



**REPORT (CONSULTATION 5/20) OF 3 DECEMBER 2020.**

**I. CONSULTATION**

*I want to ask about judges' participation in comments on judicial decisions in the media.*

*Judges have freedom of expression and specialised and technical legal training that can be valuable for educating about and disseminating proceedings and judicial work.*

*However, sometimes the media seems to seek an opinion contrary to the judicial decision rather than explaining it. This appears to be an attempt to distort a judicial decision that may not be politically very interesting in a certain sense by persuading a fellow magistrate to criticise it.*

*Moreover, during such interventions or programmes, a judge cannot give a legal opinion, technical criticism or commentary on a judgement based solely on technical-legal or jurisprudential aspects.*

*How is a judge to behave in these situations to educate and inform without being used for spurious ends and without interfering with other judges' judicial independence, without having been involved in the proceedings, and in a way that avoids damaging the Judiciary's reputation and the public's confidence in it?*

*Moreover, the next question would be, should a judge participate in such debates or the media as a judicial commentator or talk-show guest when he is unfamiliar with how to behave as a spokesperson, has received no training in the matter, and his opinion represents nothing more than his own?*

**II. OBJECTIVE OF THE CONSULTATION**

**1.** The consultation concerns possible limitations or self-imposed restrictions on judges' freedom of expression derived from judicial ethics principles. Specifically, it asks about comments on social media about judicial decisions or actions. This same consultation highlights that, in principle, this activity can improve transparency and serve as education and outreach about the justice system's social role. However, it notes that because it is often impossible to assess, qualify or analyse the issue in depth, there is a danger (greater or lesser depending on the medium) of slipping into overly simple assertions that



may affect the apparent independence of other judges or magistrates, or promote a negative image of the Justice system, eroding social confidence in it.

2. To analyse the aspects concerned by the consultation, which cover multiple facets, several ethical principles come into play. These must be combined, making it necessary to examine nuances and distinctions insofar as conflicting factors intersect and seem to point in opposing directions.

Principle (31), located at *Integrity* (III), is the most closely linked to the question raised: *Judges, as citizens, have the right to freedom of expression, which they will exercise with prudence and moderation to preserve their independence and appearance of impartiality, and maintain social trust in the judicial system and jurisdictional bodies.*

This general premise must be completed with other pieces taken from *Principles* that illuminate the situation from different angles introducing some other pattern or influencing the same consequences, although strengthened with new perspectives. On the one hand, the *Independence Principle* (I) demands from *the members of the Judiciary* an active commitment to promoting *an attitude of respect and trust in the Judiciary throughout society* (3); and imposes on them the duty to maintain the *appearance of impartiality* (17), which requires special prudence when developing the freedom they have to *contribute reflections and opinions* before the media or in public statements (19). Although this prudence calls for a certain restraint, it can and should be reconciled with the function –which they can assume and is plausible– of social education by explaining the law and procedural principles (20).

Finally, the proactive approach to transparency embodied in Principle 35 should not be forgotten: *“Judges must assume a positive attitude towards transparency as a normal way of functioning for the Judicial Administration, to which they may rely on the means of institutional communication at their disposal.”*

### III. ANALYSIS OF THE QUESTION

3. Projecting the principles enunciated above to the proceedings herein considered – commenting in the media about judicial matters– allows for a very generic statement that, at the same time, can be accompanied by certain guidelines. Given the plurality and variety of conceivable circumstances, there is no way to proclaim fixed or exhaustive criteria beyond a few that seem to be crystal clear. Ultimately, each person must, responsibly and first weighing up all the factors involved, decide in each case whether or not to make the information and opinions available to the public, and set the limits about



what goes beyond prudence and moderation in the exercise of freedom of expression. In one way or another, these are recommendations that appear in all judicial ethics codes, as well as, although at a different level from the ethical plane on which we are now focusing, in both national and supranational jurisprudence.

As a general rule, there is nothing against issuing such opinions, clarifications, or comments on judicial proceedings, so long as it is done with desirable *prudence* and *moderation*. It does not contradict any ethical principle: Moreover, one could consider that such public media presence is encouraged by commendable commitments to transparency and dissemination to public opinion of a culture of respect for and confidence in the justice system, educating the public about how it functions in a state governed by the rule of law and the rules that govern its operation.

But at the same time, it should be stressed (it is a commonplace) that prudence and moderation require self-restraint, and one should take care not to erode other values such as independence or confidence in the justice system. The final assessment is that each one should modulate their discourse (or avoid giving their opinion) to comply with the requirements of these principles (opinion of 23<sup>rd</sup> October 2019, in response to consultation 17/2019). The Commission believes that it can offer some more specific guidelines to help in this personal task of discernment.

4. In a first approach, it is essential to distinguish between judicial matters directly relating to the person giving the opinion or information or commenting and actions or rulings issued by other jurisdictional bodies. In the first case, it is strongly inadvisable to issue assessments, opinions, or comments beyond those drawn from the jurisdictional decisions themselves. Apart from the legal prohibition on disclosing confidential information –which it is taken for granted is forbidden and should never be done, not only for ethical but also legal reasons– there is a very high risk of compromising one's impartiality (or appearance of impartiality). It should not be assumed. This could constitute grounds for recusal, which is a matter to be assessed strictly on the basis of legal and jurisprudential parameters (which are not lacking, also at the supranational level, and which are as casuistic as they are revealing). Regardless of whether or not this is the case, on a purely ethical level, it is more than advisable to avoid issuing any judgment, assessment, or comment addressed to public opinion on the resolutions or matters being processed by the body being served. The desirable transparency –which in such cases should be written as aseptic information– should be provided via the available means of institutional communication, basically the press offices (Opinion of



23<sup>rd</sup> October 2019 analysing Consultation 17/19).

5. It is even more inappropriate to appear before the public to explain or justify one's own decisions or judicial actions when such an appearance occurs as a reaction to public criticism, however unjust, baseless or unfocused it may be considered to be. Faced with these situations, the judge must seek to preserve his or her independence and calm using the instrument provided for in Article 14 of the Organic Law on the Judiciary (used with due moderation in cases where it is necessary and not merely as a way of repelling such criticism, criticism against which in principle the judge must show tolerance), and not by entering into a debate or perverse dialectics with other social actors who in principle can legitimately disagree with judicial decisions in public discussion.

6. The statement in paragraph 4 (on principle, never to give opinions or report on one's own affairs) allows for some nuance concerning cases that have already been finally judged and are no longer news: the scenario is very different when the intention is to make a dramatized recreation of past judicial proceedings, based on the recollections of those involved as sources, to recall a judicial matter which is already part of recent history; it has ceased to be *present* to become *the past*. In recent years, formats of a more documentary nature have emerged that follow this path. Ethical judgement, in this case, varies considerably as they may minimise, if not eliminate, the danger of affecting impartiality and integrity aspects, and it may be easier to emphasise the social, educational aspect (see Opinion of 23<sup>rd</sup> October 2019, consultation 15/2019). In any case, it is important to thoughtfully and rigorously assess the terms by which any such intervention should be limited in the light of the more general principles. A documented chronicle is quite different to an attempt to turn a judicial matter into a show, focusing on the most morbid aspects or seeking certain sensationalism or *voyeurism*.

7. On the other hand, the limits will be minimal (those derived from the necessary respect for the different opinions, and intellectual prudence and seriousness) when it comes to debates in a strictly academic or professional environment, with an exclusively technical-legal content (paragraph 3 of the opinion of 8<sup>th</sup> April 2019, in response to consultation 6/2019). Respectful criticism of resolutions by different bodies, based on legal arguments, enriches the debate in these areas (Opinion of 10<sup>th</sup> February 2019, consultation 21/2019). Even here, however, there can be no room for gratuitous disqualification, harsh tone, or unkind judgment, which are a disgrace to the exemplary behaviour of the Judiciary.

8. In the world of mass media and social media (to which the questioner seems to be alluding) and in the case of comments concerning actions or resolutions by other judicial



bodies on which an opinion or reflection is sought, there are no absolute axioms. However, some guidance can also be provided. The general idea would be stated with two complementary assertions. The most comprehensive scope for purely educational or informational pronouncements or dissemination of procedural rules and the requirements of fundamental rights or legal norms: to explain what remedies are available, what the procedural steps are, how matters are deliberated, what solutions can be adopted **(i)**. And as restricted as possible for critical opinions or judgments (praising or unfavourable) **(ii)**. To clarify, to explain, translate, divulge, yes, but not to censure, disavow, or enter into controversy about the judicial decision. Even less, to insinuate what should or should not have been done according to one's own opinion. Let us not forget that the opinion is offered by one who has been called upon to give it precisely for being a judge. Reluctance to make public judgments or give opinions outside the scope of proceedings and procedural rules must be part of a judge's identity. The office, and the dignity of that office, predisposes the judge to avoid giving an opinion without first examining the evidence, hearing, and weighing up the arguments of all the parties, and knowing in detail how the process has developed.

**9.** By simply illustrating the legal and procedural framework, the judge or magistrate can help inform public opinion. But when we stray into opinions or assessments, the terms are reversed: restraint marked by prudence and moderation. Faced with this dichotomy, before accepting an invitation to take part in a programme, talk show, or interview, the judge should, on the one hand, consider the nature of the medium, the framework and context in which his or her opinions will be framed. Some programmes, media, and formats legitimately try to encourage controversy, even bitter debate, or emphasise each issue's political dimension. In contrast, others search for a technical or legal assessment without attempting to contrast it with others or give it a political slant. More partisan media channels, following the logic of the news media market, may try to push a judge to take up positions that are better avoided in a matter subject to procedural controversy. Elementary rules of prudence make it necessary to evaluate these elements: in certain contexts, more prone to sensationalism or polemic, it is difficult to avoid becoming pigeonholed, to have one's interpretation distorted, or comments branded as "political," no matter how much effort one exerts in avoiding these simplistic interpretations, or the well-intentioned, but naïve intention of not entering into debate with other commentators becomes simply fictitious and unrealistic. It will be all too easy to get into controversy and tarnish the image of neutrality that the Judiciary should project.

**10.** The jurisdictional culture that should be innate in every magistrate leads him or her



to avoid publicly expressing opinions on matters judged by other colleagues unless he or she has not read and studied the judicial decision and has not witnessed the evidence or the reasons invoked and presented by the parties. Hasty opinions that go beyond generic respect for the judge's decision and the initial trust that must be assumed can discredit the justice system in the public's mind. Judicial decisions are open to criticism: by jurists, by journalists, politicians, citizens, commentators... but these people are not other judges or magistrates called upon in principle to carry out this healthy and legitimate work. It may seem frivolous or light-hearted for a judge or magistrate to issue his or her own verdict without the filter of due process.

It is easy for the public to get the idea that the Judiciary acts carelessly, or is not unanimous, or that judges decide on a whim: In this context, in the absence of in-depth analysis, the public may get the impression that the opinion is intended to supplant the Judiciary's response. The duty of loyalty to the institution –the Judiciary and the Justice System– embodied in one of the ethical principles (3) would be affected.

**11.** It would also be intolerable from the point of view of the principles of judicial ethics to go so far as to publicly state –expressly or implicitly– which decisions are appropriate or how a case pending before another court should be resolved, even if this is done without any intention of influencing. It could become an unacceptable intrusion from any point of view.

**12.** Other interventions that are particularly damaging to confidence in the justice system are those that feed the perception, so unfortunately rooted in public opinion and the media, of political leanings in judges and magistrates that could have a decisive impact on their judicial decisions. Subscribing to such a view is to fail to actively encourage in society an attitude of respect for and trust in the Judiciary.

## IV. CONCLUSION

In view of the foregoing, we issue the following opinion:

- i) Like all citizens, judges enjoy freedom of expression and so may intervene in the media.
- ii) When asked for their opinion or comments on judicial matters, they should remember that these are of interest precisely because of the judge's professional status. This imposes on them a duty of self-restraint, prudence, and moderation so as not to fail in their loyalty due to the Power they serve or affect the requirements derived from the



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principles of independence, integrity, and impartiality.

**iii)** As a general rule (one that could allow for some very singular exceptions, such as academia or proceedings that are already history), it is not advisable to comment on or give opinions about a judge's own concerns: the risk of affecting impartiality is very high. Transparency, which is also an ethical requirement, may be fulfilled by dissemination through institutional mechanisms (press offices). In the face of criticism, a judge should not enter into controversy.

**iv)** Comments on proceedings or decisions of other judicial bodies are admissible when they help to explain, disseminate, provide context for such proceedings, or provide information about the procedural rules or the requirements of the rule of law and the functioning of the administration of justice: to inform is to contribute to a legitimate and praiseworthy educational effort, and ethics encourages that.

**v)** Criticism focused on censure and disavowal of a judge or court that issued a decision may contravene the ethical principles that allude to respect for the powers of the State and the image that must be projected to strengthen the dignity of the Justice System and public confidence in it.

**vi)** In principle, a judge should avoid proposing solutions or presenting his or her own criteria formed outside the rigorously procedural scenario in which a judge is called upon to decide. This is because they may confuse public opinion about the jurisdictional function or undermine its social prestige by giving an impression of arbitrariness or that the jurisdictional decision may ultimately be capricious because it conforms to the judge's personal ideas.

**vii)** A judge should not seek to influence, either tacitly or expressly, deliberately, or unwittingly, or give the appearance of seeking to influence, the decisions to be taken by other judicial bodies.