

Full bench of the High Council of the Judiciary

# Notice to the Minister of Justice

Referral of 2 May 2023

Delivered to the Minister of Justice on 13 December 2023



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# INTRODUCTION

1. On 2 May 2023, the High Council of the Judiciary received a request for an opinion from the Minister of Justice pursuant to Article 65 of the Constitution. The Council's opinion is being sought in order to consider in more detail the status of the judiciary and the objective of better preserving the image of the justice system. The Council has been asked to give its opinion, first, on the relationship between the freedom of expression of *magistrats*<sup>1</sup> and their ethical duty to act with discretion, particularly with regard to the use of social media, the views and opinions expressed at formal sittings and their freedom of association, and second, on the exercise by *magistrats* of the right to strike having regard to Article 10, paragraph 3, of Order No 58-1270 of 22 December 1958 on the Framework Act on the Status of the Judiciary, which prohibits '*any form of concerted action that interrupts or impedes the functioning of the courts*'.
2. With regard to the second point, the High Council of the Judiciary is of the opinion that it cannot interpret Article 10 of the aforementioned statutory instrument or potentially assess its validity in place of the Constitutional Council or the administrative and European courts.
3. Therefore, this opinion only concerns the first point.

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<sup>1</sup> Translator's note: under the French legal system, a '*magistrat*' can refer to a court judge or a public prosecutor. They all belong to the same judicial body, they must pass the same competitive examinations or undergo the same recruitment procedures, they receive the same training and they may alternately change positions during their career.

# THE FREEDOM OF EXPRESSION OF MAGISTRATS AND THE BALANCING THEREOF WITH THE DUTY OF DISCRETION

4. This opinion of the full bench of the High Council of the Judiciary does not contain an exhaustive overview of the rules, statutory provisions or case law on the freedom of expression of *magistrats*. In the light of the most important statutory provisions and decisions, it contains the information which the Council considers essential, particularly as regards the specific points of the Minister of Justice's request. The Council will further consider some of these points in the context of the broader analysis that it intends to carry out during its term of office.
5. The High Council of the Judiciary also wishes to clarify that it does not intend to differentiate between judges and public prosecutors, since they are all members of the judiciary, as the Constitutional Council ruled in its Decision No 2004-492 DC of 2 March 2004.

*The general principle of freedom of expression*

6. At the constitutional level, Article 11 of the Declaration of the Rights of Man and of the Citizen of 1789 states that '*[t]he free communication of ideas and opinions is one of the most precious rights of man: all citizens may therefore speak, write and publish freely, but shall be liable for such abuses of this freedom as shall be defined by law*'.
7. Article 10(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms states that '*[e]veryone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers*'.

8. This right is the foundation of all democratic societies. It is provided for in numerous statutory provisions and clarified by the case law of both European and national courts.

*Balancing freedom of expression with the duty of discretion in public institutions*

9. All citizens, including *magistrats*, enjoy freedom of expression. However, it is not an absolute right. The freedom given to public officials must therefore be balanced with the duty of discretion, which is only specifically provided for by law for a few categories of public officials, including *magistrats* of the judiciary, whose status is defined by a framework law<sup>2</sup>, and members of administrative courts<sup>3</sup>.
10. The duty of discretion established in 1911 by the case law of the *Conseil d'Etat* (Council of State)<sup>4</sup> is imposed on all public officials<sup>5</sup>, and its main objective is to preserve people's confidence in an impartial public authority. These considerations apply to *magistrats* in particular owing to the specific task assigned to them and because they act on behalf of the judiciary as a whole. However, due to the specific nature of their duties in a democratic State, the question arises as to the extent to which *magistrats* should exercise their freedom of expression while fulfilling the duties by which they are bound owing to their capacity and status, when the values and principles of the rule of law on which their offices are based are at stake.
11. The freedom of expression of *magistrats* is both provided for and protected by framework principles (I), and exercising such freedom raises specific questions (II).

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<sup>2</sup> Article 10 of Order No 58-1270 of 22 December 1958.

<sup>3</sup> Articles L. 131-2 and L. 231-1-1 of the Code of Administrative Justice.

<sup>4</sup> *Conseil d'Etat* (CE), 8 April 1911, *Paul Charlin*, volume of decisions, p. 483; 11 January 1935, *Sieur Bouzanquet*, volume of decisions, p. 44.

<sup>5</sup> The *Cour de Cassation* (Supreme Court) requires employees placed at the disposal of a local authority to abide by the duty of discretion (Supreme Court Employment Division, 19 October 2022, appl. 21-12.370, published, AJDA journal 2022, p. 2039).

## I – The freedom of expression of *magistrats*: an established and regulated principle

### A – An established principle

12. The French Constitutional Council, the French Council of State and the European Court of Human Rights, to which cases specifically concerning the freedom of expression of *magistrats* have been referred, ensure that *magistrats* have guaranteed freedom of expression.
13. In its Decision No 2007-551 DC of 1 March 2007, with regard to the disciplinary proceedings initiated against *magistrats*, the Constitutional Council clearly stated that the guarantee of rights and the separation of powers referred to in Article 16 of the Declaration of the Rights of Man and of the Citizen of 1789 and the independence of the judiciary referred to in Article 64 of the Constitution of 1958 ‘*guarantee the independence of the courts and the specific nature of their duties, which must not be interfered with by the legislator, the Government or any administrative authority*’. In view of the Constitutional Council’s emphasis on the free communication of ideas and opinions pursuant to Article 11 of the Declaration, there are very few circumstances in which a *magistrat* may be held liable for the remarks they make.
14. The same principles are set out in the case law of the Council of State, which ruled, for example, that the circumstances in which a *magistrat* had engaged in trade union activity, ‘*and in particular the statements made to the press by the applicant in order to comment on the statement released by their union, cannot, in the light of the terms used, be regarded as a breach of the duty of discretion by which the magistrat was bound*’<sup>6</sup>.
15. The above principles are further clarified in the case law of the European Court of Human Rights. For example, in its judgment of 16 June 2022 in *Żurek v. Poland*<sup>7</sup>, the Court ruled that the general right to freedom of expression of judges may be transformed into a duty to address the

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<sup>6</sup> CE, Ass., 31 January 1973, *sieur Volff*, volume of decisions, p. 70.

<sup>7</sup> ECtHR, 16 June 2022, *Żurek v. Poland*, appl. 39650/18.

functioning of the justice system and speak out in defence of the rule of law and judicial independence when those fundamental values come under threat<sup>8</sup>. The Court insists on the need to thwart strategies aimed at intimidating, or even silencing, applicants in connection with the views expressed in defence of those values<sup>9</sup>.

16. The High Council of the Judiciary reaffirms the principle of freedom of expression of *magistrats*. In the *Recueil des Obligations Déontologiques des Magistrats* (Code of Ethics of *Magistrats*) adopted in 2019 pursuant to Article 20-2 of Framework Act No 94-100 of 5 February 1994, the Council states that ‘*magistrats may express themselves freely within the limits of their status*’. Disciplinary decisions emphasise that *magistrats* are not ‘*bound by conformism*’ and must not be ‘*reduced to silence*’. On the contrary, the principle of freedom of thought, opinion and expression is the very foundation of this ‘*specific right to independence*’, which distinguishes *magistrats* from civil servants and also applies to public prosecutors<sup>10</sup>.
17. However, although *magistrats* have freedom of expression, they must balance such freedom and comply with other principles associated with their status.

#### B – A regulated principle

18. Article 10 of the statutory instrument of 1958 states the following: ‘*[t]he judiciary is prohibited from making any political decision. Magistrats are prohibited from expressing objections to the principle or form of the government of the Republic and from expressing any political opinion that is incompatible with the duty of discretion imposed on them by virtue of their duties [...]*’. The foregoing applies to *magistrats* who refer to their capacity when expressing themselves or when their capacity is known.
19. The statutory instrument of 1958 states the responsibilities of the judiciary (the ‘*judiciary*’ referred to in the instrument clearly means the courts and

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<sup>8</sup> § 222 of the judgment.

<sup>9</sup> § 227 of the judgment.

<sup>10</sup> CSM Parquet (High Council of the Judiciary for Public Prosecutors), P13, 9 October 1987.

tribunals and those who express themselves as members of the judiciary on behalf of a court or tribunal) within institutions: members of the judiciary must not express an opinion that is purely political (neither Parliament nor the executive branch of government is a member of the judiciary) or call into question the very principle of Republican institutions such as the judiciary itself. Furthermore, within the limits imposed on them, including the duty of discretion, public officials in general and *magistrats* in particular may freely express trade union and political opinions outside a professional context.

20. While Framework Act No 2023-1058 of 20 November 2023 on the opening up, modernisation and responsibility of the judiciary supplements the second paragraph of Article 10 of the statutory instrument of 1958 referred to above and states that '*[t]he public expression of magistrats' opinions must not adversely affect the impartial exercise of their duties or the independence of the justice system*', these provisions merely clarify the rule of law and recall some of the duties imposed on all *magistrats*, as the Constitutional Council pointed out in its decision on the framework law<sup>11</sup>.
21. Generally, *magistrats* must exercise their freedom of expression in accordance with their oath<sup>12</sup>. In particular, they must act in a discrete, impartial and scrupulous manner, maintain professional secrecy and have regard for the image they portray of the justice system.
22. The Code of Ethics of *Magistrats* states that '*[w]hen expressing themselves publicly, magistrats shall show restraint so as not to jeopardise the image of impartiality of the justice system, which is essential to ensure public confidence*', and that '*[w]hen a magistrat expresses an opinion publicly by any means whatsoever in their capacity as a magistrat, they must do so with the utmost caution so as not to affect the image or credibility of the*

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<sup>11</sup> CC, Decision No 2023-856 DC of 16 November 2023, § 21.

<sup>12</sup> Article 6 of Order No 58-1270 of 22 December 1958, as amended by Framework Act No 2023-1058 of 20 November 2023: '*I swear to discharge my duties in an independent, impartial and humane manner, to conduct myself as a worthy, honest and loyal magistrat, to maintain professional secrecy and not to disclose decisions*'.

*judiciary, their impartiality as a magistrat or the duty of discretion imposed by virtue of their duties’.*

23. Freedom of expression is ultimately subject to limitations in order to reinforce other equally fundamental principles. Thus, Article 10(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms sets out the legitimate objectives of restricting the exercise of freedom of expression in a democratic society, including the objective to maintain ‘*the authority and impartiality of the judiciary*’. In the interests of the public and litigants, the judiciary must remain independent and impartial, and must be perceived as such to ensure social peace and respect for the rights of everyone. *Magistrats* are therefore required to act with impartiality, dignity, honour, loyalty, care, scrupulousness and discretion.
  
24. The High Council of the Judiciary is responsible for assessing and controlling restrictions on the exercise of the freedom of expression of *magistrats*. Appeals involving court judges and appeals concerning abuses of power by public prosecutors may be referred to the Council of State or even the international courts. This is a fundamental guarantee.
  
25. It is now appropriate to state the factors that are taken into account in this proportionality assessment.

## II – The freedom of expression of *magistrats*: an assessment according to the circumstances, the duties discharged and the public concerned

26. Despite the restrictions imposed in relation to the freedom of expression of *magistrats*, it is essential that *magistrats* can express themselves freely to ensure their independence. As recalled by the Consultative Council of European Judges in its opinion of 2 December 2022 on the freedom of expression of judges, judges ‘*have the right to make comments on matters that concern fundamental human rights, the rule of law, matters of judicial appointment or promotion and the proper functioning of the administration of justice, including the independence of the judiciary and separation of powers. This follows from the fact that the public must have confidence in the ability of magistrats to effectively represent the principles of the rule of law*’.
27. The freedom of expression of *magistrats* is not established solely for their benefit. It is a guaranteed right afforded to all litigants. *Magistrats* who discharge their duties with independence, which thus constitutes a pillar of the rule of law, have a duty to preserve the rule of law as well as the other fundamental values of the judiciary.
28. The legitimate aims that must be pursued are to preserve the impartiality and independence of the judiciary and maintain respect for the separation of powers, as these are the foundations of the rule of law and ensure that citizens have confidence in their justice system.
29. In the context of this proportionality assessment, when examining the restriction imposed on the freedom of expression of *magistrats* on a case-by-case basis, account must be taken of the nature of the views or opinions they are expressing (A), their duties (B) and the public concerned (C).

A – The nature of the views and opinions expressed by *magistrats* and the importance of context

30. First of all, when a *magistrat* exercises freedom of expression, it is necessary to determine whether the view or opinion they are expressing concerns their own judicial activity.
31. The Code of Ethics of *Magistrats* states the following: ‘*magistrats must not communicate individually with the press on the cases brought before them*’ and they must not comment on their own decisions or criticise the decisions of their colleagues. They may freely comment on decisions providing that they do so in a professional, academic or educational context.
32. The specific role of public prosecutors must be emphasised here, since in criminal matters, public prosecutors are authorised to express their views on the facts under investigation, within the limits of Article 11 of the Code of Criminal Procedure. In doing so, they must respect the parties and their rights and may therefore only refer to objective points, so as to ‘*avoid the dissemination of fragmented or inaccurate information*’. Furthermore, by expressing their views, they are raising awareness of the judiciary and thus increasing the confidence of the citizens of France in their justice system.
33. Furthermore, *magistrats* must not jeopardise the image of impartiality and neutrality of the justice system, which is essential to ensure public confidence, or undermine the credibility and dignity of the judiciary and judges. A *magistrat*’s views are perceived as an expression of the objective assessment of the *magistrat* themselves but also of the judiciary as a whole.
34. The High Council of the Judiciary has established principles that are also contained in the case law of the European Court of Human Rights and the Council of State.
35. The Council of State condemns outrageous remarks<sup>13</sup> and attacks on the institution by public officials.

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<sup>13</sup> CE 27 June 2018, appl. 412541, *M. d’Argent de Deux Fontaines* on the conclusions of G. Pellissier, RP: lawfulness of a reprimand imposed on a national police chief on account of

36. The European Court of Human Rights insists on many factors. For example, matters at issue must be in the public interest, no confidential information must be disclosed, the *magistrat* must not have any hidden intentions and their remarks must be objective, although they may be exaggerated in some instances. The Court pays close attention to the fact that *magistrats* could be discouraged from participating in a public debate. It ensures that disciplinary or criminal proceedings can ‘*not be suspected of constituting retaliation for the exercise of that fundamental right*’ of freedom of expression<sup>14</sup>. Criticisms of the functioning of the justice system must not be manifestly unfounded or constitute disparagement<sup>15</sup>.
37. Similarly, on the basis of a breach of the duty of discretion, the High Council of the Judiciary has sanctioned the use of outrageous remarks on a formal level, as *magistrats* must systematically exercise care and restraint when expressing themselves. On a substantive level, the Council has also sanctioned criticisms that undermined the confidence and respect that litigants must have in *magistrats*<sup>16</sup>.
38. However, the Council does not consider it necessary to sanction general remarks made with care and restraint<sup>17</sup>.
39. For example, *magistrats*’ criticisms of draft framework and ordinary laws concerning the judiciary or the reform of the judicial police force appear to be legitimate in principle, even if they are forcefully expressed.

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criticisms made outside a professional context ‘*on outrageous and disrespectful terms*’ concerning the action taken by members of the Government and its foreign and French defence policy.

<sup>14</sup> Judgment of 28 October 1999 in *Wille v. Liechtenstein*, appl. 28396/95 and, more recently, judgment of 1 March 2022 in *Kozan v. Turkey*, appl. 16695/19.

<sup>15</sup> Judgment of 26 February 2009 in *Koudechkina v. Russia*, appl. 29492/05.

<sup>16</sup> CSM Parquet, P6, 28 January 1975; CSM Parquet, P7, 12 August 1976; CSM Siège (High Council of the Judiciary for Court Judges), S73, 16 December 1993; CSM Siège, S20, 24 March 1966; CSM Parquet, P29, 11 June 1996; CSM Siège, S81, 14 December 1994; CSM Siège, S261, 18 January 2023.

<sup>17</sup> CSM Parquet, P12, 15 May 1987; CSM Siège, S252, 15 September 2022.

## B – The capacity of a *magistrat* who expresses an opinion

### - Consideration for the duties discharged

40. According to the case law of the European Court of Human Rights, people who specifically contribute to a public debate concerning matters in the public interest must be free to express themselves without the fear of punishment that might ‘*dissuade*’ them from exercising their right to freedom of expression. This would effectively deprive society as a whole of the benefit of a broad and informed public debate on such matters of public interest. *Magistrats* must therefore express an opinion on certain topics.

41. The High Council of the Judiciary believes that a *magistrat*’s duty to express themselves is particularly important as *magistrats* occupy a senior position in the hierarchy of the institution, particularly if they are the head of a court or tribunal. The position adopted by the High Council is entirely consistent with that adopted by the European Court of Human Rights in *Baka v. Hungary*<sup>18</sup>. In that case, the applicant, the President of the Supreme Court of Hungary, had expressed his views on judicial reforms in open letters, press releases and speeches in Parliament, and had criticised various legislative reforms concerning the courts. While stating that *magistrats* are expected to exercise their freedom of expression with ‘*moderation and propriety*’, particularly in view of their obligation to ‘*preserve their image as impartial judges*’, the Court emphasised the importance of ‘*safeguarding the independence of the judiciary*’. *Magistrats* may therefore alert their fellow citizens to the problems encountered by the judiciary, including if it is likely to be affected by proposed legislative reforms. In its decision, the Court clearly states that ‘[e]ven if an issue under debate has political implications, this is not in itself sufficient to prevent a judge from making a statement on the matter’.

42. The case of the head of a court or tribunal who expresses an opinion in support of a *magistrat* who is the subject of unjustified attacks must also be singled out. Freedom of speech is particularly important if it supports the

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<sup>18</sup> Judgment of 23 June 2016 [GC] in *Baka v. Hungary*, appl. 20261/12.

judiciary when one of its members is attacked and cannot respond themselves.

- Court addresses by a magistrat

43. For specific instances where a public prosecutor addresses the court during a hearing, freedom of speech is expressly permitted by law, as an exception to the principle of the public prosecutor's hierarchical subordination (Article 5 of Order No 58-1270 of 22 December 1958). At the hearing, the public prosecutor is bound '*by their conscience alone*<sup>19</sup>'. However, remarks made in such a context must also be made in accordance with the duty of discretion and its consequences (the prosecutor must express their view with propriety and they must not criticise the institution in a way that may raise doubts as to their impartiality or neutrality)<sup>20</sup>.

44. With regard to formal hearings, Article R. 111-2 of the Judicial Code provides that a formal hearing must be held each year during the first half of January and that during this hearing, information must be provided on the court's activity during the past year. This therefore constitutes a positive obligation for the heads of courts to provide information on the court's activity. The Code also states that in the courts of appeal, information on a topical matter or a matter of legal or judicial interest may be provided prior to information on the court's activity.

45. Speeches given by the heads of courts and tribunals at ceremonies marking the official opening of the legal year are therefore key moments in the life of a court. They provide the perfect opportunity for *magistrats* and civil servants to publicly express their satisfaction and concerns, with regard to

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<sup>19</sup> CSM Parquet, P13, 9 October 1987.

<sup>20</sup> A public prosecutor who used their position to make a declaration of principle at a hearing concerning an extradition case (Klaus Barbie) in another jurisdiction was found to have made a political statement that was incompatible with the duty of discretion imposed by virtue of his duties, as '*the government alone was responsible for the extradition and the public prosecutor was not authorised to make observations or express criticism at the hearing*' (CSM Parquet, P8, 10 February 1978). Similarly, a public prosecutor must be sanctioned for having made objectively discriminatory remarks at a hearing by claiming to have established a link between the criminal activities of a member of the community and the fact that they belonged to that community, as the prosecutor stated that crime was a way of life in the community (CSM Parquet, P82, 13 October 2015).

the situation of the court in which they hold office and developments in the judiciary, including the reforms in progress and the laws and regulations in force. Apart from extreme instances where insulting remarks are made or the institutions of the Republic are called into question, *magistrats* and civil servants must have freedom of speech.

- *The expression of trade union views*

46. Article 10-1 of the statutory instrument introduced by Framework Act No 2016-1090 of 8 August 2016 clearly states that *magistrats* have a guaranteed right to set up and join a trade union and act as unionists.

47. In two Council of State judgments<sup>21</sup>, the Court annulled the ratings of two *magistrats* that had been lowered on account of their trade union activity. On this point, according to established case law, public officials who discharge trade union duties enjoy the particular freedom of expression required to discharge their duties and defend the interests of the staff they represent. As a result, they enjoy much greater freedom of expression than other public officials<sup>22</sup>.

48. However, this freedom must also be balanced with the ethical obligations arising from the status of *magistrats*, particularly the duty of discretion<sup>23</sup>. Union representatives must therefore act with restraint, even when discharging their duties and defending professional interests.

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<sup>21</sup> CE, Ass., 31 January 1975, *Volff and Exertier*, Rec. p. 70 and 74.

<sup>22</sup> CE, 18 May 1956, *Boddaert*, volume of decisions, p. 213; CE, 30 December 2021, *La Poste*, appl. 445128, B.

<sup>23</sup> As regards public officials who are not *magistrats*, the Council of State ruled that aggressive remarks made about a line manager or other employee are liable to lead to disciplinary measures, even though they do not constitute a criminal offence (CE, 27 January 2020, appl. 4265698, *Ms Kabeche*, B, concerning the deputy of a local authority, a senior union official who had adopted a line of conduct and made remarks that were very disrespectful and aggressive towards the director general of a municipal council). Similarly, the Council of State ruled that a strong criticism of a Government policy made by a union representative was incompatible with the duty of discretion, as owing to the terms of the criticism and the manner in which it was made, it was liable to affect the smooth functioning of the department (CE, 23 April 1997, *Bitauld*, B, concerning a police officer and union member who strongly criticised the Government's policy, called the authorities into question in an offensive manner and encouraged collective unruly behaviour).

49. The Code of Ethics of *Magistrats* states that the objective of the main trade unions whose role is to defend the moral and material interests of their members is also to defend the independence of the justice system, as a result of which they are involved in public and media debates. A similar line of reasoning is adopted in the Code as it states that the scope of the duty of discretion imposed on *magistrats* is reduced when they express their views as members of a trade union, providing that the remarks they make are neither disparaging nor insulting.
50. Therefore, the High Council of the Judiciary has recalled that although trade union controversy can be very intense, the fact remains that the terms used by a *magistrat* in a trade union publication must not in any way suggest that the *magistrat* is antisemitic<sup>24</sup>.
51. Consequently, recognising the right of association inevitably gives trade unions and their representatives a right to express themselves that is even broader than the right granted by general law. More specifically, trade unionists may ultimately make strong and controversial remarks owing to their right to exercise freedom of association.

#### C – The public concerned

52. When *magistrats* share information in the context of their work, for example as members of a closed discussion group of professionals, they must act with due care and maintain professional secrecy.
53. The issue of *magistrats* expressing themselves on social media was raised by the High Council of the Judiciary in its report for 2012. The Council called on *magistrats* to be very careful when using social media and recommended that they act with due care and caution when using such platforms and exchanging information.

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<sup>24</sup> CSM, P35, 17 March 1999, and on appeal, CE, 18 October 2000, appl. 208168, *M. Terrail*, A. However, the European Court of Human Rights sanctioned Turkey in connection with a judge, the secretary general of a union of judges, who was the subject of a disciplinary sanction for having made remarks about a constitutional reform concerning the functioning of the judiciary (ECtHR, 6 June 2023, *Sarisu Pehlivan v. Turkey*, appl. 63029/19).

54. The Code of Ethics of *Magistrats* now contains information on developments specific to *magistrats* and information and communication technologies. It recalls the principles of freedom of expression of *magistrats* and the restrictions that may be imposed on them in connection with their duty of discretion. A *magistrat* who uses social media is more likely to have their decisions, comments or behaviour challenged or reported in the media, and they must therefore be more vigilant in fulfilling their ethical obligations. Although users of some social media platforms can purportedly remain anonymous, *magistrats* must continue to fulfil their duties as members of the judiciary, particularly their duty of discretion, as this provides litigants with a guarantee as to their impartiality and neutrality<sup>25</sup>.
55. On a disciplinary level, the High Council of the Judiciary imposed sanctions on the following persons: two *magistrats* who used pseudonyms to exchange messages on the social network Twitter during a serious criminal trial, suggesting that the public prosecutor at the Court of Assizes was collaborating with a judge<sup>26</sup>; a *magistrat* who made remarks on their Twitter account concerning ‘*acts of violence by Antifa and far-left thugs, the black plague that rages in the streets on Saturdays, climate totalitarianism and the Khmers Verts*’<sup>27</sup>; and a *magistrat* who published a rude and discriminatory message on a social media platform as well as several insulting and vulgar messages directed at an Internet user who was astonished by the racist connotation of her remarks<sup>28</sup>.
56. Accounts opened for a court are subject to the principles governing official positions. Although courts have a legitimate right to impart information, it is important to safeguard the rights of litigants and, in particular, to respect the presumption of innocence. Relevant case law demands that words be chosen carefully, so as not to give the impression that someone is guilty before their case has been decided by a court.

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<sup>25</sup> For a non-*magistrat*, see CE 27 June 2018, appl. 412541, *M. d’Argent de Deux Fontaines* mentioned above.

<sup>26</sup> CSM Siège, S212, 30 April 2014; CSM Parquet, P77, 29 April 2014.

<sup>27</sup> CSM Siège, S258, 16 January 2023.

<sup>28</sup> CSM Parquet, P98, 23 September 2021.

57. When a trade union expresses views through an account, it must respect the above principles concerning trade union expression.
58. When *magistrats* use private accounts and post comments on social media, they must do so with the utmost caution in order to safeguard the rights of litigants and the image of the justice system. Obviously, *magistrats* must not give way to the facilities on these platforms that threaten individuals who do not have the responsibility of judging legal cases. Crudeness, outspokenness and carelessness ultimately obscure the high opinion that citizens must have of the judiciary and its members.
59. The *Charte de Déontologie des Magistrats Administratifs* (Code of Ethics for Administrative judges) drawn up in 2011, which has been adopted in law since Act No 2016-483 of 20 April 2016, the latest version of which is dated January 2023, recommends that members of administrative courts exercise the utmost restraint when using social media platforms if access to those platforms is not protected and reserved exclusively for a private group of people, that they do not mention their capacity as *magistrats* when completing their profiles, that they carefully word the comments they make on social media and that they apply the same level of vigilance as they would when writing an article for a scientific journal.
60. Due to the complexity of this issue, which is constantly changing, including at the European level, the High Council of the Judiciary will consider the matter in more detail in the future. In particular, when drafting the *Charte de Déontologie des Magistrats* that will replace the *Recueil des Obligations Déontologiques* pursuant to the aforementioned Framework Act No 2023-1058, the Council will have the opportunity to hold consultations on this point.

# APPENDIX

Request for an opinion from the Minister of Justice to the High Council of the Judiciary of 2 May 2023

**MINISTRY  
OF JUSTICE**

*Liberté  
Egalité  
Fraternité*

RECEIVED  
9 MAY 2023  
HIGH COUNCIL  
OF THE JUDICIARY

**Keeper of the Seals  
Minister of Justice**

Paris, 2 May 2023

Dear Sir,

Following the filing of the report of the General Assembly of the Judiciary and the opinion of your Council of 24 September 2021, the draft framework act on the opening up, modernisation and responsibility of *magistrats* that will be presented to the Council of Ministers on 3 May 2023 is intended to initiate an in-depth reform of the status of the judiciary.

The creation of a third grade, the reform of ways to access the judiciary, the radical review of duties and of the composition of the promotional board and the improvement of the functioning of the promotional board are all important topics that are addressed in this proposed revision of the statutory instrument.

In full consultation with the Council, I would like to continue to review in more detail the status of the judiciary with the aim of continuously preserving the image of the justice system in the eyes of our citizens.

I therefore wish to seek the opinion of the Council on the following two points:

Over the last few years, social media has become a significant – if not the main – method of communication for our citizens. The heads of courts and tribunals, including public prosecutors, have used these platforms extensively to provide our country's citizens with information on our courts and on cases pending. Furthermore, many *magistrats* have set up an account on various social media platforms, either anonymously or not, which they use to comment on current legal and political affairs or ordinarily to share events in their private lives.

High Council of the Judiciary  
Mr Christophe Soulard  
21 Boulevard Haussmann  
75009 Paris

13 Place Vendôme  
75042 Paris Cedex 01  
Switchboard: +33 (0)1 44 77 60 60  
[www.justice-gouv.fr](http://www.justice-gouv.fr)

This use of social media and the increasing role it is playing in the democratic debate is disrupting the traditional balance between the freedom of expression of *magistrats* and their ethical duty of discretion.

Generally, the increasingly diverse ways by which *magistrats* can express their individual or collective opinions publicly at formal hearings or by exercising their freedom of association could, as far as the public is concerned, cast doubt over whether they are fulfilling their duties to act with discretion and neutrality in accordance with the rules of their profession and thus impairing the image of the justice system in general.

As the individual and collective freedoms of *magistrats* must be balanced with the fulfilment of their ethical obligations, I also wish to request your opinion on whether *magistrats* may legally exercise the right to strike.

Indeed, various *magistrats'* unions have called on their members to strike, whereas Article 10 of the Framework Act on the Status of the Judiciary prohibits '*any form of concerted action that interrupts or impedes the functioning of the courts*'.

In the light of the above law, besides the right to strike, the question arises as to how a disagreement might otherwise be expressed, for example by postponing a hearing based solely on the fact that the decision to do so indicates a disagreement on a particular matter.

These issues have numerous implications for *magistrats* and the functioning of the State, and consequently affect our citizens' views of the judiciary.

It is for the above reason that I am seeking the opinion of the full bench of your Council in order to contribute to the global assessment of these two matters that I wish to initiate.

Yours faithfully,

[Signature]

Eric Dupond-Moretti