



REPORT (Consultation 10/19), of 12 June 2019.

PRINCIPLE OF INTEGRITY ETHICAL CONSIDERATIONS REGARDING ACCEPTING GIFTS OR COURTESIES

I. CONSULTATION

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II. OBJECTIVE OF THE CONSULTATION

1. The Commission is asked to give an interpretative pronouncement of Judicial Ethics Principle 28 in the context of a judge possibly accepting gifts or courtesies offered in consideration of the position that he or she holds. Furthermore, some specific questions are formulated, all of which are relevant to the same objective, but that raise different queries regarding the extent of some regulatory concepts presented in Principle 28, such as the “logical social conventions” or the “appearance of impartiality”, or regarding particular circumstances that may coincide, such as the public or private character of the giver or the existence of any past or pending proceedings involving the same.

2. The objective of the consultation fundamentally affects the position of judge to such an extent that various Principles appear compromised. Naturally and primarily Principle 28: *Judges will not accept any gift, courtesy or consideration that exceeds logical social conventions and, in no event, where it endangers their appearance of impartiality.*

3. However, as the consultation correctly suggests, other principles relating to impartiality and even independence are also relevant. Therefore, inasmuch as accepting gifts may call into question the impartiality of the judge and thus undermine public confidence in the judicial system, other Principles appear compromised, including no. 16: *Impartiality also imposes the duty to avoid conduct that, within or away from the proceedings, could call it into question or prejudice public trust in justice;* and no.17: *Judges must endeavour to ensure the upholding of the appearance of impartiality in coherence with the essential nature that material impartiality has for the exercise of jurisdiction.*



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4. For the same reasons, the conduct that is the objective of this consultation also affects the principles that are guarantees of independence, such as no.3, which invites judges *to promote an attitude of respect and trust in the Judiciary throughout society*; or no.9, which recommends always behaving *in a way that they do not compromise or prejudice the perception held by society on the independence of the judiciary in a democratic, lawful state*.

III. ANALYSIS OF THE QUESTION

5. The Principles of Judicial Ethics often contemplate conduct or attempt to preserve values corresponding to them or which are also implied in the general legal system, above all in the chapters relating to abstention or recusal, and also the responsibility of judges. Thus it may occur in our case, for which it is not inconsequential to remember that the competence of this Commission is exclusively limited to the interpretation of the Ethical Principles, seeking to offer guidance or resolve doubts in order that it may be the judge him or herself, and precisely exercising his or her independence, who adjusts his or her conduct inside and outside the proceedings in line with the aforementioned principles.

6. Although the statement contained in Principle 28 is brief, it should be considered that this Principle, which is the objective of this consultation, comprises three interlinked passages: Firstly and in general terms, judges should not accept without forethought or prior scrutiny any form of gift, courtesy or hospitality, from either other public powers or private individuals or entities. Secondly, there is a clause that excepts or limits this strict criteria and which constitutes the object of deliberation, namely that judges can nevertheless receive gifts provided that they do not exceed logical social conventions. Finally, the above exception is qualified, in that *under no circumstances* would it be acceptable when doing so would endanger their appearance of impartiality, consequently, reconciling this final case excludes all ulterior consideration regarding the nature or cost of the gift. In other words, if the appearance of impartiality is endangered, there is not even room for accepting small presents in themselves allowable by social conventions.

7. In contrast to what occurs in other comparable systems, which fix an exact figure as to the monetary cost or value of something that authorities or officials may consider an



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allowable gift, our Principles of Judicial Ethics have preferred to resort to a legal concept that is markedly undefined and impossible to determine in abstract, as is that of *logical social conventions*. Instead of endeavouring to list exhaustively or at least by way of example precisely what gifts or courtesies should be considered to be above or below the logical conventions or simply that which the author of the rule considers acceptable, Principle 28 has preferred to leave its specific determination to the discretion of the person interpreting it.

8. There are however two considerations that lead us towards a restrictive interpretation. Above all, the exceptional nature that we have attributed to accepting gifts: the rule consists of the fact that, in principle, judges cannot accept any type of gift or courtesy, of any amount, and the weight of the argument or justification for different conduct has to stand up to demonstrating that in the specific case such gifts do not exceed that which is allowable in the light of social conventions. Secondly, the rigorous exclusion of any gift, whatever its nature may be, and whether or not it exceeds the conventions, when it endangers - which is somewhat more exacting than damages - the appearance of impartiality.

9. Having dealt with these general consideration, it proceeds to pass comment on the particular conditions that in each specific case have to assist us in giving meaning to the much reiterated *logical social conventions*, together with the notion of *endangering the appearance of impartiality*. However, it is first advisable to give an initial warning: the conditions or circumstances to which we are going to refer do not represent an exhaustive enumeration, as the social reality is always far richer than the imagination of the interpreter and also - it should be added - than the imagination of the author of the rule, who for that precise reason resorted to expressing his or her intentions via indeterminate legal concepts. On the other hand, these conditions or circumstances are not generally given a quantifiable abstract importance, so that a hierarchy may be established between them, but rather that their relative weight will depend on their greater or lesser presence in each case and the manner in which they combine.

10. The first and fundamental circumstance to take into account is undoubtedly the market cost of the gift or present. If Principle 28 has renounced establishing a set figure, it does not seem that those of us interpreting it should fill this gap with our own opinion, although nobody could fail to see that it would be difficult for the logic of social



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conventions to accept values above a modest amount. In any event, attention should not only be paid to the “objective” market price but also, for example, to the givers ease of access to it.

11. A second circumstance that must always be considered is whether whoever seeks to give the gift has litigation pending that directly or indirectly depends on the judge, or that he or she may be expected to hear. Here, in the interest of rigorously preserving the appearance of impartiality, a minimal degree of prudence should lead to the refusal of any gift or hospitality.

12. A third circumstance to be taken into account is the public or private nature of the giver. Here the consultation offers some reasons for rejecting as inappropriate any courtesy that comes from particular individuals or entities, so as to *avoid any form of suspicion, misunderstanding or libel by public opinion or citizens in general*. It is true that a more stringent scrutiny is appropriate in these cases, but maybe not to the point of excluding completely and *a priori* its compatibility with the requirements of judicial ethics. Think, for example, of the gift of a simple promotional pen, of a book maybe written by the giver him or herself or, to continue with the example put forward in the consultation, of theatre tickets, provided not by the Town Hall, but by a local theatre company.

13. In short, there are probably many circumstances to consider, but we would add only two: diligence and generality. It seems obvious that the more frequent the gifts, the greater the risk to the appearance of impartiality and the less understandable it becomes for social conventions. A judge having a permanent box seat for attending football matches, or frequently receiving different presents from a certain person or from another authority, is not the same as, in contrast, exceptionally and for a particular reason, celebration or anniversary he or she receiving a courtesy or hospitality. And surely a gift offered solely to the judge should not deserve the same judgement as the same gift presented to all the authorities or collectives in a particular location.



IV. CONCLUSION

In view of the above, the opinion of the Committee is as follows:

- i) The position of judge imposes particular limitations on exercising certain rights and also entails some special ethical requirements. In accordance with Principle 28, in order to accept gifts or courtesies judges should abide by two precautions: firstly, that the aforementioned conduct does not endanger or call into question their appearance of impartiality. Secondly, that the gift does not exceed the logical social conventions.
- ii) Both concepts have to be examined, and their respective significance determined in light of the specific case. In other words, it is not possible to provide a conclusive rule that may offer general solutions at the abstract level, judges must therefore prudently ponder the concurrent conditions or circumstances.
- iii) Logically, one of the principal circumstances is the value or price of the gift, which in any event must be understood as modest. Furthermore, and whatever its value may be, endangering the appearance of impartiality excludes or is incompatible with the mandate of Principle 28: endangerment that almost inevitably occurs if the present is from one of the parties in litigation heard by the judge in the past, present or in a foreseeable future.
- iv) A further element to take into account is the public or private nature of the giver, because it forms part of the logic of social conventions that institutions maintain certain courtesies or hospitalities between them. This is not the case when the gift comes from an individual, for which its eventual acceptance must be subject to an extremely rigorous prior scrutiny.
- v) Finally, the frequency or diligence, as well as the generality, are also elements to consider and whose examination illustrates the restrictive and cautious spirit that must preside over the interpretation of Principle 28 and, consequently, the practice of offering gifts to judges and, of course, the practice of accepting them.