



REPORT (CONSULTATION 6/20) OF 24 FEBRUARY 2021

I. QUERY

Judges are entitled to freedom of expression, dissemination of information and literary production or creation. This is a fundamental right which is compatible with their activities.

Contributions, journalistic articles and opinion pieces by judges and senior judges on technical legal issues are common in print media (newspapers and magazines), above all in specialist legal journals and media.

Nevertheless, publishing an article on one site is not the same as publishing it on another. A national newspaper is not the same as a regional newspaper. It is common knowledge that there are newspapers whose opinion sections are more reputable or established, or have greater impact than other, more recent, digital media.

Likewise, it is not the same to publish in certain legal journals as it is on other less widely used legal websites.

There has, however, been a major change in the form of the widespread expansion of digital platforms, which has led to the proliferation of these types of media. While traditional newspapers enjoy socially accepted status, many digital newspapers are being publicly challenged for spreading false information, compromising ethical principles, being used as outlets for propaganda and sensationalism, or for having a markedly ideological leaning in their editorial approach which is perhaps more extreme than in other mainstream media.

This could apply equally to television media. Participating dispassionately in a radio or television news programme which prioritises seriousness and information does not seem the same as participating in a heated, scandalmongering debate in a programme with a clearly marked editorial line or even in a programme devoted to celebrity gossip.

A judge's contribution to a particular media outlet can link them to the practices employed by this type of media. And this can affect both the image of the judiciary as a whole, the judiciary's appearance of impartiality and public confidence in justice.

To what extent, in their freedom of expression, dissemination of information and literary production or creation, does a judge need to look at not only what they say but where they say it?



II. PURPOSE OF THE CONSULTATION

1. The issue at the heart of this query is that of determining to what extent the image of the judge or the judiciary as a whole, judges' appearance of impartiality or public confidence in justice might be affected by a judge's participation in the media, and particularly in different types of media. The query refers, as an example, to judges' contributions to articles in print or digital newspapers and specialist journals, as well as their participation in radio or television programmes which discuss current affairs related to justice.

2. The query submitted to the Committee touches on several principles included in the Principles of Judicial Ethics:

The principle of independence

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.

The principle of impartiality

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.

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.

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.

The principle of integrity

22. Integrity requires that judges adhere to conduct that reaffirms public confidence in the administration of justice, not only in the exercise of justice but also in all



circumstances in which they are recognisable as judges, or which call on their status as such.

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

3. A judge, like any other person, may freely express their thoughts or opinions, given that this is a fundamental right recognised and protected in Article 20.1(a) of the Spanish Constitution. The text of the Principles of Judicial Ethics, adopted by the General Council of the Judiciary, states in Principle 31 that, in general, ‘*As citizens, judges are entitled to freedom of expression*’. Nevertheless, the very same text also recognises that this right must have certain limitations which are imposed by the need to ‘*preserve their independence and appearance of impartiality, and to maintain public confidence in the judicial system and the courts*’. Consequently, this ethical principle requires that freedom of expression should be exercised by judges ‘*with prudence and moderation*’, and respecting the principle of ‘political neutrality’, which this Committee has underlined in its recent Opinion of 14 January 2021 (Consultation 4/2020) as a concept ‘that is ingrained in the principles of impartiality, independence and integrity’.

4. This Committee has already had the opportunity to deliver its opinion on a judge’s right to freedom of expression and the limits on their involvement in social media - Opinion of 25 February 2019 (Consultation 10/2018) - which included the following specific considerations in paragraphs 4, 6, 8 and 10.

Paragraph 4 states that ‘*the duty of every judge to be mindful of the fact that they are required to behave in accordance with the dignity of the judicial function (Principle 29) and to exercise freedom of expression with the prudence and moderation necessary to preserve their independence and appearance of impartiality, and to maintain public confidence in the administration of justice (Principle 31) constitute ethical obligations that extend to all aspects of life, both personal and professional, as well as to participation in social networks*’.



Judicial Ethics Committee

Paragraph 6 states that *‘Without denying judges the possibility of accessing social media and allowing themselves to be recognised as such, they should first make an ethical assessment of whether their identification as a member of the judiciary on social media, whether directly or indirectly, in light of the content of their contribution, might affect other people’s perception of their independence, impartiality and integrity’*. It adds that *‘When a judge uses social media to express an opinion after having disclosed their position, this gives rise to a number of risks, including the following: some people might consider that they are expressing their opinion in their capacity as a judge or member of the court; some might think that this is an opinion which is commonly held among the judicial body; when the opinion directly or indirectly concerns a case that they will hear, their appearance of impartiality might be affected; if they speak harshly, their lack of restraint and prudence might undermine confidence in justice’*.

Paragraph 8, meanwhile, states *‘Nevertheless, judges must always be prudent when using social media, taking particular care to ensure that they preserve their independence and the appearance of impartiality, and may never disclose any information on cases that they have heard in their role as judge, as indicated in Principle 19, when judges’ expression of their reflections and opinions is secondary to their duty to exercise prudence in making public statements and protect the confidentiality of any information that might concern the parties or the process’*.

Paragraph 9 refers to the fact that *‘the publication of personal opinions, whether they concern legal issues or matters outside the law, and certain reactions to third-party publications may compromise not only the appearance of impartiality referred to in Principle 17 but also, under some circumstances, the principles of impartiality, independence and integrity. This is referred to, on the one hand, in Principle 16, which entails the judge’s duty to avoid conduct which might jeopardise their impartiality and undermine public confidence in justice and, on the other hand, in Principle 9, which requires judges to behave and exercise their rights in such a way that they neither compromise nor damage society’s perception of the independence of the Judiciary. It should also be remembered that Principle 22, referring to integrity, requires judges to adhere to conduct that reaffirms public confidence in the administration of justice in all circumstances in which they are recognisable as judges.*



Judicial Ethics Committee

This imposes an ethical duty on judges to be extremely careful when expressing their opinions, making personal assessments and reacting to other people's comments, especially when they are recognisable as members of the judiciary, and extra caution must be taken when using media which may be shared across social networks'.

Finally, paragraph 10 states that *'the degree of prudence required from judges varies according to the scope of dissemination of the publication and the characteristics of its readership or audience.*

The expression of personal opinions on legal or other matters is unlikely to have the same impact on the appearance of independence and impartiality, or on the perception of confidence in the administration of justice, if the readership or audience for such opinions or comments is comprised solely of members of the judicial service.

The broader the scope of dissemination, the more thorough the ethical assessment should be prior to the dissemination of opinion, comment or reaction to third parties, in order that, if publication is considered appropriate, the necessary prudence is exercised to ensure that the values underpinning the principles of judicial ethics are not compromised'.

5. Likewise, it is worth noting this Committee's Opinion of 23 October 2019 (Consultation 17/2019), which, after recognising the fundamental right to freedom of expression to which judges, as citizens, are entitled, stated that *'the Principles of Judicial Ethics incorporate various general precautions and appeals for self-restraint, which have already been stated: prudence and moderation in the exercise of free expression in Principle 31; and prudence is again called for in Principle 19 in order to ensure that that their appearance of impartiality is not affected by their public statements. It is, of course, the judge's own responsibility in each case to assess the extent of prudence and moderation required by these principles. The latter principle goes so far as to add a prohibition, which requires that judges always show discretion with respect to any information that might harm parties or proceedings'* (paragraph 9).



Judicial Ethics Committee

Paragraph 10 states *‘Consequently, it is generally advisable that judges remain vigilant in ensuring that the information they provide to the media does not compromise their appearance of impartiality, nor - since this involves a collegial body - the independence of its members, and this includes disclosing details of any of its debates. They must, in all cases, omit all mention of anything that might harm parties or proceedings’.*

Paragraph 11 clarifies that *‘these precautions are especially important in high-profile cases, where it is advisable that judges carefully consider whether it is appropriate to provide information or make personal statements and, if so, up to what point it is appropriate, since it seems clear that these types of cases pose increased risks’.*

6. Applying the above criteria, if a judge is invited to express their opinion at the request of a particular media outlet, it is their responsibility to consider these principles and to ensure that their involvement and expression of opinion is governed by moderation and prudence, always endeavouring to keep in mind that their public readership or audience identify them as a representative of a power of the State.

7. Even greater caution must be taken if a judge is asked to participate in certain media outlets, as the query alludes, which seek sensationalism or confrontation on sensitive issues in public opinion. This is the case, for example, with the tabloid press, celebrity gossip programmes and television talk shows, which enjoy audiences in the millions and which can trigger heated debates where nuance is often absent, and in which an opinion expressed by a judge might be understandable by a legal professional but, at the same time, misinterpreted by the general public. Here, there is a very great risk that public confidence in the administration of justice might be damaged, or that essential ethical principles such as integrity, independence and impartiality might be affected.

8. Finally, it remains to address the question regarding the educational role that judges should play in their relationships with the media or in their work as contributors to specialist legal journals, which was discussed in the Opinion of 8 April 2019 (Consultation 5/2019). Paragraph 3 of this opinion states that *‘judges’ publication in the general media and in legal journals in particular is compatible with their educational role in explaining the law and the way in which fundamental rights operate within the process, as referred to in Principle 20. Judges’ knowledge of the law is fostered not only by the study of existing doctrine and jurisprudence on specific matters, but also from the experience gained in the performance of the judicial function and the practical knowledge of legal*



Judicial Ethics Committee

matters acquired through the matters in which they have been involved because of their profession. Consequently, judges' use of their knowledge on issues that have been the subject of judgments that they have handed down for the purpose of dissemination in specialist legal publications does not contravene the Principles of Judicial Ethics'.

9. In the section on 'Propriety, and the appearance of propriety' in the 'Commentary on the Bangalore Principles of Judicial Conduct', issued by the Judicial Integrity Group of the United Nations Office on Drugs and Crime (United Nations, New York, 2013), with respect to judges' appearance on commercial radio or television, paragraph 152 states that *'participation in a programme connected with the law could be appropriate. Several factors need to be considered in determining whether or not a judge should participate in such programmes: the frequency of appearance, the audience, the subject matter, and whether the programme is commercial or not. For example, depending on the circumstances, a discussion of the role of the judiciary in government or the court's relationship with community education and treatment facilities might be appropriate'.*

IV. CONCLUSION

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

- (i) A judge, like any other citizen, is entitled to freedom of expression, and as such may participate in the media.
- (ii) Judges' involvement in the media must be governed by respect for the principles of independence, integrity, impartiality and transparency.
- (iii) They must exercise their freedom of expression with the prudence and moderation necessary to preserve their independence and appearance of impartiality.
- (iv) Judges' publication of personal opinions in the media, whether they concern legal issues or matters outside the law, may compromise not only the appearance of impartiality but also their integrity and impartiality, which requires judges to be extremely careful when expressing such opinions.
- (v) Judges' involvement in the media, when it is governed by the principles identified above, plays a valuable educational role in explaining the law and the way in which fundamental rights operate within the process.
- (vi) Extreme care must be taken in considering these principles, and it could be concluded that the high risk of undermining these principles makes it inadvisable for a



Judicial Ethics Committee

judge to participate in media or programmes which, due to their format, may encourage heated debate or sensationalism, or which are identifiable by the general public as ideologically aligned with a biased and non-pluralistic political approach.