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"To Post or Not To Post":

Judges, Public Prosecutors and Social Media

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1. Introduction

The topic of judicial ethics has become more and more relevant in the last years, especially in connection with the issue of the **use of social media by judges and public prosecutors**.

Although members of the judiciary, like other citizens, are entitled to freedom of expression, belief, association and assembly, they should always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary. The way members of the judiciary use social media may have an impact on the public's perception of judges and public prosecutors and confidence in judicial systems.

The topic of the use of social media by the judiciary is complex. On one hand, particular instances of judges using social media have led to situations where those judges have been perceived to be biased or subject to inappropriate outside influences. On the other hand, social media can create opportunities to spread judges' and prosecutors' expertise, increase the public's understanding of the law and foster an environment of open justice and closeness to the communities that judges serve. Additionally, there have been instances where social media have served as a platform for online abuse or harassment of judges.

The European Commission for the Efficiency of Justice (CEPEJ) adopted in 2018 a "**Guide on Communication with the Media and the Public for Courts and Prosecution Authorities**", where the growing importance of the image the judiciary gives to citizens is highlighted: "*in terms of image, nothing is taken for granted and justice cannot escape this trend. Every alleged mistake is likely to receive a broad attention with possible harmful consequences for the institutions and those who represent them. As a result, justice cannot, as it was in the past, confined itself any longer in an ivory tower, deliver judgements without taking into account how these will be received and understood, and look down at the people' and media's agitation with detachment and diffidence*" (article 1.3)[1].

The aim of this paper is to offer an **overview of the European standards about judicial ethics**, with particular regard to the issue of the use of social media by judges and public prosecutors and the topic of the balance between **freedom of expression** and **deontological or disciplinary liability**.

2. Judicial Ethics: International Guidelines

The need of an independent and impartial judge is mentioned in all international and national laws concerning the judiciary, as a precondition to ensure the right to a fair hearing.

[1] The Guide, adopted at the 31st Plenary Meeting of the CEPEJ, Strasbourg, 3 and 4 December 2018, is available at https://rm.coe.int/cepej-2018-15-en-communication-manual-with-media/16809025fe (all websites were checked in June 2022).

For instance, article 6 of the **European Convention on Human Rights** states that "*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*". The same is provided also in the **European Union Charter of Fundamental Rights,** article 47, paragraph 2.

Those two principles are mentioned also in the **International Covenant on Civil and Political Rights**, article 14, which shows how the independence of the judiciary and the connected impartiality are common values in all democratic States: "*In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law*".

As it was pointed out by the **Council of Europe** in the **Opinion n. 1 of 2001** on independence of judges the "*independence is not a prerogative or privilege in their own interests, but in the interests of the rule of law and of those seeking and expecting justice*[2]".

Those values have been recognized as fundamental also by the judiciary itself, for instance through the opinion jointly adopted in 2009 by the Consultative Council of European Judges (CCJE) and the Consultative Council of European Prosecutors (CCPE) on the relations between judges and prosecutors in a democratic society, called **Bordeaux Declaration**[3]. Both Councils have recognised, with special regards to the scope of this analysis, that "*judges and public prosecutors must both enjoy independence in respect of their functions and also be and appear independent from each other*" and have underlined that "*the sharing of common legal and ethical values by all the professionals involved in the legal process is essential for the proper administration of justice*", devoting special attention to the relationship between judges, public prosecutors and media.

Given the essentiality of the above-mentioned values, **appearing impartial is as important as being impartial**. New problems are coming out from the use that members of the judiciary, especially as individuals, do of the social networks nowadays. The core issue is: the imagine of the judiciary as an independent and impartial body can be undermined, from the citizens' point of view, by a **misuse of social media**?

This question brings us to a second relevant issue: to what extent the **freedom of expression** of a judge or a public prosecutor can be limited? Even though members of the judiciary represent in a certain way the State they are serving, they are still citizens to whom the basic human and civil rights cannot completely be denied, especially the freedom of expression, recognized as a fundamental right at European and international level.

[2] The document is available at https://rm.coe.int/1680747391.
[3] The Opinion is available at https://rm.coe.int/1680747391.

For instance, the **International Covenant on Civil and Political Rights** (ICCPR) recognizes (article19) to all human beings both the right to freely express with every means (orally, writing, in an artistic form or with every other media) and to hold opinion without any interference. But, at the same time, it underlines the necessity of exercising this right with 'responsibility', introducing an exception: "*It [the freedom of expression] may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary*". The right to free expression is also guaranteed in article 10 of the **European Convention of Human Rights**, where we can find similar words, and it has also been included in article 11 of the **Charter of Fundamental Rights of the European Union**, that is now annexed to the Treaty and have the same legal value as the rules contained therein (as stated in article 6 of the Treaty on European Union).

This means that, being a relative right, freedom of expression can be balanced if it interferes with other principles and values, as the independence and impartiality of the judiciary.

Article 4.6 of the so called Bangalore Principles – **The Bangalore Draft Code of Judicial Conduct**, adopted in 2001 and revised in 2002, a set of guidelines adopted by the Judicial Group on Strengthening Judicial Integrity and universally recognized as standard principles of judicial conduct – emphasize that judges are entitled to freedom of expression, belief, association and assembly, like any other citizen, "*but in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary*"[4].

On this side, the main issue that we are facing is the **absence of hard law rules** that can set boundaries, especially in the field of the relationships between members of the judiciary and social media. In fact, there is currently no consensus on judges' and public prosecutors' use of social media and most judiciaries' rules and regulations are silent on the topic.

Evidence of the great debate about the need of codified rules in this field comes out from the meeting of **The Global Judicial Integrity Network** held in Vienna in 2018, where judges and other stakeholders raised this problem and expressed their concerns on the use of social media by the judiciary. It is worth remembering that The Global Judicial Integrity Network was established – in the context of **The Global Programme for the Implementation of the Doha Declaration** on Integrating Crime Prevention and Criminal Justice into the Wider United Nations Agenda to Address Social and Economic Challenges and to Promote the Rule of Law at the National and International Levels, and Public Participation launched by the United Nations Office on Drugs and Crime[5] – as a

[4] The Bangalore Principles are available at https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf; the detailed 2007 Commentary is available at https://www.unodc.org/res/ji/import/international_standards/commentary_on_the_bangalore_principles_of_judicial_conduct/bangalore_principles_english.pdf.

[5] The Declaration is available at https://www.unodc.org/documents/congress//Declaration/V1504151_English.pdf.

platform to provide assistance to judiciaries in strengthening judicial integrity and preventing corruption in the justice system.

In this context, a set of **Non-Binding Guidelines on the Use of Social Media by Judges** stem from the discussions during the Expert Group Meeting held in Vienna in 2018, the outcomes of the survey as well as wider consultations with Network participants: they can represent a guide for domestic judicial systems in addressing this topic and judges and public prosecutors may also make direct recourse to them to find principles about how to behave when using social media[6].

However, as it has been pointed out, it can also be considered "*new wine in old bottles"*[7]: in other words, it seems to be an old problem with a new dress. In this sense, even if social media have their own peculiarities, judges and public prosecutors can find a useful guide for their behaviour into the aforementioned **Bangalore Principles of Judicial Conduct**, adopted in the UN context in 2001.

This document, even if it is not mentioning social networks, is the outcome of a long path of mediation between the different member States to elaborate a common and universal standard for the judges' conduct, also trying to avoid any negative impact to the independence of the judiciary. The principles set out are the expression of the highest legal traditions about judicial functions, but, unlike previous deontological codes, the Bangalore Principles try to give concrete advice to assess bias and concentrates on six core values: **independence, impartiality, integrity, propriety, equality of treatment, competence and diligence**.

The main objective of this document – as of most judicial codes – is to assure **public trust** in judges, which is inevitably connected to the image the judiciary gives to citizens: judges and public prosecutors are required to uphold the highest ethics standards and to show integrity and propriety also when expressing their opinions on social media.

3. Use of Social Media by the Judiciary: Pros and Cons

When dealing with judges and social media, we have to make a basic distinction between the case where they are expressing themselves as **members of the judiciary** and the one where they are using social media as **private individuals**, for instance to keep in touch with far and close friends, to share moments of their lives or to express their opinion on public or private matters.

The use of social media by judges is analysed in many documents just from the perspective of the **negative perception** that they can give to citizens. For this reason, all the (binding or not binding)

[6] The complete text of the Guidelines can be found on the official site https://www.unodc.org/res/ji/import/international_standards/social_media_guidelines/social_media_guidelines_final.pdf. The Discussion Guide for the Meeting is available at https://www.unodc.org/res/ji/import/policy_papers/social_media_discussion_guide/discussion_guide_social_media.pdf.

[7] K. R. Fisher, "*Judicial Ethics in a World Of Social Media*", in A. Schoeller-Schletter (ed.), "*Impartiality of Judges and Social Media Approaches, Regulations and Results*", 2020, 9.

resolutions about the judges' behaviour stress the necessity of using a proper language, not talking about the cases that come before them and avoiding comments or posts about political sensitive topics.

All these principles reproduce the myth of the judge not only as '*bouche de la loi*', but as a '*super human*' that sets highest moral standards for his or her life, sometimes forgetting or underestimating the mobility of the border of the concept of morality, especially in a fully globalized era in which the collective has left the stage to the individual and then to the infinite points of view brought by each one.

On the opposite, social media can also have a really **positive impact** on how citizens relate to justice. For instance, feeling more proximity with the judiciary is also a way to put in practice a principle that is common to all the democratic legal traditions: grant to everyone, in equal conditions, the access to justice. Social media and their capacity to **narrow physical distances** can also lead to narrow the distance that people feel about law issues.

More in general, the participation of judges in the public debate generated by different social media can be, following certain rules, an opportunity to increase the public understanding of how the complex machine of the justice system works, improving the trust in the judiciary[8].

Anyway, starting from what it seems to be the less complex side of this phenomenon, both for judges and prosecutors, there are strong and clear provisions on how to relate with the medias when they are **acting as part of the judiciary**. It is clear that public communications in which a judge gives information about matters in progress or about matters that were brought before him or her are totally inappropriate and often formally sanctioned by domestic codes. Normally, the competent authority for the purpose is the judicial self-government body or the President of the Court or the Head of the Public Prosecutor's Office, but also mere deontological or ethical sanctions might be enforced.

In this way a **fair balance** between the necessity to inform the population on important or relevant cases and the fact that the judge or public prosecutor is not expressing his or her own opinion but the opinion of the Office – as guarantee of his or her own independence – has to be reached. This is an important point also to ensure that the public opinion is correctly informed and to avoid unilateral media narration of judicial events, that might be unprecise and tend to spectacularize the cases, violating the rights to privacy of the accused and the victim.

The **European Commission for the Efficiency of Justice (CEPEJ)**, in the **Guide on Communication with the Media and the Public for Courts and Prosecution Authorities** adopted

[8] This fundamental role of the judges was recognized also in the Bangalore Principles, even if it was not directly related to social media: "*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 extrajudicial 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*" (Commentary, paragraph 156).

in 2018, pointed out that it is important that the judiciary communicate with citizens to inform about the organization of their activity, but also "*when the public debate asks questions about the functioning of justice or specific processes/causes, it is important that the communication takes place in such a way as to provide all the objective and legal elements to direct the debate on correct and not mystified directions*", for instance "*in emergency situations (crisis communication), that is, when the reaction by the institutions is not plannable at the table: it can happen if a magistrate or a judicial institution is publicly attacked (or) in case of suspicion or evidence of judicial error*"[9].

It is more difficult to clearly understand the rules to which judges are subject when using social media as **private citizens**. In the absence of specific international or national regulations we can start from a simple reflection that can be the base for discussion. In an era where social media are becoming increasingly important we cannot imagine to prohibit to judges to use them, not only because it would be unreasonable to ask them to totally retreat from public life, that it is increasingly based on virtual interactions, but also because it is necessary for judges and public prosecutors to understand how the different social media work because more and more cases that come before the Court can implies the use of technologies[10].

What is important is that judges take in mind, when expressing their opinion on the social media, that if they touch sensitive topics they can be seen as not **impartial** if a similar matter is before them. An exception can be find directly in the Commentary to the Bangalore Principles, where it is stated that "*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*" (Commentary, paragraph 138).

As it was pointed out also in the abovementioned Non-Binding Guidelines, judges have to be aware of the **specificity of social media**, especially the potentiality of reach a greater public and the consequent amplification of the content of their 'posts' or of simple actions such as 'liking' a page or a post and, on the other hand, the long permanence that any action made on the internet has.

For instance, also concepts like being 'friend' or to 'follow' someone have a completely different meaning in the social media context than they usually have in traditional usage. In some cases, those categories don't mean nothing more than having a relationship with any content provider, as it can be the relation a reader might have with a journalist. In some other cases, if the interaction becomes more personal, than probably the judge has to use the same rules of restraint that he or she is applying with 'real' friends: thus, it cannot be impartial when taking decisions if one of this 'virtual friend' is a

[9] The complete guide can be found at https://rm.coe.int/cepej-2018-15-en-communication-manual-with-media/16809025fe.

[10] A similar point of view is expressed in the aforementioned Commentary to the Bangalore Principle, paragraph 31.

party or is involved in the case. Much certainly depends also on the nature of the social media platform itself and on the kind of possible interactions between its users.

On this aspect, we can find some useful advice in the aforementioned Non-Binding Guidelines, where a whole paragraph is dedicated to friendships and relations online: it is suggested for instance to periodically control the pages liked or the friends accepted, in order to remove or block friends or followers, especially where failure to do so would reasonably create an **appearance of bias or prejudice**.

Due to the rising importance of knowing the risks and the benefits of the social media it is fundamental to **train newly appointed judges and prosecutors** on this topic and on the use of technology in general, also because for the new generations of members of the judiciary having a 'virtual life' is not exceptional.

4. Freedom of Expression of Members of the Judiciary in the Italian System

Article 21 of the **Italian Constitution** guarantees free speech regardless of how opinions are expressed. However, the protection of free speech is not unlimited, as the Italian Constitution also guarantees other rights such as human dignity or the right to privacy.

With reference to the subject matter of this paper, one important question is whether a judge's or public prosecutor's free speech on social networks is or can be limited in the Italian domestic system. To answer this question, the present section discusses, first, the general interplay between judges' and public prosecutors' free speech and other constitutional rights; second, it will be shown that, absent specific rules on this topic, judges and prosecutors can rely at most on non-binding or disciplinary rules; third, the recent position of the Italian Supreme Court of Cassation is presented, which however adds little to the current scenario. Therefore, we conclude that specific and binding rules would be a more appropriate tool to regulate the use of social networks by Italian judges and prosecutors.

Long before social networks existed, the **Italian Constitutional Court** ruled on the correct balance that must exist between the right of judges and prosecutors to free speech and their duties of impartiality and independence[11]. In particular, the Italian Constitutional Court confirmed that judges and prosecutors are granted free speech too, although in their case the protection of other constitutional rights has a role to play.

The Italian Constitution provides that judges and prosecutors must be **impartial and independent** (articles 101 and 104 of the Italian Constitution). These principles apply not only in the performance of judicial tasks, but also in private life. In particular, even when acting as an ordinary citizen, the

[11] *See* Constitutional Court, judgment no. 100 of 7 May 1981.

judge or the prosecutor cannot behave in such a way as to cast doubt on his or her independence and impartiality.

Respect of these principles even in private life is essential to ensure the credibility of the entire judicial order and the public's trust in justice, which in turn ensure that judges' decisions are respected. On these grounds, the Italian Constitutional Court allowed limitations on judges' and prosecutors' free speech that are greater than those normally applicable to citizens.

With particular regard to judges' and prosecutors' free speech on social networks, the Italian legal system does not provide for generally applicable rules: only for administrative judges specific although non-binding rules have been set, while for ordinary judges the only guidance may be retrieved indirectly from other sources.

As for **administrative judges**, the **Presidential Council of Administrative Justice** (*Consiglio di Presidenza della Giustizia Amministrativa*), i.e. the self-governing body of administrative judges, has recently adopted a **resolution** dealing explicitly with administrative judges' free speech on social networks[12].

The resolution provides for non-binding rules and stresses the importance of striking the right balance between free speech and the use of social networks by administrative judges, who are not just private citizens but have an institutional role and a special status.

It lays down several important principles, the most important being the following: (i) the responsibility for statements disclosed via social networks is always personal and cannot involve the State; (ii) judges may use social networks for personal purposes even through aliases, provided that this is done without an unlawful purpose; (iii) judges must always abide by independence and impartiality in order not to compromise the trust that citizens have in justice; (iv) judges must always communicate with appropriate language; (v) judges should be particularly careful not to communicate with parties to the proceedings, with lawyers or in general with persons involved in the proceedings before them; (vi) social networks cannot be used to advertise personal activities of the magistrate; (vii) judges should be careful when accepting friends on social networks or connecting with someone (friendships with persons involved in the professional activity should in general be avoided). In this respect, the resolution clarifies that being connected or friends with a party or a lawyer on a social network does not prevent the magistrate from deciding on a case, as – the resolution acknowledges – friendships in real life are not the same as friendships on social networks[13].

[12] Administrative Presidential Council, resolution of 25 March 2021, available at https://www.giustizia-amministrativa.it/web/guest/-/delibera-sull-uso-dei-mezzi-di-comunicazione-elettronica-e-dei-social-media-da-parte-dei-magistrati-amministrativi-consiglio-di-presidenza-della-giust.

[13] In general, pursuant to article 51 of the Italian Code of Civil Procedure, in the cases specifically set forth therein, a party who considers that the judge is not impartial, for example because he or she is friends with or a relative to the other party, may request the substitution of the judge.

To summarise, the choice of the Presidential Council of Administrative Justice was not to completely prevent administrative judges from using social networks. It was rather to lay down **recommendations**, which are not binding and, if infringed, do not trigger disciplinary proceedings. In other words, the resolution amounts to mere guidelines of a very general content, that don't provide administrative judges with practical rules of conduct to follow in their daily life. For example, the international legislation that was discussed earlier in this paper suggested that judges should periodically check their friendships or the groups they follow on social networks, as to avoid having their impartiality and independence called into question, while none of this is provided for in the Presidential Council of Administrative Justice's resolution.

As to **ordinary judges**, the **High Council of the Judiciary** (*Consiglio Superiore della Magistratura*), i.e. the self-governing body guaranteeing the autonomy and independence of the judiciary from the other powers of the State and dealing with all the most important decisions about judges' and public prosecutors' career (including disciplinary proceedings), has not yet intervened to lay down specific rules on the use of social networks by judges and prosecutors. The only guidance in this respect is to be found indirectly, by interpreting the Law on the Disciplinary Responsibility of Magistrates (the "**Disciplinary Law**")[14] or by looking at soft law instruments such as the Code of Ethics of the National Association of Magistrates (the "**Code of Ethics**") [15].

With respect to the **Disciplinary Law**, its application may result in judges and prosecutors facing disciplinary procedures and possibly sanctions even when they express their opinion via social networks, whether in the performance of their duties or in private life.

Indeed, article 1 of the Disciplinary Law provides that, in their work, judges and prosecutors must respect the principles of impartiality, confidentiality and protection of human dignity. The abovementioned law adds that, even in his or her private life, the judge or the prosecutor must not behave in such a way as to compromise his or her personal credibility, his or her esteem and decorum or the esteem of the judiciary. Other examples of conduct that could give raise to disciplinary sanctions for the judge or the prosecutor under the Disciplinary Law include disclosure of procedural documents covered by secrecy and breach of confidentiality of proceedings, whether ongoing or completed. Similarly, giving an interview about ongoing trials or soliciting publicity about one's office activities may also lead to disciplinary sanctions. The Disciplinary Law could be infringed also by committing a criminal offence, such as defamation.

It follows that, even in the absence of specific rules for the use of social networks, the Disciplinary Law is such as to result in sanctions in case of infringement through the use of social networks, for example by publishing confidential information on a trial. After all, social networks are meant to

[14] Legislative Decree No. 109/2006.

[15] Available at https://www.associazionemagistrati.it/codice-etico.

disseminate thoughts as widely as possible and posts are public, so that, in these cases, the duties of confidentiality and impartiality are very likely to be breached. For example, the dissemination through social networks of news about a trial or the publication of decisions that violate someone's dignity would in all likelihood lead to a disciplinary sanction.

The above is confirmed by the fact that the **High Council of the Judiciary** already took action against the misuse of social networks by magistrates. For example, the Council sanctioned a prosecutor who had published an offensive message on his Facebook page against the mayor of the city where he worked. Similarly, a judge who had published a post on her Facebook profile describing her ex-boyfriend as a fraudster was sanctioned. On the other hand, the fact that a judge had posted comments on Facebook about the physical appearance of an actor involved in criminal proceedings before her was not considered to be detrimental to the judge's impartiality, because this kind of comments did not affect the impartiality of the decision[16].

With respect to the **Code of Ethics**, it was adopted by the **National Association of Magistrates** (*Codice etico dell'Associazione Nazionale dei Magistrati*), i.e. the national association to which judges and public prosecutors can freely subscribe and whose main aim is the safeguard of the independence of the judiciary (the Italian National Association of Judges is one of the founding members of UIM-*Union Internationale des Magistrats*, the body established in Salzburg in 1953, that gathers the national associations of judges from several countries of the world).

The main difference between the Code of Ethics and the Disciplinary Law is that an infringement of the Code of Ethics does not result in professional liability for the judge, except if the violation is so serious as to also constitute a disciplinary offence under the Disciplinary Law.

In particular, article 6 of the Code of Ethics, which concerns **relations between judges or prosecutors and the media**, provides that members of the judiciary may not solicit the publication of news concerning their work. When a judge or a prosecutor considers that he or she has to provide information on his or her work in order to ensure that citizens are properly informed, only official information channels should be used. In any case, when a judge or a prosecutor makes statements to the press or the mass media, he or she must always respect the dignity of the person involved.

This ethical rule applies to all the statements that judges or prosecutors may make in relation to his or her work and must therefore also be considered applicable to social networks, because they are instruments of mass communication. However, it presents two drawbacks: (i) it is a very broad rule, whereas, in order to guide judges' and public prosecutors' behaviour in a more effective manner, the Code of Ethics should arguably be more specific; (ii) it only concerns statements that judges or prosecutors make concerning his or her own activity, not specifying whether he or she also encounters limits when expressing himself or herself on subjects other than work.

[16] High Council of the Judiciary, Decision No. 127, 25 July 2017.

In response to a questionnaire sent by the Supreme Court of the Czech Republic, the **Italian Supreme Court of Cassation** has recently had the chance to clarify some interesting aspects on the use of social networks by Italian judges and prosecutors[17]. Nonetheless, these clarifications remain non-binding and general in nature.

First, the Court of Cassation clarified that a distinction should be made between rules governing the **personal use of social networks** by judges and prosecutors and those governing **official communications between judicial offices and the media**, in particular the press. While, as we have seen, the personal use of social networks by judges and prosecutors is not regulated, there are certain rules for official communications between heads of offices and citizens or with the mass media. In particular, the High Council of the Judiciary has drawn up guidelines aimed at balancing the interest of citizens to know about judicial events and the need for confidentiality on certain investigations[18]. For example, for the public prosecutor's office, it is recommended that information on judicial activity is transmitted to the mass media only by a **person in charge of communication**. Furthermore, the information must guarantee the confidentiality of the suspects and the investigative secrecy. For judges, on the other hand, it is provided that when they decide on cases of public interest, they should make short reports that can be released to the public by the media officer. In any case, as these are just guidelines, they are not binding.

Second, concerning in particular the statements made by judges and prosecutors via **social networks**, the Court of Cassation confirmed that, absent specific rules, the Disciplinary Law is applicable. As we have seen above, this law restricts to some extent judges' and prosecutors' free speech, especially when expressing themselves on their judicial activity. Indeed, expressions that violate the duty of fairness and confidentiality and harm the parties involved in a judgment, their lawyers or other judges may lead to a **disciplinary sanction**.

Third, the Court of Cassation emphasised that even when judges and prosecutors express themselves on matters other than judicial activity, they must make **careful use of social networks**. The duties of sobriety and confidentiality can also be breached by using social networks for personal purposes. This is why judges and public prosecutors must in any case avoid disclosing public details of their private lives that could cast doubt on their impartiality and credibility. The same applies to the expression of opinions by judges and prosecutors, because their free speech, whether it is

[17] The answers of the Court of Cassation are available at https://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/QUESTIONARIO_SULLE_ATTIVITA_SECONDARIE_DEI_GIUDICI_REPUBBLICA_CECA_.pdf?msclkid=5ed86c16cecb11ec90cab43d1af57b3c. The answers to questions concerning the use of social media by Italian judges can be found in paragraph B1.

[18] Resolution adopted by the High Council of the Judiciary on 11 July 2018, available at https://www.csm.it/web/csm-internet/-/linee-guida-per-l-organizzazione-degli-uffici-giudiziari-ai-fini-di-una-corretta-comunicazione-istituzionale.

expressed through posts, follows, likes or group memberships, is even more restricted if it concerns political issues or topics of general interest.

In conclusion, the use of social networks by Italian judges and prosecutors is not outright prohibited nor specifically regulated. Except for certain non-binding rules that are meant for administrative judges only, Italian (ordinary) judges and Italian prosecutors should be careful about how they use their social networks, because generally applicable disciplinary rules can also be infringed through the use of social networks. For instance, the misuse of social networks may violate the **principles of impartiality, confidentiality and sobriety**. Apart from this, the only guidance for the use of social networks by ordinary judges and prosecutors can be retrieved in soft-law instruments which, however, fall short of providing the clear-cut and practical rules that seem to be needed.

In this scenario, and also with a view to ensuring legal certainty and predictability of disciplinary sanctions, it would be opportune for the High Council of the Judiciary to intervene and lay down clear **rules on the use of social networks by judges and prosecutors**.

The importance of appropriate rules on professional and personal use of social networks by judges has been recently reaffirmed by the President of the Italian Republic Sergio Mattarella who, in a speech delivered to the High School of the Judiciary, stressed the importance of a proper use of social networks by judges and prosecutors in order to ensure the confidentiality of the decision, as well as the esteem and credibility of judicial activity as a whole[19].

5. A Comparative Analysis of Judicial Ethics in Europe

Having considered, in the preceding paragraphs, the main guidelines on judicial ethics and how magistrates' freedom of speech can be generally limited in the light of the applicable laws and regulations, both at international and national level, it is important to understand whether such limitations have impact on everyday life and, particularly, on the use of social networks by individual judges and public prosecutors, taking into account how specific events can affect the public debate on the impartiality of the judiciary.

As stated above, the legal context is vast and mostly consists of **non-binding principles** shared by many constitutional systems; nevertheless, there are both differences and similarities to be evaluated when analysing how different judicial systems identify the fundamental relationship between impartiality, judicial ethics and freedom of speech. After all, "*in recent years there has been a trend towards independent and more transparent ethical regulation for sitting judges, which is said*

[19] The video is available at https://www.youtube.com/watch?v=2oyM6fo1pC4.

to promote public confidence in the judicial institution, and reflect a move towards accountability and transparency as judicial values"[20].

In the context of a comparative study, a better understanding of the perspective of existing judicial systems is paramount in order to detect which areas of this legal debate are susceptible to be harmonised and may, therefore, combine into a **uniform legislation**.

As to the proposed comparative methods, a detailed comparison of some countries' experiences in the field of judicial ethics and freedom of speech is deemed effective to the purpose of improving existing legal sources and, possibly, to contribute to the unification of the regulatory framework.

This goal might be achieved, for instance, by developing the groundwork set by the **Bologna and Milan Global Code of Judicial Ethics 2015**, approved at the International Conference of Judicial Independence held at the University of Bologna and at Bocconi University of Milano in June 2015. In its preamble it states: "*parallel to the development of national codes of judicial ethics it is very important that a global code of judicial ethics should be adopted. The text is based on and adopted from standards contained in the Mt Scopus International Standards of Judicial Independence 2008, The New Delhi Code of Minimum Standards of Judicial independence 1982, Montreal Universal Declaration of The Independence of Justice 1983, The Bangalore Principles of Judicial Conduct November 2002, the United Nations Basic Principles of Independence of the Judiciary, The Burgh House Principles of Judicial Independence in International Law (for the international judiciary), the American Bar Association's revision of its ethical standards for judges. The Global Code is also based on the Code of Judicial conduct for the United States Judges 1973, California Canon of Ethics 2003, Canadian Judicial Council, Ethical Principles for Judges (1998), Council of Chief Justices of Australia Guide to Judicial Conduct (2002), the Guide to Judicial Conduct (for General Courts), and the Guide to Judicial Conduct 2009 (UK Supreme Court). Inspiration has also been drawn from the Tokyo Law Asia Principles; Council of Europe Statements on judicial independence, particularly the Recommendation of the Committee of Ministers to Member States on the independence, efficiency and role of judges by the Council of Europe 1998*"[21].

The fundamental need for such an effort regarding judicial ethics and freedom of expression, after all, is intertwined with the growing use of social media and, on the other hand, with the judicial duty to face and decide over disputes pertaining to sensitive social issues. To this end, complying with ethical codes laid out by national and international authorities may be found to be essential in overcoming the public debate surrounding transparency and accountability among magistrates.

[20] G. Appleby-A. Blackham, "*The Growing Imperative to Reform Ethical Regulation on Former Judges*, in *International & Comparative Law Quarterly*, Volume 67, Issue 3, July 2018, 505-546.

[21] The complete text is available at https://www.icj.org/wp-content/uploads/2016/02/Bologna-and-Milan-Global-Code-of-Judicial-Ethics.pdf.

5.1. Remarks on the Legal Form and the Main Object of the Regulatory Framework on Judicial Ethics

It is important to keep in mind that the main existing regulation is, as mentioned, for the most part contained in **soft law instruments**, such as codes of conduct often written by judges and prosecutors themselves[22].

This circumstance appears, in many cases, to be strictly interdependent to the safeguard of the institutional independence of the judiciary: self-regulation systems are, in other words, a mean to resist to external normative structure set forth by the executive power.

External legislation, in fact, is in most countries deemed dangerous in relation to the necessity of guaranteeing **separation of powers** between political and judicial authorities. This being the case, it is largely debated whether the government of a given State should hold the power to remove judicial officers due to proven conduct of misbehaviour or if such kind of authority should only be exercised through self-governance and self-legislation.

This issue has to be analysed through the lens of traditional judicial values specifically declined in the everchanging world of communication: transparency, accountability, representativeness and efficiency among magistrates.

It has been said that independence, impartiality and integrity of courts and judges are the core values in a democratic society[23]; nonetheless, judicial transparency and accountability are also recognised as essential parameters in estimating the appropriateness of judges' and prosecutors' public and private conduct, as signified by the aforementioned **Bangalore Principles of Judicial Conduct**.

It bears mention that some of these shared ethical standards frequently appear in conflict with one another and, specifically, accountability among the judiciary is often put in opposizion to its independence. However, the complementary worth of such principles cannot be doubted, especially if appreciated in relation to the ultimate goal of **maintaining public confidence in the moral integrity and institutional appropriateness of the judiciary**.

This concept of public confidence, in particular, is recurring in ethical legislation, since it refers to the general perception of the judiciary and the trust bestowed upon its work[24]. This connection was

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[22] "*The orthodoxy has been that, even in ensuring this value, it is the judges themselves that are best placed to determine appropriate codes of conduct to govern their behaviour generally, as well as to determine in individual instances whether they are affected by bias and should step aside from hearing a particular matter*", in "*The Growing Imperative to Reform Ethical Regulation on Former Judges*", in *International & Comparative Law Quarterly*.

[23] M. Šimonis, "*The Role of Judicial Ethics in Court Administartion: From Setting the Objectives to Practical Implementation*", in *Baltic Journal of Law & Politcs*, Vytautas Magnus University, Volume 10, n. 1, 2017.

[24] "*The touchstone of 'public confidence' recurs across international and domestic judicial regulation. It is asserted, time and time again, that it is this concept of 'public confidence' that allows judges to fulfil their fundamental role of resolving disputes that arise in both the private and public law spheres*", in "*The Growing Imperative to Reform Ethical Regulation on Former Judges"*, op. cit.

underlined by the aforementioned Bologna and Milan Global Code of Judicial Ethics, whose Preamble states as follows: "*public confidence in the judicial system and in the moral authority and integrity of the judiciary is of the utmost importance in a modern democratic society and it is essential that judges, individually and collectively, respect and honour judicial office as a public trust and strive to enhance and maintain confidence in the judicial system*".

In this regard, crucial emphasis on judges' public conduct is placed by the **Opinion no. 3 of the Consultative Council of European Judges (CCJE)**, which clearly states, among other things, that "*the methods used in the settlement of disputes should always inspire confidence. The powers entrusted to judges are strictly linked to the values of justice, truth and freedom. The standards of conduct applying to judges are the corollary of these values and a precondition for confidence in the administration of justice*" and "*the confidence in the justice system is even more important in view of the increasing globalization of disputes and the wide circulation of judgments. Furthermore, in a State governed by the rule of law, the public is entitled to expect the general principles, compatible with the notion of a fair trial and guaranteeing fundamental rights, to be set out. The obligations incumbent on judges have been put in place in order to guarantee their impartiality and the effectiveness of their action*" [25].

This having been said on the general objective of judicial ethical codes, in a more comparative approach it is now possible to briefly analyse some of the differences among the **regulatory frameworks of European countries**, bearing in mind that these differences often reflect different aims and are mostly derived from different political views across the continent[26].

5.2. Comparative Analysis of European Ethical Codes

It is interesting to note that in many countries a softer approach to judicial ethics implies that the legal framework mainly aims to provide the judiciary with **general guidelines**, without setting specific types of conduct.

Such is the case with the **Statement of Principles of Judicial Ethics for the Scottish Judiciary**, adopted in 2010[27]: it is a code that provides members of the judiciary with a compendium of ethical principles by which magistrates should be guided both in their professional and private lives.

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[25] 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, Strasbourg, November 2002, available at https://rm.coe.int/16807475bb.

[26] See "*The Role of Judicial Ethics in Court Administration: From Setting the Objectives to Practical Implementation*", op. cit.

[27] "*The Statement of Principles of Judicial ethics for the Scottish Judiciary*", 2010, available at https://www.judiciary.scot/docs/librariesprovider3/judiciarydocuments/statementofpriciplesofjudicialethicsreviseddecember2016.pdf?sfvrsn=db91ec0c_10#:~:text=The%20judge%20should%20seek%20to,display%20of%20bias%20or%20prejudice.

Similarly, **the Guide to Judicial Conduct for England and Wales**, drafted in 2013 by a working group of judges set up by the Judges' Council, essentially aims to provide judicial office holders with general assistance pertaining ethical questions that may arise while exercising their professional functions, although it does not contain detailed prescriptions[28].

Denmark's regulatory system can also be framed within this softer approach in codifying ethical principles; in fact, their **guiding ethical code adopted in 2014 by the Association of Danish Judges**[29] takes carefully into account the trust bestowed by the population in the Danish courts, avoiding the imposition of rules and adopting guidelines that are meant to help magistrates maintain their independence and authority.

In the same perspective, the **Association of Finnish Judges** chose to codify ethical principles that reflect views and values broadly shared by judicial operators in their everyday conduct: this has the effect of strengthening the public confidence in the administration of justice.

In other countries, while still maintaining a less strict approach on ethical and disciplinary codification for the judiciary, regulatory authorities have chosen to lay down a more detailed code of conduct. Such is the case of the **Code of Ethics of Judges of the Republic of Lithuania**, adopted in 2006[30]; the Lithuanian code, in fact, has an analytical structure and clearly states its aims, which mainly are to identify ethical behaviour to be followed by judges and prosecutors – both while exercising their public service and conducting their private life – and to always assure the increase of public confidence in the judiciary.

A different approach can be detected in the **Slovenian Code of Judicial Ethics**[31]; in its preamble it states clearly that the first objective of the codification is to impose those Constitutional rules which apply to judiciary conduct, by way of identifying detailed modes of behaviour to which judges must adhere. Consequentially, this type of ethical regulation contains detailed rules and imposition, both professional and personal, and provides for specific disciplinary responsibility in case of non-adherence; in other terms, Slovenian magistrates are strictly bound to follow ethical conduct principles recognized by their code.

Some interesting considerations are also included in the opinion of the **Spanish Judicial Ethics Committee**, entitled "Implications of the Principles of Judicial Ethics in the Use of Social Networks by Members of the Judiciary" (Report [Consultation 10/2018] of 25 February 2019), where a

[28] "*Guide to Judicial Conduct*", The Judges' Council of England and Wales, 2013, available at //https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/judicial_conduct_2013.pdf.

[29] "*Ethical Principles for Judges*", The Association of Danish Judges, 2014, available at //http://dommerforeningen.dk/english/ethical-principles-for-judges/.

[30] "*Code of Ethics of Judges of the Republic of Lithuania"*, The General meeting of the Lithuanian judges, 2006, available at //http://www.judicial-ethics.umontreal.ca/en/codes%20enonces%20deonto/documents/Code_lituanie.

[31] "*The Code of Judicial Ethics of Slovenia"*, The Association of Judges of the Republic of Slovenia, 2001, available at //http://www.judicial-ethics.umontreal.ca/en/codes%20enonces%20deonto/documents/SLOVENIA-CODEOFJUDICIALETHICS.pdf.

moderate viewpoint is shown: judges' participation on social networks is not considered in conflict with the Principles of Judicial Ethics and judges can publicly present themselves as such on social networks, but at the same time they must conduct a prior ethical assessment on how to present themselves – evaluating to what extent identifying themselves as members of the judiciary may determine the content, opinions or behaviour they express in public on social networks – and how to react to the posts of others, in order to preserve the dignity of the jurisdictional function. As in Bangalore Principles, it is also underlined that judges identifying themselves as such on social networks may work towards fulfilling ethical duties relating to their **educational role** or to the **defence of fundamental rights and values** on which the legal system is based.

5.3. Brief Case Study: How Judicial Ethical Guides May Apply to Social Media Use

Having provided a synthetical overlook on how ethics is dealt with in different countries, the aim of this study is to try and identify in what way judicial ethics and manifestation of thought are intertwined with the use of social media by judges and public prosecutors.

In this paragraph, we will identify specific incidents pertaining to **the use of the most popular social media** (such as Facebook, Twitter, LinkedIn, etc.), analysing them in terms of adherence to judicial ethical codes[32]. More precisely, attention has been brought on virtual connections between judicial operators and citizens, with special regard to the possibility of connection with people who may appear in courtrooms before judges and prosecutors.

In pursuing this goal, an essential assistance is provided by the broad case study examined by the **American Bar Association** (ABA), which has often given advisory ethics opinions on the use of social media by magistrates[33]; although this experience comes from non-European States, it still can prove useful in the context of a comparative research about uniform law on the relationship between members of the judiciary and social media. In certain American States, such advisory opinions have been codified and sanctioned with disciplinary action, while in other cases they have been included into guidelines, in adherence to the softer approach previously observed in some European ethical regulations.

In this sense, a **severe approach** can be detected while examining the ethical regulation on social media use in States such as Florida, Oklahoma and Massachusetts, which strictly prohibit judges and prosecutors from interacting on Facebook or LinkedIn with people, and specifically lawyers, who may appear in their courtroom.

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[32] See extensively S. Singh, "*Friend Request Denied: Judicial Ethics and Social Media*", in *Journal of Law, Technology & the Internet*, Volume 7, 2016.

[33] *Ibidem*.

On the other hand, a sensibly more **moderate approach** is favoured by those States (such as California, Arizona, Utah and North Carolina) which only specifically forbid the judiciary to "friend" lawyers who have cases pending before them, while providing general ethical guidelines whose infringement is not subject to disciplinary sanctions.

Conclusively, many studies underline the importance of taking into account different factors while defining appropriate and permissible social media interaction between magistrates and other users[34].

Two factors, most of all, are underlined by judges' associations: the **nature of the social network site** – if it is of a personal nature, like Facebook, it is deemed more likely that the connection between magistrates and lawyers could influence public confidence in the judge's work – and the **greater or smaller number of social connections** on the social media page – a large number of social connections is in fact deemed less likely to ingenerate public perception of specific individual ties between judges or public prosecutors and lawyers.

5.4. New Strategies on the Use of Social Media by Members of the Judiciary

The importance of the issue under discussion has been recently underlined by the **European Network of Councils for the Judiciary** (ENCJ) in its **Report 2018-2019** on **"Public Confidence and the Image of Justice"**, expressly devoted to the individual and institutional use of social media within the judiciary. As stated in the Introduction, "*(the) project seeks to respond to a recognition of the need for the judiciary to adapt its communication skills to the demands of the 21st century. This report identifies some of the main principles to consider when using social media, both by institutions in the judiciary system, and also by individual judges and prosecutors*" [35].

More precisely, the Report focuses on the need for specific guidelines related to the **use of social media by individual judges and prosecutors**, as well as for the institutional use of such media.

As for the first aspect, the ENJC has underlined both the advantages and disadvantages of the use of social media by members of the judiciary (rights and risks) and has analysed the topic of judges' identification and the issue of the proper behaviour on social media, with special regard to shared contents, friendships and connections, also focusing on the use of social media for evidence gathering and non-legal research and on privacy and security on social media[36].

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[34] See "*Friend Request Denied: Judicial Ethics and Social Media*, in *Journal of Law, Technology & the Internet*", op. cit.

[35] ENCJ Report 2018-2019 on "*Public Confidence and the Image of Justice: Individual and Institutional use of Social Media within the Judiciary*", available at https://pgwrk-websitemedia.s3.eu-west-1.amazonaws.com/production/pwk-web-encj2017-p/ENCJ%20Report%20Public%20Confidence%20and%20the%20Image%20of%20Justice%202018-2019%20adopted%20GA%207%20June%202019_0.pdf.

[36] The desired objectives of these guidelines are as follows: improve internal and external communication; sharing regular and consistent information; developing a satisfying organisational culture; understanding roles and responsibilities; enhancing productivity and effectiveness; the Judiciary feeling relevant and valued in promoting his/her work in order to defend the system.

With regard to the **institutional use of social media**, on the other hand, the Report especially takes into consideration the reasons for using social media institutionally (objectives and content), the drawbacks, the communication strategies for social media, the types of social media and channels, the privacy settings in this case, how to deal with (malicious or contemptuous) comments, the ways to monitor social media, the language to be used, the opportunity of establishing a spokesperson[37].

It is interesting to note that the ENCJ, while focusing on what it presently deems the most urgent topics – such as the corporate use of social media by the institutions within the judiciary and the communication instruments between the judiciary and other branches of state power – also identifies key topics on which future studies should focus, such as protocols on how to deal with those who are regarded as most influential actors in terms of promoting public confidence and the image of justice, guides of best practices with other legal professionals or the organisation of a conference with representatives of other state powers on the communication instruments, "*acknowledging the importance of communication with other legal professionals and the influence they can exercise on public confidence and the image of justice*".

Great importance is also given to the proposal of the institution of **social media advisers** in judicial offices and of expanding the training offer on these topics: judges and public prosecutors should engage in **training on the use of social media**, which should be provided within formal judicial training and be a permanent part of the judicial curriculum. The content of the training should cover technical aspects (such as the different privacy settings of different social platforms), aspects of profiling, data issues and also how to educate friends and relations on the risks of using social media and it should, in the end, raise awareness of issues which are peculiar to social media.

6. Conclusion

Social media have become an important part of the social life of many people and communities, changing the way in which information about them is collected, communicated and disseminated.

Given the nature of judicial office and the vital importance of public confidence in the **integrity and impartiality** of the courts, the use of social media by judges, both individually and collectively, raises specific questions and ethical risks that need be addressed.

Even if there is not a hard law regulation on this topic, during the last years a growing attention has been devoted to the themes of the ethics of the judiciary and the use of social media, since the way judge and public prosecutors uses social media may have reflections on the **public confidence**

[37] The desired outcomes in this case are the developments of productive relationships with other participants and the general public, regular institutional contact, public awareness, as well as to promote education and responsibilities and to ensure guidance and consistency in delivering information.

in the judicial system: being a judge in the modern world also means being to deal with the communication and technological challenges faced by today's judiciary.

The **soft-law instruments** adopted at international, European and domestic level can really help in finding a common way to answer to these difficult issues. Broad consensus has been reached, as this short analysis has shown, on the main applicable **guidelines**: avoidance of behaviours that can potentially undermine judicial independence, integrity, propriety, impartiality, the right to fair trial or public confidence in the judiciary; prudence about communication with parties, their representatives or the general public; recourse to an adequate language; prudence about friendships; prohibition to express opinions or communicate information about cases before them or likely to come before them; carefulness about privacy settings; importance of training on the topic.

Nonetheless, being a judge or a public prosecutor does not mean to cease having political beliefs or opinions on political and social issues as it couldn't imply to abandon the relationship with other members of the community; however, restraint is necessary to maintain public confidence in the impartiality and independence of the judiciary.

In conclusion, the importance of having **common sources of regulation** about how members of the judiciary can discharge their obligation to balance their private life with the public role can't be underestimated nowadays, given the transnational dimension of the social media phenomenon itself and the importance of building the figure of the "**European Judge**", well aware of his duties and of his role in the European legal, social and political context.