political statements

•Contributing to publications

151. Special considerations arise when a judge writes or contributes to a publication, whether related or unrelated to the law. **A judge should not permit anyone associated with the publication to exploit the judge's office.** In contracts for publication of a judge's writings, the judge should retain sufficient control over advertising to avoid exploitation of the judge's office.

Appearance on commercial radio or television

152. The appearance of a judge on a commercial radio or television network might be seen as advancing the financial interests of that organization or its sponsors. **Care should therefore be taken in doing so. On the other hand, many citizens secure their knowledge about events, social affairs and the law from such outlets.** Depending on the arrangements, therefore, **participation in a programme connected with the law could be appropriate.** *Several factors need to be considered in determining whether or not a judge should participate in such programmes: the frequency of appearance, the audience, the subject matter, and whether the programme is commercial or not. For example, depending on the circumstances, a discussion of the role of the judiciary in government or the court's relationship with community education and treatment facilities might be appropriate.*

4. Public appearance – political statements

31. **More generally, it is necessary to consider the participation of judges in public debates of a political nature.** In order to preserve public confidence in the judicial system, judges should not expose themselves to political attacks that are incompatible with the neutrality required by the judiciary.

34. However, judges should be allowed to participate in certain debates concerning national judicial policy. They should be able to be consulted and play an active part in the preparation of legislation concerning their statute and, more generally, the functioning of the judicial system. This subject also raises the question of whether judges should be allowed to join trade unions. Under their freedom of expression and opinion, judges may exercise the right to join trade unions (freedom of association), although restrictions may be placed on the right to strike.

Opinion no. 3 of the Consultative Council of European Judges (CCJE)

4. Public appearance – political statements

136. A judge should not involve himself or herself inappropriately in public controversies. The reason is obvious. The very essence of being a judge is the ability to view the subjects of disputes in an objective and judicial manner. It is equally important for the judge to be seen by the public as exhibiting that detached, unbiased, unprejudiced, impartial, open-minded, and even-handed approach which is the hallmark of a judge. **If a judge enters the political arena and participates in public debates - either by expressing opinions on controversial subjects, entering into disputes with public figures in the community, or publicly criticizing the government – he or she will not be seen to be acting judicially when presiding as a judge in court.** The judge will also not be seen as impartial when deciding disputes that touch on the subjects about which the judge has expressed public opinions.

Commentary on The Bangalore Principles of Judicial Conduct

4. Public appearance – political statements

When the judge may feel a moral duty to speak

140. Occasions may arise when a judge - **as a human being with a conscience, morals, feelings and values - considers it a moral duty to speak out.** For example, in the exercise of the freedom of expression, a judge might **join a vigil, hold a sign or sign a petition to express opposition to war, support for energy conservation or independence, or funding for an anti-poverty agency.** These are expressions of concern for the local and global community. If any of these issues were to arise in the judge's court, and if the judge's impartiality might reasonably be questioned, the judge must disqualify himself or herself from any proceedings that follow where the past actions cast doubt on the judge's impartiality and judicial integrity.

Commentary on The Bangalore Principles of Judicial Conduct

4. Public appearance – political statements

A judge may speak out on matters that affect the judiciary

138. There are limited circumstances in which a judge *may properly speak out about a matter that is politically controversial, namely, when the matter directly affects the operation of the courts, the independence of the judiciary (which may include judicial salaries and benefits), fundamental aspects of the administration of justice or the personal integrity of the judge*. However, even on these matters, a judge should *act with great restraint*. While a judge may properly make public representations to the government on these matters, the judge must not be seen as “lobbying” government or as indicating how he or she would rule if particular situations were to come before the court. Moreover, a judge must remember that his or her public comments may be taken as reflecting the views of the judiciary; it may sometimes be difficult for a judge to express an opinion that will be taken as purely personal and not that of the judiciary in general.

4. Public appearance – political statements

134. A judge, on appointment, does not surrender the rights to freedom of expression, association and assembly enjoyed by other members in the community, nor does the judge abandon any former political beliefs and cease having any interest in political issues. However, restraint is necessary to maintain public confidence in the impartiality and independence of the judiciary. *In defining the appropriate degree of involvement of the judiciary in public debate, there are two fundamental considerations. The first is whether the judge's involvement could reasonably undermine confidence in his or her impartiality. The second is whether such involvement may unnecessarily expose the judge to political attacks or be inconsistent with the dignity of judicial office. If either is the case, the judge should avoid such involvement.*

Commentary on The Bangalore Principles of Judicial Conduct

4. Public appearance – political statements

39. The CCJE considers that rules of professional conduct should require judges to avoid any activities liable to compromise the dignity of their office and to maintain public confidence in the judicial system by minimising the risk of conflicts of interest. To this end, they should refrain from any supplementary professional activity that would restrict their independence and jeopardise their impartiality. **The precise line between what is permitted and not permitted has however to be drawn on a country by country basis (...).**

Opinion no. 3 of the Consultative Council of European Judges (CCJE)

4. Public appearance – political statements

Reasonable observer test

1.3 A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a **reasonable observer** to be free therefrom.

- The question is whether a reasonable observer would (or in some jurisdictions “might”) perceive the tribunal as independent.

In attempting to strike the right balance, the judge must consider whether - in the eyes **of a reasonable, fair-minded and informed member of the community - the proposed conduct is likely to call into** question his or her integrity or to diminish respect for him or her as a judge. If that is the case, the proposed course of conduct should be avoided.

Commentary on The Bangalore Principles of Judicial Conduct

4. Public appearance – political statements

106. Accordingly, it has been suggested that in making a judgment on such a matter, six factors should be considered:

(a) The public or private nature of the act and specifically whether it is contrary to a law that is actually enforced;

(b) The extent to which the conduct is protected as an individual right;

(c) The degree of discretion and prudence exercised by the judge;

(d) Whether the conduct was specifically harmful to those most closely involved or reasonably offensive to others;

(e) The degree of respect or lack of respect for the public or individual members of the public that the conduct demonstrates;

(f) The degree to which the conduct is indicative of bias, prejudice, or improper influence.

The use of these and similar factors would assist in striking a balance between public expectations and the judge's rights.

4. Public appearance – discussion about the law

•156. A judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, both within and outside the judge's jurisdiction. **Such contributions may take the form of speaking, writing, teaching or participating in other extra-judicial activities.** Provided that this does not detract from the discharge of judicial obligations, and to the extent that time permits, a **judge should be encouraged to undertake such activities.**

4. Public appearance – discussion about the law

A judge may participate in a discussion of the law

139. A judge may participate in discussion of the law for educational purposes or to point out weaknesses in the law. In certain special circumstances, a judge's comments on draft legislation may be helpful and appropriate, provided that the judge avoids offering informal interpretations or controversial opinions on constitutionality. Normally, judicial commentary on proposed legislation or on other questions of government policy should relate to practical implications or drafting deficiencies and should avoid issues of political controversy. In general, such judicial commentary should be made as part of a collective or institutionalised effort by the judiciary, not of an individual judge.

Commentary on The Bangalore Principles of Judicial Conduct

4. Public appearance – Engagement in different kind of associations

Art. 12 - Associations

The right of a judge to belong to a professional association must be recognized in order to permit the judges to be consulted, especially concerning the application of their statutes, ethical and otherwise, and the means of justice, and in order to permit them to defend their legitimate interests.

Universal Charter of the Judge

4. Public appearance – Engagement in different kind of associations

25. Judges should be free to form and join professional organisations whose objectives are to safeguard their **independence, protect their interests and promote the rule of law.**

Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities

4. Public appearance – Engagement in different kind of associations

167. A judge may participate in community, non-profit-making organizations of various types by becoming a member of an organization and its governing body. Examples include charitable organizations, university and school councils, lay religious bodies, hospital boards, social clubs, sporting organizations, and organizations promoting cultural or artistic interests. However, in relation to such participation, the following matters should be borne in mind:

- (a) It would not be appropriate for a judge to participate in an organization if its objects are political, if its activities are likely to expose the judge to public controversy, or if the organization is likely to be regularly or frequently involved in litigation;
- (b) A judge should ensure that the organization does not make excessive demands on his or her time;
- (c) A judge should not serve as legal adviser. This does not prevent a judge from expressing a view, purely as a member of the body in question, on a matter which may have legal implications; but it should be made clear that such views must not be treated as legal advice. Any legal advice required by the body should be professionally sought;
- (d) A judge should be cautious about becoming involved in, or lending his or her name to, any fund raising activities; and
- (e) A judge should not personally solicit membership if the solicitation might reasonably be perceived as coercive or is essentially a fund-raising mechanism.

4. Public appearance – Engagement in different kind of associations

168. A judge should not hold membership in any organization that discriminates on the basis of race, sex, religion, national origin, or other irrelevant cause contrary to fundamental human rights, because such membership might give rise to the perception that the judge's impartiality is impaired. A judge may, however, become a member of an organization dedicated to the preservation of religious, ethnic or legitimate cultural values of common interest to its members.

127. It is not advisable for a judge to belong to a secret society where lawyers who appear before him or her are also members, since it may be inferred that favours might be extended to those particular lawyers as part of the brotherhood code.

4. Public appearance – Participation in legal education

Participation in legal education

157. A judge may contribute to legal and professional education by delivering lectures, participating in conferences and seminars, judging student training hearings and acting as an examiner. **A judge may also contribute to legal literature as an author or editor. Such professional activities by judges are in the public interest and are to be encouraged.** However, the judge should, where necessary, make it clear that comments made in an educational forum are not intended as advisory opinions or a commitment to a particular legal position in a court proceeding, particularly because judges do not express opinions or give advice on legal issues that are not properly before a court.

Commentary on The Bangalore Principles of Judicial Conduct

5. Conclusion

Judges may, and sometimes have a moral obligation to engage in activities/to publically address issues concerning the Rule of law even when they fall outside of their judicial activities

Chapter VIII – Ethics of judges

72. Judges **should be guided in their activities by ethical principles of professional conduct**. These principles not only include duties that may be sanctioned by disciplinary measures, but offer guidance to judges on how to conduct themselves.

Thank you for attention