



Second opinion delivered on 30th November 2015 by the Iberoamerican Commission of Judicial Ethics, on the use of social networks by judges. Consultation by the Supreme Court of Costa Rica. Reporting Commissioner David Ordóñez Solís

Introduction

Commissioner José Manuel Arroyo Gutiérrez and, through him, the Judiciary of the Republic of Costa Rica have formulated the following consultation: "...based on article 83, subparagraph a) of the Latin American Code of Judicial Ethics (herein CE), this consultation is presented to the Latin American Committee for Judicial Ethics in order to define some general parameters for the ethical use of social networks by members of the judiciary and their support staff. The familiar controversy of fundamental rights is taken into account given, on the one hand, the involvement of the freedom of information and speech and, on the other, the image and rights of individuals involved in judicial processes, a matter that also concerns the healthy development of interpersonal relationships within the sphere of the Judicial Administration".

The consultation and the Council of Notables document attached to it were immediately distributed amongst the Commissioners. Subsequently, and following questions, the Executive Secretary requested that a Commissioner create a presentation to consider at the in-situ meeting in Santiago, Chile on 30 November and 1 December 2015. The Committee adapted the basic principles of this presentation and, based upon it and the contributions offered at the debate, produced the following opinion. The Council of Notables document and the presentation of the Commissioner coincide significantly and the Committee has decided to include them on its website in order to facilitate understanding amongst all those interested in the matter.

Social networks

It may be fitting to review some attributes that distinguish the different social networks and lead to a specific scope for some considerations.

In this regard, networks can be distinguished according to:

a) the content of the communications for which they are intended. Some are intended only for, in principle, brief text messages; others allow for sending sound or visual messages. They generally provide for the transmission of text, photographs and videos.

b) some facilitate mainly multilateral communication, that is, each participant sends and receives communications. Others, however, are meant for transmitting the thoughts of one sender.

c) some allow only for the participation of accepted contributors, others are open to anyone wishing to receive the communication without requiring the registration of the receiver, although registration is required to respond.

d) some have a specific purpose, others target any matter, which does not mean that they cannot be used in distortion of their original aim.

In principle, these categories are independent from a logical standpoint; but, in the specifics, they actually appear gathered together with a practical purpose, in a way that lends identity to each network. Without looking to exhaust the entire spectrum of available networks, but in order to illustrate these aforementioned categories, we shall review.

Twitter: intended for sending brief text messages to whoever wishes to receive them. Allows only for comments by registered users, thus useful for unilateral communication. In principle, users do not aspire to interact but rather to express themselves. This characteristic makes it particularly suitable for the institutional communication of Judiciaries, High Courts and Councils of the Judiciary.

Facebook: Serves for intercommunication only between accepted individuals. However, those who join the network obviously identify themselves with a password whose confidentiality depends on the care each user dedicates to safeguarding it. In turn, each admitted participant can share the communications received with those admitted to his/her own circle. Consequently, it is worth noting that those who join this network lose control over the sphere of communication, relinquishing it to the other participants.

LinkedIn: has a professional purpose. Users can connect by inviting other users or third parties to become a connection (contact). Those who are accepted become connected. However, the connection reaches the contacts of their contacts (second-degree connections) and the contacts of the second-degree contacts (third-degree contacts), that is, it does not have a tool available for restriction. Similar ones are *Vadeo* and *Xing*. Networks with these attributes can be especially useful for libraries, but can be risky for other users because they invite, sometimes provocatively, the engagement of opinion outside of the natural scope of a ruling.

Blog: a term coined from *weblog*, a neologism that, in turn, aims to describe the idea of incorporating a file to a webpage. Generally used to post documents, including academic, opinion, literary and other types of essays which, grouped in a location reachable by any user of the world wide web, allows for editing those essays at little cost and making them accessible to any user. For the matter in question, it shows attributes similar to Twitter but is distinguished from this network by the relatively large size of the communicated texts.

Instagram: the purpose is to circulate photographs and videos from cellular telephones via Facebook, Twitter, Tumblr, Flickr and other networks amongst the members accepted to the

network.

It is necessary to emphasise that all of these social networks share a series of attributes.

The first is that they communicate with an audience whose membership is beyond the control of those who participate in it. A second characteristic is the enormous vastness, at least potentially, of that audience. The third is the permanence of the communication in the digital registries. The fourth is the ease of selectively recovering the content of the communication according to the interest it awakens in future scenarios, which are impossible to predict. One of the most typical characteristics of this unpredictable situation is the possible change in trust with the members of the audience, in the cases in which they may have been chosen. The fifth is that each provider establishes the content of the use of information agreement it requires for use of the network. It is imperative for users of the network to be meticulous in the examination of these terms. As an anecdote, it is fitting to recall that Instagram announced a modification to the agreement it required of its users on 17 December 2012, following which it was interpreted that it was preparing to commercialise the posted photos. Amid the criticism, it removed the clause, denying that this was the aim of the clause.

In summary, social networks exponentially expand communication with regard to time, space, possible recipients and the automaticity and speed with which it can be selected.

The rights of judges as citizens

The CE holds that the same rights that apply to all people apply to judges. However, these rights can undergo certain restrictions based on the preservation of the function they exercise¹. Although with specific characteristics, comparable restrictions weigh on the Judges². Of course, each country regulates these restrictions by means of local guidelines whose interpretation is beyond this Committee. Consequently, the considerations presented here should not be interpreted as alternatives or substitutions for duties and limitations founded on other legitimate standards but, in any case, as complementary to them and, fundamentally, as an examination of the possible conflicts with the Code, which is to be interpreted by the Committee.

An initial observation reveals that there are no clauses specifically limiting the use of social networks and therefore no special restrictions or duties envisaged with regard to their use.

However, it would be misguided to conclude that Judges can make indiscriminate use of these networks. Just like a microphone, paper and pen or a courtroom, networks are both a tool and a forum for communication that puts anyone who uses them on display. In turn, whilst the duty of foreseeing the consequences of an action weighs on the author, observing due care not to violate his or her duties, it falls to whomsoever logs on to a social network to

¹ EUROPEAN COURT OF HUMAN RIGHTS, judgment of 9 July 2013, Di Giovanni v. Italy (confirmation of a disciplinary sanction against a judge for an opinion regarding a selection of judges) (appeal no. 51160/06).

² RULING OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS “Case of López Lone et al. v. Honduras”. 5/10/2015. www.corteidh.or.cr/casos.cfm

anticipate its repercussions. In the presence of such a powerful tool, this anticipation entails the duty to thoroughly inform oneself of its scope, especially with regard to the audience that it can reach, in the present and in the future, and the distortions that, based on the conduct and even the non-conduct of others, the communication plan originally envisaged may undergo.

It is enormously helpful to favour the profound inspection of those who may use networks in compliance with the specific ethical duties taken on by the training centres of the Judicial Authorities to facilitate that understanding by promoting interest in it, providing suitable information and developing the means of instruction they deem conducive to responding to the situation of each country.

A second is that, whilst assuming a core shared by all members of the Latin American Judicial Summit, the Code we interpret refers to the local conceptions and conditions for the proper determination of the content of some of the duties it imposes. An example of this is the reference of article 54 to "...the predominant values and sentiments of the society in which he/she works."

A third is that the precautions that the user of a network should observe depend on its characteristics.

Duties most commonly compromised by the use of networks

The Committee considers it necessary to conduct a cursory review of the ethical duties most likely to be affected by the use of social networks, which are most if not all of the topics contained in the Code. Independence, impartiality, institutional responsibility, courtesy, integrity, transparency, professional secrecy and caution, all therefore take on attributes deserving of consideration.

It is essential for judges to be independent and appear as such to normal observers. This means that they cannot shroud themselves in partisan political stances or, in general, reveal positions that make them appear susceptible to being influenced by individuals or groups outside the objective strength of conviction they find in the arguments presented in a legal debate (article 4 CE). Consequently, they cannot formulate unilateral statements on the networks or participate in exchanges that proselytise, display positions or show who or what could influence their disposition. To use networks intended to express one's own thoughts, only obtaining a response in the event of arousing the interest of others, judges should take into account that they are unaware of the potential audience insofar as the degree of understanding of a message. They should also not deem the message to say only what they suppose is literally expressed but should foresee the implications depending on the context in which it is sent and assume that it could eventually be exhibited outside of that context. In the analysis of the potential violation of ethical duties the evaluation of the purpose served by the message is especially important for the judge who posts it. The less linked to aspects of their persona that they can or should justifiably reveal, the less participating in the network will be compatible with the particular obligations of the function. He or she should keep in mind that participating as a simple observer in a network with a forbidden purpose may be interpreted as an endorsement of the contents exchanged on it.

Networks appropriate for informal exchanges in a universe of people accepted by the judge make more spontaneous exchanges possible. Therefore, there should be no presumption of an endorsement of the proselytism of a friend on a network that links to persons joined by a link of this nature. However, he or she should also abstain from being the one to make the statement. In any case, receiving the message without expressing an opinion and assessing how much of the group's content enters a realm improper to their function. Participation in a political philosophy forum is not in itself forbidden. However, the timing and relationship with groups that dabble in politics, directly or indirectly, may make it improper for a judge. Along these lines of thinking, he or she should permanently assume that the potential scope of the information, opinions and profiles incorporated may have a very different fate than that intended.

Article 3 states: "The judge with his attitudes and conduct should indicate that he/she is in no way influenced -either directly or indirectly- by any other private or public power, either external to or within the judicial system" and, in accordance with article 7, "Not only is the judge required to be ethically independent but nor should he/she interfere in the independence of other colleagues". The application of these rules of independence should not arouse greater problems with regard to the use social networks by judges. However, it is worth highlighting that the presence of judges of different levels in one exchange can transmit communications that lead to surmising what the attitude of some may be with respect to the issues submitted to the others and therefore influence, real or assumed, would presumably be present.

The duties of caution and moderation considered in article 8 are conceived in these terms: "ARTICLE 8. The judge should exercise the power which accompanies the judicial function with moderation and prudence". It is worth distinguishing between accompanying power and power consisting of the judicial function. The latter is beyond the networks, the former could interfere in the use of these media; in such a scenario, the communication is subject to both duties.

The impartiality referred to in chapter II of the CE should not only be observed by the judge but should avoid situations that may lead a reasonable observer to harbour doubts in this respect (article 11 of the CE). Contacts on social networks may raise these doubts in lawyers and parties. This may stem not only from specific statements transmitted by them but by the judge's acceptance of certain lawyers or litigants itself to the universe of contacts on the respective network. With regard to these acceptances, those that take place when the judge is already aware that they are lawyers or litigants before his or her court seem particularly objectionable. However, the fact that it will frequently be conjecturable even when this is not the case should not be disregarded. Article 10 of the CE refers to a certain period when it establishes that "the impartial judge is one who pursues objectivity based on the evidence and truth of the facts, maintaining throughout the whole process an equivalent distance from the parties, their lawyers and avoiding any type of conduct which could indicate favouritism, bias or prejudice." But the CE does not exclude the impact of prior conduct on the reasonable observer's confidence in the impartiality of the judge. Along this line of thinking, article 12 requires that the judge "endeavour to avoid situations which directly or indirectly would justify his/her distancing from the case". In turn, articles 13 and 15 require

the judge to avoid "all manifestations of preferential or special treatment with lawyers and those being judged, arising from his/her own conduct or that of the other members of the judicial profession" and to endeavour "not to hold meetings with one of the parties or their lawyers (in their office, or with greater reason, outside it) which the counterparts and their lawyers may reasonably consider unjustified". A social network may constitute a meeting place outside of the office. In this respect, judges can maintain decision-making power regarding what they post, but not what they receive. For the latter, their opportunities are exhausted with entry to the network.

Article 43 establishes that the judge must "promote an attitude in society, rationally based, of respect and trust in the administration of justice". This institutional responsibility finds a particularly demanding scenario in social networks due to the vastness of the audience they can reach, either through the will of the judge or surpassing it, and, moreover, both for what the judge communicates and for what is communicated to him/her. In this last regard, provocation contained in a received message can be a stimulus against which it is difficult to decide whether or not it constitutes more serious damage to the values that the CE seeks to preserve to reply or remain silent.

Article 52 of the CE requires a judge to show a "tolerant and respectful attitude towards any criticisms of his/her decisions and conduct". In turn, it constitutes an attitude of caution unique to the institutional responsibility of the judge to limit his/her message with respect to a case to those provided that he or she sends in it. Article 61 of the CE thus establishes that "Professional secrecy is based on safeguarding the rights of parties and those close to them from misuse of the information obtained by the judge in carrying out his/her functions" while article 62 adds that "Judges are obliged to maintain strict confidentiality and professional secrecy in respect of cases in progress with the facts and information heard in the exercise of their duties" and article 66 emphasises that "the requirement of confidentiality and professional secrecy incumbent on the judge extends not only to institutional means of information but also in the strictly private context". These rules directly affect the use of social networks. Added to them is a more generic duty considered by article 68 of the CE with these words: "Caution is oriented towards self regulation of the decision-making power of judges and to strict compliance with the jurisdictional function."

In some areas, the violation of professional secrecy is especially harmful. Mass media undoubtedly belongs in this category. But social networks sometimes have a no-less communicative power. Furthermore, and above all, that power is difficult for the user to anticipate. This implies a duty of extreme care when using them. In addition, membership to a social network puts judges at risk of receiving criticism, a response to which puts them in a position of violation, risk or doubt with regard to the observance of caution and moderation that they should observe. Even more delicate is the fact that silence itself can be interpreted in such a way as to jeopardise these values.

Article 54 states that: "The integral judge should not behave in a manner in which a reasonable observer would consider this to be a serious threat to the predominant values and sentiments of the society in which he/she works", while article 53 recalls that: "The integrity of the judge's conduct outside the strict confines of jurisdictional activity contributes to a well founded trust on the part of citizens in the judiciary." Again, judges should be

extremely diligent in foreseeing and preventing the social networks in which they participate from becoming the scene "outside the strict confines of jurisdictional activity", which make incursions into acrimonious attitudes with the values considered in both norms.

Networks can constitute an effective means of granting transparency to an action. However, in this respect, the publication should observe the duties recalled above and, particularly, those considered in articles 59 and 60. Article 59 establishes: "The judge should behave, in respect of social communications, in a fair and prudent manner, and above all ensure that the legitimate rights and interests of the parties and the lawyers are not undermined or harmed". The potential violation of this duty must be pondered when using networks that require acceptance, that is, those that do not allow access to everyone. The circumstance itself of requiring registration may be seen as improper if it does not have an aim clearly compatible with the CE and does not carry consequences that may be deemed to violate the rights of those who join, especially the right to privacy. Article 60 concludes: "The judge should avoid behaviours or attitudes which may be construed as unjustifiably or disproportionately seeking social recognition". These rules make it advisable for the information that may constitute a violation of professional secrecy or the statements that lead to social recognition to originate from institutions more than from the people who occupy positions so that their content is assessed with an equal and objective perspective for all of the Judicial Authorities.

In view of the considerations above, the Latin American Committee for Judicial Ethics has adopted the following conclusions and recommendations.

CONCLUSIONS

1. Judges have the rights that apply to all people. However, those rights may be restricted in protection of jurisdictional function.
2. Social networks are not explicitly considered by the CE, nor can they be understood as prohibited in and of themselves. However, as they are an instrument for communication that allows for the transmission of content, they should not violate the principles enshrined in the CE.
3. The proper use of social networks constitutes a useful element for the publication of legitimate institutional and personal aims, as long as the judge conforms to the duties outlined in the CE.
4. Judges who join a social network should not only avoid statements that entail non-compliance to the duties outlined in the CE but must also assess the possibility of their statements ending up beyond the scope of their disposal and being manipulated outside of the originally envisaged communication plan.

RECOMMENDATIONS

1. Judges, regardless of their position in the hierarchy, should perform a profound

examination of the characteristics and scope of the network and of the terms of the agreement with the provider consenting to it. They should assess the significance of the purpose pursued by joining and the chances of maintaining the communications within the guidelines of the CE.

2. Judiciaries should consider the possibility of offering suitable instruction, by means of judicial schools and other training centres, for familiarising servants of the Judiciary with the characteristics and possibilities of each social network, as well as their ethical implications. Special emphasis should be placed on the potential scope of the networks as well as the scarce or null possibility of those who participate in them to restrict the communication of the data, opinions or profiles that they post.

3. Judges should assess the significance of accepting or not accepting a person to their universe of contacts on a social network, fully restricting any communication with those who, as parties or as lawyers and other justice professionals, litigate in a matter the judge is hearing at the time.

4. In the event of opening profiles on social networks, to assess the potential consequences of identifying oneself as a judge and, in the event this occurs for causes beyond their control, always bear in mind the responsibility imposed by the position of the judge.

5. Ensure knowledge of those with whom the network is shared, unless use of it gives no signs of familiarity amongst those connected.

6. Keep in mind that any communications, especially those that are brief or out-of-context, can give rise to unintended misunderstandings for the sender.

7. Avoid any content that cannot be expressed publicly.

8. Make use of advanced-level computer security measures (passwords, antivirus, antimalware, identity theft protection -antiphishing-, etc.).

9. Take into account that any action, image or statement may be documented and made public knowledge by means of social networks.