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Ninth Opinion, 12 March 2020, of the Ibero-American Commission of Judicial Ethics on the use of new technologies by judges: ethical advantages and challenges. Rapporteur: Commissioner Eduardo D. Fernández Mendía

1. Introduction

1. The 15th Meeting of the Ibero-American Commission of Judicial Ethics, held in Madrid on 3 and 4 July 2019, agreed to prepare an opinion on the ethical implications of the use of new technologies by judges.

2. In the last three centuries the monotony of a slow evolution has been modified by different cycles of the industrial revolution as a pretext to the current era, which is often referred to as the fourth revolution. This three hundred year period sees the appearance of the railway and the steam engine as drivers for the industrial cycle, followed by electricity and mass production. The third stage is linked, in the middle of the 20th century, with the emergence of electronics, information and communications technology, to a technological explosion of immense proportions. We thus arrive at these two initial decades of the 21st century and focus on this fourth stage, which does not hinder the meteoric rise of the new technologies, but is related to robotics, biotechnology, nanotechnology and the Internet, which in turn has undergone different stages of development (web 1, web 2, web 3, web 4). This enumeration is certainly open because the technological revolution is practically unstoppable, and its evolution reminds us of Heraclitus of Ephesus when he said there is nothing permanent except change.

3. The challenge these circumstances represent for Ethics, the evolution of which is influenced by different dimensions that are not temporally measured by the same standards, stems from giving a response that reminds the operators at the service of justice of the centrality of human dignity and its realisation or materialisation in the fundamental rights harboured by Law. It is not about facing the technological novelty with Ethics, rather of situating it in its just terms of instrumental value, in its means-ends relationship with the innate values of human dignity.

4. The aim of the Ibero-American Commission of Judicial Ethics is to analyse, from an ethical perspective, the advantages and challenges that the new technologies suppose for the exercise of the jurisdictional function, and to attempt to provide several proposals for action by judges from an ethical point of view.

5. The first part addresses the coexistence of principles that have relevance for the exercise of the judicial function but which are, initially, contradictory, as is the case with protecting the privacy of citizens and the transparency of political powers. In the second part, we examine the advantages and challenges presented by the use of

new technologies by the judiciary. The third part sets forth the need to reinforce certain ethical principles and judicial virtues in the face of the use of new technologies in the judicial function. Lastly, by way of conclusion, some proposals for ethical behaviour by judges in the context of advanced technology are adopted.

2. The emergence of the right to personal data protection and the imperative for transparency of public authorities in an era of advanced technology

6. Nowadays, the role of judges and the ethical dimension of their function are inscribed in a context of greater sensitivity towards the protection of personal data but at the same time must respond to the clamour for greater transparency of public authorities, and better security of communications in a sphere where, however, the obligations of professional secrecy, motivation and training are still relevant.

2.1 The right to privacy as a limit to the use of new technologies

7. In the universal sphere, enshrined in Article 17 of the International Covenant on Civil and Political Rights is the fundamental right of all persons not to be subject to "arbitrary or unlawful interference with their privacy, family, home or correspondence", protecting them against "unlawful attacks on their honour and reputation" in accordance with the law.

8. In the same vein, in 2013 the United Nations General Assembly exhorted the protection of citizens' personal data, calling upon all States to:

   - Respect and protect the right to privacy, including in the context of digital communications;

   - Take measures to put an end to violations of the right to privacy and to create the conditions to prevent such violations, including by ensuring that relevant national legislation complies with their obligations under international human rights law;

   - Review, on a regular basis, their procedures, practices and legislation regarding the surveillance of communications, their interception and the collection of personal data, including mass surveillance, interception and collection, with a view to upholding the right to privacy by ensuring the full and effective implementation of all their obligations under international human rights law;
   - Establish or maintain existing independent, effective, adequately resourced and impartial judicial, administrative and/or parliamentary domestic oversight mechanisms capable of ensuring transparency, as appropriate, and

accountability for State surveillance of communications, their interception and the collection of personal data[1].

9. In Europe, within the framework of the Council of Europe, the European Court of Human Rights has laid down reiterated jurisprudence as regards the protection of human rights linked to new technologies that have their roots in legal principles deriving from the fundamental rights contemplated in the European Convention on Human Rights, in particular its Article 8, which protects the right to private and family life.

10. The Charter of Fundamental Rights of the European Union, proclaimed in Nice in 2000 and in force since 1 December 2009, enshrines a fundamental autonomous right to the protection of personal data that concern them, data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law, having the right to access and rectification, and it being necessary to establish an independent supervisory authority.

11. The General Data Protection Regulation, which came into force in the European Union on 25 May 2018, has been an extraordinary advance in this sphere2. Notwithstanding this, it is precisely in the legal sphere where the protection of such rights in the legal process is at the discretion of judges. In this sense, article 55.3 of the European Regulation establishes: "Supervisory authorities shall not be competent to supervise processing operations of courts acting in their judicial capacity".

12. Section 20 of the preamble of the European Regulation explains the reason for this special rule:

> While this Regulation applies, inter alia, to the activities of courts and other judicial authorities, Union or Member State law could specify the processing operations and processing procedures in relation to the processing of personal data by courts and other judicial authorities. The competence of the supervisory authorities should not cover the processing of personal data when

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[1] United Nations General Assembly, Resolution 68/167, The right to privacy in the digital age, A/RES/68/167, 18 December 2013.

[2] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (*OJ* L 119, 4.5.2016, p. 1). In addition, Directive (EU) 216/680 of the European Parliament and of the Council, of 27 April 2016, must be taken into account, which relates to the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (*OJ* L 119, 4.5.2016, p. 89).

courts are acting in their judicial capacity, in order to safeguard the independence of the judiciary in the performance of its judicial tasks, including decision-making. It should be possible to entrust supervision of such data processing operations to specific bodies within the judicial system of the Member State, which should, in particular ensure compliance with the rules of this Regulation, enhance awareness among members of the judiciary of their obligations under this Regulation and handle complaints in relation to such data processing operations.

13. In the Ibero-American sphere and since 1997 the Judicial Summit has been explicitly concerned by the incorporation of new technologies into the exercise of the jurisdictional function as suitable instruments for the best administration of justice, as long as the right to intimacy via a legal data protection framework is respected[3]. This concern has been reiterated in successive declarations in the Summit, culminating in the Final Report on the Technological Divide in Justice, adopted in the 16th edition.

14. In the axiological pillar of our legal orders, the preservation of dignity and human rights, as higher principles that legitimise and condition the rest of the juridical systems, are also a cornerstone in this expansion phenomenon.

2.2 The imperative of the openness and transparency of political authorities

15. The democratisation of power has been accompanied by the validity of human dignity and the guarantee of the rights that comprise it. Public power must be legitimised in its exercise, supposing in particular the public nature of acts of governance and the transparency of public administration, which has become a thermometer of the health of our societies.

16. Openness and transparency is the opposite of what rationality confronts with the unfortunate tendency of some public authorities towards opacity or the undue reservation of acts of governance, including those of the judiciary, with anachronistic and improper legislations for a rule of law.

17. Accountability, explanations in clear and verifiable language and genuine transparency afford the exercise of human rights a favourable setting.

3. The advantages and challenges of new technologies in the exercise of the judicial function

18. New technologies are set to greatly transform the exercise of the judicial function. On this point, they offer clear advantages, but are not exempt from risks and challenges that it is important to systematise. Effectively, technological means are

[3] Ibero-American Judicial Summit, Third Conference of Supreme Court Presidents, Madrid 27 to 31 October 1997.

useful instruments for the administration of justice as, for example, the use of videoconferencing has shown, but they are especially disadvantageous when the judge is not sufficiently trained or when the convenience of incorporating external jurisprudential doctrine is abused, in the sense that it is passed off as original.

3.1 Advantage of new technologies in the judicial function

19. The use of technology implies undeniable advantages for the recipient of the legal protection and also for judicial agents, in particular as regards traceability, speed and transparency. Furthermore, artificial intelligence could have a role, although limited, in the exercise of the act of judging.

20. The traceability of each of the stages that make up the due electronic process allows for all of the technical operations used to be exhibited, from the call for protection to the jurisdictional resolution. Traceability offers the reliability of the procedural itinerary in accordance with pre-established rules of transparency and a common guarantee to users and operators, as a demonstration of the computerised due legal process.

21. The speed in the development of the proceedings facilitates the artificial sequencing in an appropriate manner of the traditional and slow processing thereof. Programming tends to optimise undue dead time or manifest inadequacy, without ignoring the defence of the rights of those on trial.

22. Transparency in the management of proceedings is not a matter of goodwill to the litigant or community, rather, on the contrary, it derives from the constitutional and conventional quality of the public nature of governmental acts, as long as this does not unduly affect citizen privacy.

23. As pointed out by David Kaye, the United Nations Special Rapporteur on the right to freedom of expression, artificial intelligence is linked to "increasing independence, speed and scale connected to automated, computational decision-making. It is not one thing only, but rather refers to a "constellation" of processes and technologies enabling computers to complement or replace specific tasks otherwise performed by humans, such as making decisions and solving problems." However, professor Kaye continues to draw attention to the fact that artificial intelligence does not imply that machines work according to the same concepts and rules as human intelligence but that, simply, it optimises the work of computerised tasks assigned by humans through iterative repetition and attempt[4].

24. *The Declaration on Ethics and Data Protection in Artificial Intelligence*, approved in 2018 by the data protection authorities of the European Union, France and Italy,

[4] Report by the United Nations Special Rapporteur, David Kaye, on the promotion and protection of the right to freedom of opinion and expression General Assembly, A/73/348, 29 August 2018, section 3.

and with the support of other European authorities and those of other continents, states its objective as preserving human rights and taking into account the following principles: equity, attention, vigilance and accountability; transparency and intelligibility; privacy by default and privacy by design, the empowerment of every individual and the effective recognition of their rights, along with the fight against unlawful or discriminatory biases[5]. Looking to the future, it is "asked that common guiding principles on artificial intelligence be established" and a Working Group be created on Ethics and Data Protection in Artificial Intelligence[6].

25. In 2019 the European Commission set out its strategy on artificial intelligence, and considered that "Europe's ethical approach to AI strengthens citizens' trust in the digital development and aims at building a competitive advantage for European AI companies"[7]. In its communication the European Commission reinforces the seven requirements that must respect the applications of artificial intelligence to be considered trustworthy: human agency and oversight; technical robustness and safety; privacy and data governance; transparency; diversity, non-discrimination and fairness; societal and environmental well-being; accountability[8]. At the beginning of 2020, the European Commission adopted a white paper on artificial intelligence, in which it insisted on its ethical dimension and the need for us to be able to trust it[9].

26. In the American sphere, referring to the uses and potential impacts of new technologies for the administration of justice, it is indicated that they can fulfil the following functions:
    - Extremely accurate monitoring of the progress of a case.
    - Speeding-up and control of communications.
    - Control of deadlines of a group of cases and monitoring of which activities have been carried out within each of them.
    - Efficient use of time.
    - Better handling of legal and jurisprudential information regarding the facts of a case.
    - Solid notion of which party is driving the proceedings.
    - Automation and standardisation of routine tasks.
    - Greater levels of security in the storing of information.

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[5] "Declaration on Ethics and Data Protection in Artificial Intelligence", 40th International Conference of Data Protection and Privacy Commissioners, Brussels, October 2018.

[6] Cotino Hueso, Lorenzo. (2019). "Ethics in the design for the development of an artificial intelligence, robotics and trustworthy big data and their usefulness from law". *Revista Catalana de Dret Públic,* (58), 2019, pp. 29-48. https://doi.org/10.2436/rcdp.i58.2019.3303 (last consultation: 29 February 2020).

[7] European Commission, *Building Trust in Human-Centric Artificial Intelligence*, Brussels, 8.4.2019, COM (2019) 168 final.

[8] High-Level Expert Group on Artificial Intelligence, Ethics guidelines for trustworthy AI, European Commission, Brussels, April 2019.

[9] European Commission, *White paper on Artificial Intelligence - A European approach to excellence and trust*, COM (2020) 65 final, Brussels, 19 February 2020.

– Facilitate the design, planning, monitoring and evaluation of specific policies.
– Make it easier to deliver information to users and citizens[10].

27. Thus, the pressing need to resort to new technologies in order to guarantee the transparency, effectiveness and diligent management of an updated due legal process demands, in contrast, guaranteeing the values invoked by the universal declaration on human rights, based on dignity and the value of human beings, and on the equality of rights for women and men.

28. It is necessary, therefore, to adopt a planning strategy that takes in the perspectives of law, technology and legal ethics in a continuous dialogue that enables the judicial operation to reduce its pending tasks.

3.2 Challenges of new technologies in the judicial function

29. Effective legal protection guaranteed by the judicial system places citizens as an essential element of the whole, whatever their position in the due process. Both conventional comparative law (Article 8 of the Pact of San José, Costa Rica and Article 6 of the European Convention of Human Rights) and constitutional law enshrine the right to a fair trial, which demands a judge, prior appointment of judges, or their equivalent in hearings, that is, a court before which the non-substitutable procedural acts unfold. In the jurisdictional task - without entering into the ethics analysis - the support that the judge turns to adopt a correct and fair decision is that of human expertise or even technology, which must not be binding, notwithstanding its passing through the sieve of "rational constructive criticism"[11].

30. We must, therefore, warn of the need to avoid not just the application of the law to the letter, which may be unfair (*summum ius, summa iniuria*) but, in addition, the indiscriminate application of new technologies in the judicial sphere could lead to legally unsatisfactory results.

31. The challenges of new technologies must permit the overcoming of mistrust or incredulity concerning their virtues or strengths at the service of justice. Perhaps on this topic the saying "what is not known is not loved" becomes more evident, to which their obligatory capacity to be employed ethically is indispensable.

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[10] Hernández, Cristián, *Information and Communications Technology: uses and potential impacts for the administration of justice*, Justice Studies Center of the Americas (CEJA).

[11] The delimitation of consent on the Internet, in particular the acceptance of cookies, is significant, as has emerged from European case-law, in particular the judgment of the Grand Chamber of the Court of Justice of the European Union, of 1 October 2019, Planet49, C-673/17, EU:C:2019:801 (consent on personal data on the Internet and cookies) in accordance to which "the storing of information, or the gaining of access to information already stored, in the terminal equipment of a subscriber or user is only allowed on condition that the subscriber or user concerned has given his or her consent, having been provided with clear and comprehensive information."

32. A study carried out in 2015 by the CEJA and Microsoft identified the following challenges for new technologies in the Latin American judicial sphere:

- Improve the response capacity of the justice system in the face of ever more diverse and growing demand.
- Consolidate procedural reforms underway, drive procedural reforms for unreformed matters and change the logic of written records.
- Reorganisation of judicial offices.
- Substantially improve governmental decision-making processes and operations management in sector institutions.
- Increase the overall effectiveness and efficiency of the justice system.
- Develop effective support and communication mechanisms with users and the general public, strengthening instruments of accountability[12].

33. In the face of these challenges, new technologies are put forward as responses to the tremendous desire to obtain the right to a better administration of justice, not without recognising the controversies that this generates. Added to this should be the question mark regarding whether the operators of the justice system have exercised or exercise their task with the knowledge and training recommended by Article 34 of the *Ibero-American Code of Judicial Ethics*: “Judges must, with their theoretical and practical knowledge, strive to contribute towards the better development of Law and the administration of justice”.

34. By way of example, mention can be made of the experience in Argentina with the application of artificial intelligence in the judicial sphere through the *Prometea* project.

35. The Deputy General Prosecutor's Office for Administrative-Commercial and Tax Affairs of the Public Prosecutor’s Office of the City of Buenos Aires took the first step towards the incorporation of artificial intelligence via this system that had its beginnings in August 2017. Since its development, over 50 national and international organisations and institutions have interacted from this body (UN, OAS, University of Oxford, University of Sorbonne, Inter-American Court of Human Rights, Constitutional Court of Colombia and the Ministry of Justice in Spain).

36. *Prometea* has collaborated in the automation of the main tasks of these organisations. It is characterised by four functions. Firstly, intelligent assistance, as by working as a virtual assistant it intelligently generates users in the obtaining of a result. Secondly, the automation is split into two. On the one hand, complete automation, where algorithms automatically connect data and information with documents and, on the other hand, automation with reduced human intervention, as

[12] 12 Justice Studies Center of the Americas (CEJA) and Microsoft, *Perspectives on the use and impact of ICTs in the administration of justice in Latin America* , editors: Cristián Hernández (CEJA) and Roberto Adelardi (Microsoft), Santiago de Chile, 2015.

in many cases people must interact with the automated system in order to complete or add value to the creation of a document. Thirdly, classification and intelligent detection. Detection starts from the reading and analysis of a large volume of information, in which *Prometea* is able to identify documents based on the multiple combinations it has been trained with. Fourthly, prediction without "black boxes", that is, without opacity and with complete transparency, which implies that all algorithms using *Prometea* are traceable and identifiable[13].

37. Within the framework of the European Council, in 2018 the European Commission for the efficiency of justice (CEPEJ) approved the *European Ethical Charter on the use of artificial intelligence in judicial systems and their environment*, outlining the following principles:

- Principle of respect of fundamental rights: ensuring that the design and implementation of artificial intelligence tools and services are compatible with fundamental rights covered in the European Convention of Human Rights, and in Convention 108 of the European Council of 28 January 1981 for the protection of individuals with regard to the automated processing of personal data.
- Principle of non-discrimination: specifically preventing the development or intensification of any discrimination between individuals or groups of individuals (by racial or ethnic origin, socio-economic background, political opinions, religious or philosophical beliefs, trade union membership, genetic data, biometric data, health-related data or data concerning sexual life or sexual orientation) especially when categorising or classifying data related to such individuals or groups of individuals.
- Principle of quality and security, according to which the processing of judicial decisions and data must use certified (trustworthy) sources, and models and algorithms conceived must be stored and executed in secure and traceable environments in order to guarantee their integrity and intangibility.
- Principle of transparency, impartiality and fairness, which establishes the overriding need to make data processing methods and the design process for data processing accessible and understandable, taking into account intellectual property rights and trade secrets. It also seeks to avoid the elimination of prejudices and partiality when designing AI tools that can significantly affect the lives of individuals, in this case, in the Justice sector.
- Principle "under user control", which seeks to ensure that users of the judicial administration system are duly informed of the binding nature of the AI tools offered to them and of the different options available, especially if they are going to be subject to legal proceedings wherein the issue shall be partially or totally processed by AI (machine). In the latter case, the user will have the right to object to this processing of data.

[13] The European Commission, in its aforementioned *White paper on artificial intelligence*, COM (2020) 65 final, p. 12, alerts of this risk in the following terms: "The specific characteristics of many AI technologies, including opacity ('black box-effect'), complexity, unpredictability and partially autonomous behaviour, may make it hard to verify compliance with, and may hamper the effective enforcement of, rules of existing EU law meant to protect fundamental rights. Enforcement authorities and affected persons might lack the means to verify how a given decision made with the involvement of AI was taken and, therefore, whether the relevant rules were respected. Individuals and legal entities may face difficulties with effective access to justice in situations where such decisions may negatively affect them".

38. Courts are beginning to make declarations on distinct uses of algorithms in the criminal and administrative sphere with slightly different solutions.

39. Thus, for example, in the United States of America, the *Loomis judgment* (2016) of the Wisconsin Supreme Court confirms the use by a criminal court of first instance of a risk assessment via algorithms, through a program called COMPAS (*Correctional Offender Management Profiling for Alternative Sanctions*), in relation to the probable recidivism of the defendant. The judgment considers that the right of the sentenced person to due process was not violated; however, it warns of the following limitations: due to the trade secret of the program it is not known how the data are processed; the sample used by the program refers to the entire United States and does not take the context of Wisconsin into account; there are doubts about whether the analysis is more rigorous with specific minorities or with the gender of the sentenced person; the instruments in the program must be constantly revised in view of population changes (paragraph 66)[14].

40. In contrast, in Europe, the SyRI judgment from the Hague District Court makes a pronouncement on the conformity of this System Risk Indicator to fundamental rights; in other words, a legally established instrument used by the Dutch government to detect fraud in the management of social benefits and within the tax sphere. In the view of the Dutch court, SyRI violates Article 8 of the European Convention of Human Rights to the extent that it fails to guarantee the 'fair balance' required for intruding in private lives, in the sense that the SyRI application is not sufficiently transparent and verifiable. Thus, Dutch legislation goes against Article 8 of the European Convention and is therefore non-binding[15].

41. In short, the new technologies and instruments now available, as for example the use of big data and algorithms, can be a support mechanism in the hands of judges as long as they take into account, as is the tradition, the fundamental rights of each citizen. Nonetheless, new technologies may function better in some departments than others, seeing that the application of artificial intelligence is not the same, for example, in quantitative or objective matters than in other spheres where

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[14] Wisconsin Supreme Court, judgment of 13 July 2016, *State v. Loomis*, 881 N.W.2d 749 (Wis. 2016. A favourable comment on this usage appears in "Criminal Law — Sentencing Guidelines — Wisconsin Supreme Court Requires Warning Before Use of Algorithmic Risk Assessments in Sentencing. — State v. Loomis, 881 N.W.2d 749 (Wis. 2016)", *Harvard Law Review* 2017 Vol. 130, pages 1530-1537. For an opinion that is radically against its use, see Leah Wisser, "Pandora's Algorithmic Black Box: The Challenges of Using Algorithmic Risk Assessments in Sentencing", *American Criminal Law Review* 2019, Vol. 56, pages 1811-1832.

[15] 15 Rechtbank Den Haag (Hague District Court), judgment of 5 February 2020, NJCM c.s. / State of the Netherlands (SyRI), C/09/550982 / HA ZA 18-388, ECLI:NL:RBDHA:2020:865. Given the predominance of SyRI in the poor neighbourhoods of large Dutch towns, the proceedings saw the intervention of the United Nations special rapporteur on extreme poverty, Philip Alston, as amicus curiae.

subjectivity or intentionality reign. Therefore, there are areas favourable to the use of technologies, particularly where routine tasks and quantitative procedures are concerned, leaving the corresponding decision-making to the judge. In this regard, new technologies are enormously important for the establishment of patterns in relation to specific and reiterated problems referring to quantitative, objective questions, etc. Machines must be at the service of the Judiciary to deal with objective matters, but never evaluative ones. Therefore, there is no doubt that the focus of the new technologies should come from the judge.

4. The reinforcement of determined ethical principles and virtues in the face of the use of new technologies in the judicial function

42. The evolution of technology throughout all the ages has meant different lifelines where the undeniable usefulness for the development of humanity does not always correlate to the accompaniment of ethics in its diverse manifestations. A reasonable observer is sufficed to perceive the paradoxical contrasts between technology and human dignity and rights, be they related to security, arms, genetic, pharmacological or ecological disciplines, etc.

43. Any technological tool that collaborates instrumentally with effective judicial protection through a competent, independent and impartial judge, and which keeps the focus on humans, their dignity, rights and obligations, deserves a special reception. In this case, there must be an effective combination and cohesion between information and communications technology (ICT), the judicial order and ethical responsibility in all of the segments of the due legal process.

44. The ethics questions that bring with them the incorporation of new technologies are especially relevant and have awoken a great interest in Ibero-American countries such as Chile, above all from 2016, when digital processing of judicial proceedings was established and the Virtual Judicial Office was created, which affords litigants access to the electronic processing of proceedings in all courts.

45. This system has entailed considerable advantages for lawyers and the general public, as it provides registries of the different stages of proceedings and 24-hour access to courts from any location in Chile via the use of electronic devices. It therefore improves transparency, accessibility and evidence in the judicial system, at the same time as facilitating the study and analysis of case-law.

46. However, free access to judicial registers and the publication of judgments must not violate the rights of the parties that have intervened in each case, as these registers may contain personal data in certain sensitive examples. This has given rise to several initiatives aimed at restricting information that permits the identification of the parties involved, considering the exceptions imposed by public access or advising the duty of reservation and professional secrecy. There is currently

working on a computational project that tends to "anonymise" computer records in proceedings that should be reserved, such as adoptions, divorces, violence in the family, all those that affect children and adolescents, and those containing sensitive data in general.

47. The preamble of the Ibero-American Code of Judicial Ethics alludes to the "institutional commitment to excellence" and states that it is an "instrument to strengthen the legitimisation of the Judiciary". The adoption of a Code of Ethics involves a message that the judicial authorities themselves send to society recognising the unease that this weak legitimacy provokes, and the effort involuntarily assuming a strong commitment towards excellence in the provision of the justice service.

48. The Ibero-American Commission of Judicial Ethics suggests reinforcing its institutional mission by favouring the creation of reports on the part of public or private bodies that take into account the ethical dimension of the use of new technologies in the exercise of the judicial role.

49. The ethical principles and virtues in play are those of the ongoing professional training of the judge, transparency and professional secrecy. In addition, it is necessary to examine the matter of the use of social networks by judges that reveals their particularities.

4.1 The positive attitude of judges towards new technologies and ongoing professional training

50. The prudent use of technological support demands that judicial operators are specially trained, allowing them to distinguish the correct utilisation of information and communications technologies in terms of transparency, trustworthiness and equality of arms in litigants as a metaphor for the procedural principle of equality of parties, especially if an evident digital divide exists between the parties that reduces the equality of contradiction.

51. For this reason chapter IV of the Ibero-American Code of Judicial Ethics, dedicated to the knowledge and training of judges, is key as a response to the due and ethical use of technology. In fact, Article 28 lays down the grounds for the ethical dimension of the knowledge and ongoing training of judges that, in reality, has "its grounds in the right of those on trial and society in general to obtain a quality service as regards the administration of justice".

52. Article 29 of the *Ibero-American Code of Judicial Ethics* demands that judges have developed the appropriate technical capacities and ethical attitudes to apply the prevailing current law. Article 29 underlines the obligation towards ongoing training on the part of judges. In any event, as laid out by Article 31 of the *Ibero-*

American Code of Judicial Ethics, technical preparation must lead to the maximum protection of human rights and the development of constitutional values.

4.2 Transparency and professional secrecy in the use of new technologies by judges

53. The meteoric rise of technology, via the use of the internet, the merging of global digital content, data mining or accumulation (big data), the internet of things and the undeniable incursion of artificial intelligence are relevant from the judicial viewpoint to the extent that they should be used in order to improve conflict resolution, endeavouring to make technology work transparently, without biases that go against legality, etc. As the rapporteur of the United Nations on extreme poverty has indicated: "predictive analytics, algorithms and other forms of AI are highly likely to reproduce and exacerbate biases reflected in existing data and policies"[16].

54. Nevertheless, it is especially pointed out in Article 62 of the *Ibero-American Code of Judicial Ethics* that "judges have the obligation to maintain strict confidentiality and professional secrecy in relation to ongoing proceedings and to facts or details learnt in the exercise of their function or as a result thereof". Chapter X on professional secrecy is entirely devoted to this prevention in order to safeguard the rights of the parties and those close to them.

4.3 The ethical dimension of social network use by judges

55. The life of judges as citizens has also been affected by the new technologies in their private lives to the point where their usage could have relevance for the exercise of the judicial role. There has been an adoption of guidance on this matter in different regional, national and international spheres.

56. In 2015, this Commission had the opportunity to make a statement on these matters, at the request of Costa Rica, in its second opinion which underlines that it is a typical conflict of fundamental rights between the freedom of information and expression of judges themselves and the image and rights of those involved in legal proceedings.

57. The opinion from this Commission considered that it did not follow to establish either restrictions or special obligations on the use of social networks by judges on the basis of them being instruments of communication. The Commission did, however, recommend that indiscriminate use of the networks be avoided, and that judges should always draw inspiration from the principles and virtues of the Ibero-American Code of Judicial Ethics.

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[16] Report by the United Nations Special Rapporteur on extreme poverty and human rights, Philip Alston, General Assembly, A/74/493, 11 October 2019, paragraph 82.

58. In reality, social networks are a useful element for disseminating legitimate institutional and personal intentions. Their common characteristics are indicated in terms of them all being linked by an extremely vast audience, a communication that cannot be controlled by any of the participants. Another characteristic element is the permanence of the material communicated on digital registers and the ease of recovering it. The opinion especially underlines the duties of independence, impartiality, institutional responsibility, courtesy, integrity, transparency, professional secrecy and prudence.

59. Our Commission ends its opinion with some conclusions and recommendations, which serve as a guide to judges and other operators, and where it is reiterated that the former can use social networks like any other member of the public. It indicates, however, the existence of clear ethical limits imposed on the judge as a user of social networks. As an epilogue to these conclusions it advises that: "Judges who join a social network should not just avoid statements relevant to non-compliance with the duties outlined in the Ethics Commission Opinion, they should also assess the possibility that their statements go beyond their capacity for explanation and maybe manipulated outside the originally foreseen communication plan".

60. In 2018 the Judicial Integrity Network, within the framework of the United Nations Office on Drugs and Crime (UNODC), created several principles on the use of social networks by judges[17]. This debate drew attention to the fact that the adaptation of innovation on the part of many judges could be hindered by the preservation of judicial integrity. Judges must comply with legal and ethical ramifications that other professions may not face when using technology. Although these apparently ordinary actions have no importance for the majority of people, provided they adhere to a minimal social etiquette, they may have unforeseen consequences for judges. Notwithstanding this, there is an underlining of those positive aspects that can be provided by social network platforms such as openness, closeness to society and the potential for disseminating the reach of experience and increasing citizens' understanding of the law. In contrast, it also highlights negative aspects that derive both from what judges decide to publish and from the fact that they can be trapped by distortion, the misinterpretation of their posts, and even from cyber-bullying and threats to their privacy and safety.

61. In any event, rather than establishing new ethics standards it refers to the Bangalore Principles of Judicial Conduct (2002) given that, in principle, the same standards from ordinary reality are applied to virtual reality. In fact, for the majority of

[17] The initial consensus of 25 judges and legal experts from the five continents, gathered together in at the UNODC headquarters in Vienna at the beginning of November 2018 by the Global Judicial Integrity Network, in an initiative of the Judicial Integrity component of the Global Programme for the implementation of the Doha Declaration.

experts, these regulations cover the rules regarding the obligations of any judge. Nevertheless, the problem foreseen for some was not so much the consequent disregard for these elements by a judge, rather, an involuntary drift regarding several topics in the unexplored virtual territory. In Vienna in 2018 it was agreed that only adequate, personalised training could help judges in the new technological environment.

62. Lastly, in a national sphere such as that of Spain, its Judicial Ethics Commission made a statement in an opinion in 2019 on the ethical implications of the use of social networks for Spanish judges[18]. In its conclusions, the Judicial Ethics Commission of Spain insists on the prudence with which judges must act in order to avoid the uncountable risks supposed by the use of social networks in their extra-judicial activity. In this regard, in one of its conclusions the Spanish Commission pointed out:

> The expression of opinions, comments and reactions by judges on social networks can seriously damage the appearance of independence and impartiality, as well as being a reflection of a behaviour that must preserve the dignity of the jurisdictional function. This is the reason for the emergence of the correlative ethical obligation to be extremely careful as regards expression, where the reasonable possibility exists of the speaker being recognisable as belonging to the judiciary (conclusion 7).

63. This topic was the object of special consideration in the combined meeting of the Ibero-American Commission of Judicial Ethics and the Judicial Ethics Commission of Spain held in Madrid on 4 July 2019. In their conclusions both Commissions:

> Advise of the need for judges to be completely aware of the positive and negative effects of their participation on social networks, in relation to the image they can give of their independence, impartiality and integrity. It is a matter that requires many nuances and attends to the concurrent circumstances, and both Commissions have already made statements in a number of reports and opinions in this regard. In any case, the opportunity is taken to once again emphasise the convenience of being especially prudent in terms of how to present oneself (stating the position of judge or not), the content of the interventions (which should always stand out for their courtesy and good manners) and online interaction with others (which should always be careful of not creating any appearance of a lack of impartiality).

64. These recommendations certainly hold their relevance beyond that of the renewed casuistry that is universally present. To this is added the prolific appearance of individual and institutional opinions, and national or state judiciaries. Regardless, attention should be drawn to the need to prevent the abusive use of new technologies, and there should be addressed of the way of how cases should be tackled in which news items or photographs from one era can have repercussions out of their context, years later; the use of official logos on social networks should

[18] Judicial Ethics Commission of Spain, *Report (Consultation 10/18), 25 February 2019. Implications of the principles of judicial ethics in the use of social networks by members of the judiciary.*

be avoided given that the purpose of these identifications is to represent institutional dignity, and so on.

65. Finally, the ongoing evolution of this reality concerning the personal and professional lives of judges demands a continuous, prudent and reasonable examination of legitimate periodical participation on social networks with the acute observation that their double facet of citizens and judges feeds back positively beyond the risks and challenges. Their right to expression contains a singular correlative personal and institutional responsibility that must be preserved, in terms of the principle of the judicial role as a duty orientated by public interest.

5. The proposals for ethical behaviour of judges in the face of new technologies

66. Given that in the *Ibero-American Code of Judicial Ethics*, as underlined in its preamble, "it is proposed to seek the voluntary adherence of the various Ibero-American judges attentive to the professional awareness demanded by current times", the Commission recommends a balanced personal and non-transferable ponderation on the part of the judge that overcomes the tensions between novelties and the dramatic rise of new technologies.

67. In this intelligence, the protection of human rights universally and regionally proclaimed must establish human beings as the recipients of a public service of justice that takes into account the advantages and challenges of the new technologies.

68. The following recommendations are adopted to this effect that, given the meteoric evolution of new technologies, require an opportune and prudent updating.

I. Judges and their auxiliaries must remain trained in the characteristics, design, functioning and functionality of the new information technologies used by the court where they carry out their work.

II. In the training of judges, at least three circumstances should be distinguished for their role:

a) The new technologies as a means, instrument or tool that allows for greater effectiveness, productivity or quality in the judicial response.

b) The new technologies as an object of legal proceedings, in view of the offences, unlawful or abusive actions and of the conflicts or controversies that may arise with or due to their utilisation, which derive in litigation that must be dealt with by the legal system.

c) The new scenarios that comprise the sphere of jurisdictional activity in light of the transversal incidence of social networks, data banks and similar.

III. Judges must be knowledgeable on the design of new technologies in order for their use to be admissible (Articles 29 and 30 of the *Ibero-American Code of Judicial Ethics*).

IV. Judges must be independent in order to avoid using new technologies when they fail to adjust to the rules of accessibility or suitability when the elements necessary for a correct decision are not provided (Articles 6 and 7 of the *Ibero-American Code of Judicial Ethics*).

V. Judges must be cautiously impartial in order to avoid the use of new technology distorting the equality of arms between parties.

VI. In any event, the motivation on the existence of doubt, probability or certainty in the *thema decidendi* shall correspond to the judge and not to the technological support.

VII. Judges should uphold due transparency and public access that allows them to exhibit their duties with the aid of new technologies.

VIII. Judges should make it easier for new technologies to guarantee litigants the right to due legal process in which there is an emphasis on efficiency and a diligent and reasonable duration of proceedings.

IX. Judges should generate, via an appropriate institutional response, genuine trust in new technologies.