



Twelfth opinion, of 16 October 2020, of the Ibero-American Commission on Judicial Ethics on judges' ethics and freedom of expression. Reporting judge: Commissioner Elena Martínez Rosso

I. Introduction

1. At the virtual meeting on 17 July 2020, the Ibero-American Commission on Judicial Ethics (CIEJ) of the Ibero-American Judicial Summit agreed to draw up an opinion with respect to judges' ethics and freedom of expression.
2. Judges express themselves publicly through formal and institutional channels, such as when they pronounce judgements and during hearings. At the same time, they also speak informally through the media, social networks and when they exercise other rights such as the right to assembly, which may constitute an implicit or unequivocal manifestation of an ideology or belief, such that it could be seen to affect their independence or impartiality.
3. Unrestricted exercise of any of these forms of expression can compromise the ethical principles or values that serve as constraints on the freedom of expression enjoyed by judges, by virtue of the nature and the content of their function.
4. Attempting to determine these constraints in the cases considered in this opinion is the task that we will undertake to address. To this effect, after defining the applicable ethical framework, we will analyse the different areas of judges' freedom of expression in judgements, at hearings, on social media, in exercising the right to assembly and, finally, in the media.

II. Regulatory framework

5. As stated in the preamble to the Ibero-American Code of Judicial Ethics and included in the CIEJ opinion of 16 March 2018, entitled 'Ethical considerations with respect to the relationship between judges and the media':

It is important to remember that under the rule of law, judges are required to strive to find a solution that is just and in accordance with the law for the legal case that is under their jurisdiction. The power and authority that they exercise originates from the same society that, through the established constitutional mechanisms, selects them for such an important and necessary social function, based on the verification of certain specific aptitudes.

The power conferred on each judge entails specific requirements that would be inappropriate for the common citizen exercising private powers; acceptance of judicial duties brings benefits and advantages, but also burdens and disadvantages.

Twelfth CIEJ opinion on judges' ethics and freedom of expression

From the perspective of a governing society, it is understood that judges should concern themselves not only with 'being' but also about 'being seen to be' in accordance with the dignity inherent to the power conferred, so as to avoid giving rise to legitimate doubts in society about the way in which judicial service is carried out.

The law should be aligned with the common good and general interest, but within the sphere of the judicial function, a special importance attaches to certain goods or interests of defendants or litigants, lawyers and other court officers and auxiliaries, which must be taken into consideration.

Judicial ethics must be proposed and applied with a deliberative logic that seeks a reasonable point of balance between values, namely, between the values of the judge as a citizen and as the holder of a power whose exercise has repercussions on the goods and interests of both specific individuals and society in general.

6. While the legal framing above is part of an opinion where recommendations are made on judges' actions in respect of the media, many of these recommendations are valid and transferable to any form of judges' exercise of the right to freedom of expression.

7. The same general scope with respect to judges' different forms of exercise of freedom of expression can be seen in the United Nations Basic Principles on the Independence of the Judiciary, cited in the same opinion. These principles recognise that 'members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary'.

8. In addition, as included in the opinion cited above, the Bangalore Principles of Judicial Conduct establish that: 'A judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary'. The opinion also holds that: 'the general objective of guaranteeing independence and impartiality is, in principle, a legitimate reason for restricting certain of judges' rights.

9. Article 8.1 of the American Convention on Human Rights states that: 'Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal'. In this respect, the State has the obligation to stipulate that their judges and courts comply with these precepts. It is therefore consistent with the American Convention to restrict certain behaviour by judges, with the aim of safeguarding independence and impartiality in the exercise of justice while protecting the 'rights and freedoms of others'.

10. The European Court of Human Rights judgement cited in the opinion underlines that, while it is legitimate to impose on civil servants, on account of their status, a duty of discretion, they are individuals who qualify for the right to freedom of expression. A fair balance therefore needs to be struck between respect for the freedom of expression and the legitimate interest of a democratic State in ensuring that its civil service properly furthers the purposes of Article 10.2 of the European Convention on Human Rights. With respect to public officials serving in the judiciary, the European Court judgement recognises that they should show restraint in exercising their freedom of expression in all cases where the authority and impartiality of the judiciary are likely to be called in question. It is for this reason that judicial authorities, in so far as concerns the exercise of their adjudicatory function, are required to exercise maximum discretion in order to preserve their image as impartial judges.

11. Both the European Court and the Inter-American Court of Human Rights recognise certain legitimate restrictions to judges' freedom of expression in order to preserve two fundamental ethical principles in the exercise of the jurisdictional function, namely: independence and impartiality. Moreover, both courts agree that such restrictions should be lifted when there is a risk to public freedoms or the rule of law. In general and as underlined in the document referred to above, the European codes of conduct confer on judges not only the power but also the duty to intervene in the event of a risk to democracy or the rule of law.

12. While it is recognised that judges' freedom of expression with respect to the media is an instance in which such restrictions are put to the hardest test, there are other forms of exercising freedom of expression where judges risk compromising the ethical guidelines that govern the conduct of a 'good judge'.

III. Judgements

13. The natural, official and institutional expression which is most clearly identified with the jurisdictional function is the statement of a judicial body's intent through judgements.

14. While the assertion that judges should speak only through their judgements may not now seem sustainable, these are the only forms of expression that enable fulfilment of the primary function assigned to the members of the judiciary, i.e., judging and enforcing the judgement.

15. There are no models or formulas for judgements; they are as distinct from each other as the people who pronounce them. Nevertheless, beyond validity and adherence to the law, there are certain ethical guidelines that every 'good judge' should respect when drawing up a judgement.

16. Firstly, there is the legal and ethical duty to state the grounds or justification for decisions. Reasons must be given to ensure that decisions are not taken arbitrarily or as a mere act of authority. Moreover, justification for rulings is the only possible way of resolving a conflict that guarantees the proper exercise of the constitutional right to defence or, in other words, that controls the way in which judges fulfil their duties or exercise their jurisdictional power.

17. The Uruguayan Supreme Court judgement No. 349/2009, of 2 October 2009, held as follows:

With respect to the grounds for judgement, the Court indicated that: 'Without a doubt, stating the grounds for a judgement - or its justification - is the most important part of the judgement, where the judge sets out the reasons or basis for their decision, i.e., they explain what determined their choice of solution to the conflict that they had to resolve. This essential requirement in the concluding part of a case defines judgement as a reflective action, rather than an arbitrary act of authority, and allows control over the way judges exercise their jurisdictional power' (Vescovi et al., C.G.P. annotated, Vol. VI, pp. 62-63).

Yet, as Igartúa indicates (Teoría analítica del derecho [Analytical Theory of Law], pp. 99-100), alongside the preceding intraprocedural concept of stating grounds, it should be added that this principle of a constitutional basis is incorporated into the system of guarantees that democratic constitutions create to protect individuals against state power and, in particular, the manifestation of this power through jurisdiction. 'But, above all, the constitutional obligation to state grounds represents a legal and political principle which, at the heart of its meaning, expresses the need for controllability. This does not mean endorsing institutional control (courts of appeal and cassation) but openness to general control. Consequently, neither the parties, nor their lawyers or the judges hearing the motions exhaust the use of judgements. These judgements are also for the public [...] The political implication of this shift in perspective is clear; the privatist view of control exercised by parties and the bureaucratic view of control exercised by the higher courts is now integrated into a democratic perspective, where the controller is the public itself, in whose name justice should be administered because it is the repository of sovereignty [...] Popular control over judgements means that the corresponding statements of grounds provide the elements necessary to ensure that even outsiders can understand and evaluate the reasoning by which judgements seek to be recognised as legitimate components of the jurisdictional function'.

Without a statement of grounds or proper justification, there is concern over the very legitimacy of the exercise of the jurisdictional function under the rule of law.

De Asis Roig (Jueces y Normas, pp. 288-289), summarises the requirements that the Spanish Constitutional Court and Supreme Court have underlined when examining the statements of grounds for judicial decisions, as follows:

Twelfth CIEJ opinion on judges' ethics and freedom of expression

(a) They must disclose the reasons and items of evidence that allow the legal criteria used to be known.

(b) They must show the proven facts on which they are based and the legal qualification attributed to them, without the need for a specific explanation, or explicit, exhaustive or detailed reasoning of all aspects and perspectives.

(c) They must be coherent.

(d) They must be internally consistent, to avoid not so much contradiction as a failure to state grounds.

(e) They must be an application of non-arbitrary rules.

An insufficient or markedly erroneous statement of grounds amounts to a failure to state grounds, and such a defect violates the duty of effective judicial protection (Supreme Court Judgement of 31.1.92) (Judgement No. 215/2005).

In the same respect, Antonio M. Lorca Navarrete states: 'The statement of grounds for judicial decisions is a far from insignificant issue. Its establishment is connected to the right to "a fair and public hearing", as set out in Article 10 of the Universal Declaration of Human Rights of 10 December 1948 and Article 14.1 of the International Covenant on Civil and Political Rights of 16 December 1966, and, in the words of Article 8 of the American Convention on Human Rights (Pact of San José), Costa Rica, 22 November 1969: "the right to a hearing by a competent tribunal".'

'The statement of grounds for a judgement must also seek to ensure that the parties in the proceedings are sure of the correctness and fairness of the judicial decision with respect to citizens' rights and, in this respect, it must demonstrate the court's efforts to apply the law in a way that is free of any arbitrariness ("La Necesaria Motivación de las Resoluciones Judiciales", Uruguayan Journal of Procedural Law, Volume I, 1989)'.

18. Furthermore, the provisions of Article 19 of the Ibero-American Model Code of Judicial Ethics, approved in 2006 at the 10th Ibero-American Judicial Summit held in Santo Domingo, Dominican Republic, clarify that: 'Stating grounds entails setting forth, in a clear and orderly manner, legally valid and appropriate reasons to justify the decision'. Article 22 adds that 'Judges must state the grounds for their decisions on issues of both fact and law', while Article 23 states as follows: 'On issues of fact, judges must proceed with analytical rigour in the treatment of the evidentiary framework. They must demonstrate specifically what each means of proof supports, in order that an overall assessment can then be made'. In addition, Article 18 of the code stipulates that 'The obligation to state the grounds for decisions is intended to ensure the judge's legitimacy, the proper functioning of the system for procedural challenges, the proper control of the power invested in judges and, ultimately, the justice of judicial decisions'.

19. Judges who do not provide sufficient normative and factual grounds for their decisions not only allow their legitimacy to be questioned and, by often unjustified extension, that of the entire judiciary - not uncommon at the present time - but they also violate rights of a constitutional nature (the right to due process and due defence), at the same time that they disregard a fundamental ethical duty in the exercise of the judicial function.

20. Secondly, freedom of expression in judicial judgements should be exercised in such a way that clarity is the most important factor. Judicial rulings are intended not only for legal parties and their lawyers but also for the whole community - and not only the legal community - where the judge conducts their jurisdictional activity. Social control over judges is a guarantee of democratic strength and can only be exercised if decisions are clearly expressed and founded. Obscurity in wording is often the reflection of indecision, which is inappropriate in a 'good judge', in addition to which, it may hide or disguise arbitrariness. In other cases, cryptic language may conceal either ignorance or indecision.

21. Thirdly, the desired profile of a 'good judge' should underline the fact that court rulings are not opportunities for judges to show off their academic knowledge when, as is often the case, it is unnecessary for the resolution of the conflict - which is the purpose of rulings - in such a way as to provide rational justification.

22. Finally, judgements rendered by higher courts should limit reference to the author of a contested judgement by avoiding any damaging or unnecessarily insulting terms, when, strictly speaking, it is merely a question of refuting arguments and choosing those that are deemed correct to justify a decision other than the one reached by the lower court. Behaviour that does not adhere to this ethical standard disqualifies anyone who departs from it and conveys an unsatisfactory image of the judicial function.

IV. Hearings

23. The transition from a largely written procedural system to a hearing-based process, in which all procedural steps - except for the complaint and the answer - are conducted orally, entails a radical change for both judges and lawyers.

24. A few years after this new procedural system had entered into force in Uruguay (the General Procedural Code entered into force in November 1989), a group of judges from the civil court of the first instance in Montevideo agreed on an appraisal of the new procedural system. This appraisal suggested that the hearings had revealed attitudinal aspects of judges that had previously been concealed, by virtue of the types of tasks that they had performed as part of the written process.

25. The judges also agreed that the greatest criticisms of the new system were directed specifically at this now fully exposed attitudinal aspect, pushing judges' justifications for rulings and their legal training into the background. At least, these were not reasons for complaints against or criticisms of judicial proceedings at that time.

26. So, what were the attitudinal aspects on which all this criticism was focused? Accusations included: lack of impartiality (greeting each party differently, using more familiar language with one of the parties or allowing it from one party); lack of conviction or firmness when directing the hearing; authoritarianism and arrogance; lack of preparation for the hearing through careful reading of the casefile and/or lack of concern for the human and material resources necessary for its proper functioning; intolerance and lack of flexibility in response to reasonable arguments; lack of manners and courtesy, inhibiting the reasonable atmosphere that should prevail at all hearings; and lack of punctuality.

27. Subsequently, Uruguay's Judicial College developed a programme to draw attention to the fact that judges express themselves not only through their judgements but also, in a highly significant way, through their attitudes.

28. It was intended to convey the idea that attitudes shape the image of a 'good judge', that they have ethical implications and that they can often disqualify judges' actions over and above their legal decisions in the view of lawyers, legal parties, and the entire community which they serve.

29. Judges' freedom of expression in hearings should take into account that certain attitudes reveal both positive and negative values. Judges should therefore seek to exercise as much self-control as possible in order to avoid the emergence of negative values such as those mentioned above.

V. Social media

30. The Ibero-American Commission on Judicial Ethics has already taken a position on this subject in its opinion of 9 December 2015, following the consultation by the Judiciary of the Republic of Costa Rica.

31. While this opinion offers exhaustive treatment of the subject, it is pertinent to remind ourselves of the ethical duties that may be compromised by the use of social networks: independence, impartiality, courtesy, integrity, transparency, professional secrecy and prudence.

32. Moreover, it is both relevant and necessary to highlight the conclusions and recommendations included in this opinion.

33. The conclusions underline the fact that social media is a communication tool which allows the transmission of content and that this content must not violate the principles enshrined in the Ibero-American Code of Judicial Ethics. They also suggest that judges who use social media should not only avoid making statements that amount to failure to fulfil the duties provided for in the Ibero-American Code, but must also weigh the possibility that their statements may be beyond their capacity to withdraw and may be manipulated beyond the originally envisaged communicative intent.

34. Notable recommendations include the need for the judiciary to consider the possibility of providing instruction, through Judicial Colleges and other training bodies, with the aim of familiarising officers of the court with the characteristics and potential uses of each social network and their ethical implications, focusing on users' lack of or limited ability to restrict the dissemination of information, opinions or profiles that appear on the network.

35. Another important recommendation is related to the consequences of a judge's decision whether or not to include a person in their circle of contacts, seeking to restrict or avoid any communication with subjects who are involved in a matter that is being heard by the judge.

VI. Right to assembly

36. This right is, of course, a separate right from the right to freedom of expression. Nevertheless, a judge's attendance at certain events, functions or meetings may be considered by a reasonable observer to be an expression of adherence to certain beliefs or ideologies that are manifestly held by the participants of the gathering in question. Consequently, the judge's impartiality could be seen to be compromised in specific cases, where such issues are involved in the object of the proceedings.

37. A judge's participation in an annual march to commemorate those who were 'disappeared' during the military dictatorship in Uruguay led to an administrative investigation ordered by the Supreme Court. The judge in question was involved in hearing several of the cases in which the military was investigated as allegedly responsible for the disappearances and human rights violations which gave rise to the annual commemorative march. The resolution that put an end to the investigation made special note of the ethical duty that was not observed in this situation - to the extent that the judge's conduct called their impartiality into question, leading to an application for their removal from the case - and this evaluation was made on the basis of Article 12 of

the Ibero-American Model Code of Judicial Ethics: 'Judges should seek to avoid situations that would directly or indirectly justify their removal from a case'.

38. A judge's exercise of the right to assembly may be considered by a reasonable observer to be an expression of ideologies, beliefs or values that may compromise the judge's independence or impartiality. From this perspective of a reasonable observer, the judge, doing their utmost in their duty of prudence, caution and restraint, must determine how to behave.

39. As a corollary, the expression of ideologies and beliefs is sometimes implicit, arising from decisions such as attending a particular meeting or gathering, and is as limited for judges as the exercise of the right to freedom of expression.

VII. The media

40. As noted above, on 16 March 2018, in Santo Domingo, Dominican Republic, the CIEJ approved an opinion entitled 'Ethical considerations with respect to the relationship between judges and the media'. There is little to be added in terms of theory to the content of this recently adopted opinion.

41. The document makes recommendations on the way in which judges should act with respect to both the media and journalists, which can only be reiterated. It seems appropriate, however, to add that while handling of the media - as well as the communication skills to express what is intended, without the detours to which questions or comments from journalists can lead - may come naturally to a judge, this is not often the case.

42. It is unusual for judges' training to include any skills training in this area and, since judges' work is largely solitary work involving private reflection, their social relationships and public exposure may be very limited.

43. Regardless of whether there is much to be learned about management of the media and how to act in view of the press - a matter that is, of course, a decision for each judge - it is advisable to ensure that there is a press office within the judiciary whose task it is to accurately and professionally respond to the requests of journalists and the media.

44. Statements to the media may impact on the ethical values which are essential to judges, including, most commonly, impartiality. According to Manuel Aragón Reyes:

The relationship between justice and freedom of expression has rarely been as evident as it is today. As a consequence of, on the one hand, the development of the mass media and the expansion of freedoms and, on the other, phenomena such as political

corruption, the parliamentary stagnation fostered by multi-party democracy and, of course, the transformation of certain news stories into profitable goods through “sensationalism”, there has arisen, at least in Western Europe, a leading role for judges, a “judicialisation” of social and political life, which makes the judiciary and its activities the most common subject of news stories in the pages of newspapers and the airspace of radio and television programmes.

That being said, this outflow of information and opinion on judges and their actions has both a positive and a negative side. The positive side is that this strengthens the social control that the judiciary, as well as all public power, must exercise in a democratic constitutional state, which undoubtedly works in the interests of justice itself and, more specifically, in strengthening judges' legitimacy. The negative side is the risk that this leading role sometimes poses for judicial independence or at least impartiality¹.

VIII. Conclusions

45. The different forms of judges' exercise of the freedom of expression which have been considered in this opinion all have a common denominator; they all underline the fact that a judge's mission, in all its manifestations, is founded on moral values, the dignity with which they fulfil their duties and the respect that they inspire, as maintained by Judge Francisco Gamarra in the conference given in 1944 to the Uruguayan Association of Lawyers.

¹ Aragón Reyes, M., 'Independencia judicial y libertad de expresión' [Judicial independence and freedom of expression] (speech made on 5 September 1995 at the International Association of Lawyers Congress in Madrid), *Derecho privado y Constitución* No. 10, 1996, pp. 259-260.