



REPORT (CONSULTATION 4/2020) OF 14 JANUARY 2021

I. QUERY

My question concerns to what extent a judge or senior judge may - or rather, should - divulge their ideology or criticise a politician, a political party, or particular governmental actions, whether in an interview or a symposium, in public participation or on social media.

Judges have ideologies and freedom of expression, and we are often called on as legal practitioners because of our assumed knowledge. On some occasions, however, our involvement as participants is taken advantage of, seeking to provide a technical or legal veneer or reinforcement for political issues.

Does political criticism or affiliation - whether in an article or comment, on social media or in an interview - not run the risk of affecting the image of the judicial body, the judiciary's appearance of impartiality and the public's confidence in justice?

How should a judge behave in these circumstances to comply with these principles of judicial ethics?

II. PURPOSE OF THE CONSULTATION

1. The Committee has been asked to consider whether a judge's image may be affected by public participation, as understood in a broad sense. This encompasses participation ranging from an interview in the media, through a legal symposium, to participation on social media.
2. The question posed concerns judges' impartiality, as well as their independence and integrity.
3. It is specifically related to the principles of independence, impartiality and integrity:



Judicial Ethics Committee

Principle 3. Members of the judiciary must make an active commitment to the proper functioning of the judicial system, as well as promote an attitude of respect for and confidence in the judiciary in society and exercise their judicial duties in a prudent and moderate manner, with respect for the other powers of the State.

Principle 9. Judges must behave and exercise their rights in any activity in which they are recognisable as such in such a way that they neither compromise nor damage society's perception of the independence of the judiciary in a democratic country under the rule of law.

Principle 10. Judicial impartiality is the separateness of the judge from the parties, with whom they must maintain an equal distance, and from the object of the proceedings, with respect to which they must have no interest whatsoever.

Principle 16. Impartiality also entails the duty to avoid conduct, both in and out of court, which might jeopardise their impartiality and undermine public confidence in justice.

Principle 17. Judges must ensure that the appearance of impartiality is upheld in accordance with the fundamental role that material impartiality plays in the exercise of justice.

Principle 19. Judges may share their reflections and opinions in their social lives and in their relationships with the media. They must, however, be prudent in ensuring that their appearance of impartiality is not affected by their public statements, and, in all cases, they must show discretion with respect to any information that might harm parties or proceedings.

Principle 20. In their relationships with the media, judges may play a valuable educational role in explaining the law and the way in which fundamental rights operate within the process.

Principle 21. When democracy, the rule of law and fundamental freedoms are in jeopardy, the obligation to discretion is superseded by the duty to denounce.

Principle 29. Judges must be mindful of the fact that the dignity of the judicial function requires them to behave accordingly.

Principle 31. As citizens, judges are entitled to freedom of expression, which they should exercise with prudence and moderation in order to preserve their



independence and appearance of impartiality, and to maintain public confidence in the judicial system and the courts.

III. ANALYSIS OF THE ISSUE

4. The principles set out above can also be found in the basic tenets of the Bangalore Principles of Judicial Conduct, since its approval by the United Nations Commission on Human Rights up to the Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct, adopted in 2010.

5. With respect to the principle of 'independence', it states that a judge 'shall exhibit and promote high standards of judicial conduct in order to reinforce public confidence in the judiciary, which is fundamental to the maintenance of judicial independence'.

6. Moderation in judges' exercise of their freedom of expression is an axiom repeatedly voiced by the jurisprudence of the European Court of Human Rights when a judge or senior judge has been affected by criminal proceedings or disciplinary action. We will now examine the specific circumstances of each case.

7. Legal restrictions on judges' freedom of expression to praise, criticise or participate in the activities of political parties or trade unions are laid down in Article 395 of the Organic Law on the Judiciary.

8. Article 127 of the Spanish Constitution prohibits serving judges and senior judges from membership of political parties or trade unions. The rationale is that such membership would show a specific political or ideological orientation which is incompatible with the principles of independence and impartiality referred to above.

9. The self-directed course on Judicial Conduct and Ethics developed by the United Nations Office on Drugs and Crime (UNODC), Vienna 2019 (available at https://www.unodc.org/ji/en/judicial_ethics.html), addresses the issue of judges' participation in social media. Noting that social media was in its infancy when the Bangalore Principles and related commentary were formulated, it offers some advice: do not post anything that would damage public confidence in the impartiality of the judiciary,



e.g. political views, matters of public debate; and do not identify yourself on social media as a judge or a member of the judiciary.

In addition, it provides examples of codes of conduct from various countries, in which judges must refrain from showing a preference for certain political parties or movements or offering their opinion on political issues.

10. In a similar vein, it is apposite to note that, in several opinions (including those of 9 December 2015 and 16 October 2020), the Ibero-American Commission on Judicial Ethics underlines the desirability of Judicial Colleges offering adequate training with respect to social networks and their ethical implications. The Ibero-American Commission follows the recommendation of the *Non-binding Guidelines on the Use of Social Media by Judges* and the Doha Declaration: Promoting a Culture of Lawfulness, Global Judicial Integrity Network, UNODC, suggesting that judges should be provided with training about social media platforms.

11. Discretion, seriousness and prudence are identified among the judicial qualities listed in the London Declaration on Judicial Ethics, 2010, approved by the General Assembly of the European Network of Councils for the Judiciary.

12. The Opinion on Consultation 17/19, concerning the relationship between judges and the media - the context within which the query about judges' conduct during a media interview is framed - states the following:

(iv) Information or opinions issued by a judge in the exercise of their freedom of expression and in the interests of desirable transparency must, in all cases, be divulged with prudence and moderation, primarily to ensure that *their appearance of impartiality is not affected* (Principle 19). In addition, it is also to prevent this information from contributing to the shaping of public opinion or propagation of external influences that might affect the independence of the judiciary and the image that it projects in public opinion.

13. This can also be extrapolated to a judge's public participation in an activity, assuming that this is related to training or education on the rights and duties entailed in current legislation, or addressing ongoing legal reforms, including the field of law and the



administration of justice, given the wording of Article 395 of the Organic Law on the Judiciary. Thus, the Opinion of 10 February 2020, in response to Consultation 21/19, states as follows:

‘Participation in talks can serve to promote the educational work required of judges and senior judges by the Principles of Judicial Ethics, provided that this is framed within the limits of healthy criticism which may, under no circumstances, protect attacks on judicial decisions for the simple act of dissenting to the opinion expressed by the majority’.

14. With respect to judges’ participation in social networks, Opinion 10/2018 of 25 February 2019 came to 13 conclusions, including the following:

(i) While judges’ participation in social networks is not contrary to the Principles of Judicial Ethics, the way they present themselves and participate may engender risks related to the observance of the principles of judicial ethics, which may in all cases be affected, even if they do not identify themselves as judges.

(ii) Judges may publicly present themselves as such on social media. They should, however, make a prior ethical assessment of the way they present themselves and evaluate to what extent their identification as members of the Judiciary on social networks, whether directly or indirectly by means of an alias, might condition the content, opinions or behaviours that they make public in these social networks, as well as their reactions to posts by third parties.

(iv) In the exercise of their freedom of expression, judges may state their private opinions on social media, whether or not these are of a legal nature, and may respond to other posts in the ways commonly used by users of social media.

(vi) In all cases, judges need to be prudent in their use of social media and must make special effort to preserve the appearance of impartiality.

(vii) Judges’ expression of opinions, comments and responses on social networks can have a serious impact on the appearance of independence and impartiality. They must also reflect conduct that preserves the dignity of the judicial function. Accordingly, whenever there is a reasonable possibility that they might be recognised as members of the Judiciary, they have a correlative ethical



duty to be extremely careful when expressing their opinions, making personal remarks and responding to other posts.

(xi) The Committee must not preempt the judge's own assessment of their conduct and its impact on the Principles of Judicial Ethics. Nevertheless, in the context of our task to interpret these principles, we believe that judges' participation in social networks must, in general, be governed by prudence and moderation.

(xii) In terms of ethics, with respect to judges' relationships with other users of social media and, in particular, when discussion of controversial issues arises, the principle of courtesy must inform all their actions insofar as it helps foster a positive attitude of respect and public confidence in the Judiciary.

IV. CONCLUSION

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

(i) Judges' involvement in interviews, symposiums, public participation and social networks must adhere to the concept of political neutrality that is ingrained in the principles of impartiality, independence and integrity.

(ii) Prudence and moderation are the two qualities which are pivotal to judges' freedom of expression, in accordance with both the principles of the Spanish Code of Ethics and, in the international arena, the framework of the United Nations' programmes to promote a culture of lawfulness, judicial integrity and respect for the dignity of judicial functions.

(iii) The respectful treatment of all people involved in court procedures should also be extended to out-of-court activities, applying these comments on the specific areas of the consultation with the good manners that should always accompany judicial functions, where there is no room for disrespectful, offensive or harmful expressions.

(iv) In all cases, judges must demand adequate training on the functioning and use of social networks and other social media platforms.