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Exercise of Freedom of expression by Judges: Social Media

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The principle that judges are independent means that they can exercise their right to freedom of expression. However, this raises a number of problems, including that of the judge's impartiality; for how will a judge who has exercised this right be able to adjudicate with all due impartiality, if called upon to rule in a case about which he or she has previously and lawfully expressed an opinion? What is more, is the exercise of this freedom confined to only certain means of communication, perhaps in particular excluding social media?

(A) Freedom of expression and impartiality

The CJEU followed a tortuous path before reaching the conclusion that the rule of law must be applied in the EU. The fact that judges are independent of the political power in each country is indeed because the rule of law prevails in the EU, thus encompassing the independence of the judiciary. The CJEU judgment in *Associação Sindical dos Juízes Portugueses* paved the way for preliminary rulings on national laws that may potentially be regarded as breaching judicial independence. I would merely point out that, while freedom of expression belongs to everyone, Article 10 § 2 of the European Convention enables the legislature to impose conditions, restrictions or sanctions on the exercise of this right, provided they are "necessary in a democratic society", when it comes to "maintaining the authority and impartiality of the judiciary". But this is a question that could be seen as subjective, as much as it is an objective and general one, in so far as it depends on the given case or judge. The question is therefore whether a judge is totally free to express his or her opinion, and if so what the consequences of such actions will be for him or her as a judge[1]. A brief study of certain decisions of the European Court of Human Rights will provide a few indications.

(a) Some of the Court's judgments, such as *Pitkevich v. Russia*, *Baka v. Hungary* or *Otegi Mondragon v. Spain* contain some key conclusions. However, other cases examined from the perspective of recognising the exercise of freedom of expression by a judge will also raise impartiality-related issues, namely where an applicant has complained of a violation of Article 6 § 1 of the European Convention of Human Rights also on account of a judge's lack of impartiality.

The case of *Buscemi v. Italy* is a very important one. It arose from a very complex procedure concerning the custody of a child born out of wedlock. At one point there had been a confrontation between the applicant and the President of the Turin Minors Court, and letters were disclosed to the press. The applicant took the view that the case should not have been examined by a court presided

[1] "**VI. Expression and contacts -** Judges shall exercise their freedom of expression in a manner compatible with the dignity of their office and their loyalty to the institution of the Court. ... They shall proceed with the utmost care if using social media." European Court of Human Rights, Resolution on Judicial Ethics, 21 June 2021.

over by a judge who had expressed his views in the media. The Strasbourg Court pointed out that a judge was bound by a duty of discretion[2], and that this duty should dissuade him or her from using the media, not even to respond to provocation. It thus found a violation of Article 6 § 1 of the European Convention.

The obligation to be discreet and not to use the media is also present in cases concerning the right of judges to freedom of expression. Thus the *Kayasu v. Turkey* judgment imposes a significant duty of discretion on the judicial authorities (§ 100), such that they are not supposed to use the media even in case of provocation, in view of the importance of their role. That duty was confirmed in *Olujić v. Croatia* (§ 59), *Poyraz v. Turkey* (§§ 67-69), and *Di Giovanni v. Italy* (§ 80), to mention only those cases where the judge's freedom of expression was directly at issue. To look at a particular example, in the *Poyraz* judgment of 7 December 2010 the European Court of Human Rights found no violation of Article 10. In that case an investigation had been opened against a judge, who was the head of an administrative board of the Foundation for the Promotion of Justice, following an anonymous complaint that he belonged to a religious group. The judge was appointed to the Court of Cassation. After the investigation had been closed the details were leaked to the media. The investigator subsequently lodged an application in Strasbourg to complain of a violation of Articles 6 § 1 and of Article 10 of the European Convention on freedom of expression. The freedom of expression of the investigator and the rights of the judge concerned were competing interests[3]. When the respective interests were weighed in the balance, the person who had leaked the information was not protected. In sum, this was one of the permissible limits under Article 10 § 2 of the European Convention.

(b) Fundamental rights are not absolute. There is no need to dwell on this point. But what does freedom of expression protect? A general idea is provided by Professor Solozábal, when he says that it protects only one activity: the unhindered communication of thought[4]. Judge Diez-Picazo Giménez, for his part, asserts that the sphere protected by the Constitution is more one of opinion than one of information[5]. And all authors interpret it as a right to a freedom[6].

Hitherto the solution to the problems raised has seemed obvious and the concept of incompatibility self-evident: the idea of exempting judges from sitting in cases they have already heard has been quite clear, in accordance, for example, with the rules laid down in section 219 of the Spanish Organic Law on the Judiciary, and it has been equally clear that a judge may exercise his or her right to freedom of expression, but has to assume the consequences of doing so with regard to his or her participation in a case on which he or she has publicly expressed an opinion. A distinction can also be drawn between the various purposes of the relevant statements – as the European Court of Human Rights has done in the various judgments examined –, which, according to Mr Climent[7],

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[2] *Buscemi v. Italy* judgment (emphasis added)*:* "67. The Court stresses, above all, that the judicial authorities are required to exercise maximum discretion with regard to the cases with which they deal in order to preserve their image as impartial judges. *That discretion should dissuade them from making use of the press, even when provoked*. It is the higher demands of justice and the elevated nature of judicial office which impose that duty. 68. The Court considers, as the Commission did, that the fact that the President of the court publicly used expressions which implied that he had already formed an unfavourable view of the applicant's case before presiding over the court that had to decide it clearly appears incompatible with the impartiality required of any court, as laid down in Article 6 § 1 of the Convention. The statements made by the President of the court were such as to objectively justify the applicant's fears as to his impartiality (see, *mutatis mutandis*, the *Ferrantelli and Santangelo v. Italy* judgment of 7 August 1996, *Reports* 1996-III, p. 952, §§ 59 and 60). 69. There has accordingly been a breach of Article 6 § 1 of the Convention".

[3] *Poyraz v. Turkey*, 7 December 2010, §§ 78-80.

[4] Solozábal Echavarría, J. J. "La libertad de expresión desde la teoría de los derechos fundamentales", *Revista Española de Derecho Constitucional*, 32, 1991, p. 81.

[5] Diez-Picazo Giménez. *Sistema de Derechos Fundamentales*. Cizur Menor: Civitas-Thomson Reuters, 2013, p. 317.

[6] Villaverde, *Commentarios a la Constitucion española*, art. 20 CE, 2018, I, p. 595.

[7] Climent Gallart, J. A., "La jurisprudencia del TEDH sobre la libertad de expresión de los jueces", *Revista Boliviana de Derecho*, 25, 2018, pp. 526-534.

may be categorised as follows: criticism on a purely legal level, a conflict with the right to honour or reputation of other judges, and the use of the media in response.

(B) Exercise of freedom of expression by judges

The limits to the exercise of freedom of expression are set out in Article 10 § 2 of the European Convention. But those who exercise their freedom of expression must also face the consequences of doing so even when it is exercised legally. Therefore, I must point out that the facts I am about to mention should be seen not as a penalty for the exercise of freedom of expression[8] but as a means of protecting the rule of law, one of the components of which is the independence of the judiciary. That independence guarantees the impartiality of judges in the eyes of society, and to this end, the measures provided for by law must be taken. Under point VI of the ECHR Resolution on judicial ethics, judges "shall exercise discretion in dealing with their judicial functions. They shall respect the secrecy of deliberations. Judges shall exercise the utmost discretion in relation to secret or confidential information relating to proceedings before the Court. ...".

Solutions are forthcoming in the rules governing the grounds for exemption and withdrawal of members of the judiciary. In a democratic system, the exercise of freedom of expression by a judge has two aspects: (i) the *external aspect*, i.e. the protection of the rule of law and the relationship between the judge and the society in which he or she operates, in order to guarantee his or her independence, and thus the possibility of withdrawal from a case; and (ii) the *internal or subjective aspect* represented by the judge's own consideration of his or her position with regard to the dispute after – or because – he has made use of his freedom of expression with regard to a given case, and thus the possibility of requesting an exemption from sitting in that case.

The European Court of Human Rights applies what it calls the "objective and subjective test" to analyse the conduct of a judge who has made use of his or her right and the impact on his or her impartiality: impartiality normally implies a lack of bias, but can be determined by the *subjective* approach, which consists in verifying the personal conviction of a given judge in a given case; and by the *objective* approach, which consists in verifying whether the judge offers sufficient guarantees to exclude any legitimate doubt in this regard[9]. The clearest application of these principles can be found, for example, in the *Castillo Algar v. Spain* judgment (§ 45), where it is stated that "even appearances may be of a certain importance" or, in other words, "justice must not only be done: it must also be seen to be done" (see *De Cubber*, § 26). "What is at stake is the confidence which the courts in a democratic society must inspire in the public .... Accordingly, *any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw*" (*Castillo Algar*, ibid., emphasis added).

(C) Judges and social media

The question of the practical application of the principles discussed above will now arise in relation to the use by judges of another communication system – a more extensive, more immediate and more general one – namely social media. The matter now to be addressed is not whether or not judges have the right to exercise their freedom of expression, or whether this exercise risks undermining their impartiality, or at least the appearance of impartiality that should exist. This right has already been accepted by the ECHR in its case-law and, as its judgments are of general application, countries acceding to the European Convention on Human Rights thus have at their

[8] As can be inferred from *Baka v. Hungary*.
[9] *Olujić v. Croatia*, §§ 59, 60, citing among others the *Buscemi* judgment.

disposal an enumeration of the criteria applicable to each individual situation. The question now is whether or not these new means of social communication affect the considerations set out above, in other words whether they should be treated in the same way as the traditional press, radio and media which have hitherto been at issue before the European Court of Human Rights, or whether they call for a new and different set of criteria. In this connection, the April 2010 summary of network access issues by the Committee on Codes of Conduct of the Judicial Conference of the United States may be of interest. I realise that more *social media networks* have emerged since that time, but I believe that, although they have different characteristics, they can all be likened to those described in that summary. According to this document[10], social networking refers to building online communities of people who share interests or activities. These web-based applications allow users to create and edit personal or professional "profiles" that contain information and content that can be viewed by others in electronic networks that the users can create or join. The document also draws a distinction between social networks that offer personal connections and professional networks that accomplish other business-related goals.

Here are the different types of network currently existing:

(i) *Facebook*, which provides an easy way for people to keep in touch, and for individuals to have a presence on the web without needing to build a website; (ii) *LinkedIn*, which is used mainly for professional networking and offers a means of self-promotion; (iii) *Blogs*, which are a type of website maintained with regular entries of commentary, descriptions of events or personal online diaries, combining images and links to other blogs, sometimes with the ability for readers to leave comments in an interactive format; (iv) *Twitter*, which is a combination of instant messaging and blogging; tweets are text-based posts of up to 140 characters displayed on the author's profile page and delivered to the author's subscribers, who are known as "followers" or "friends", and senders can restrict delivery to those in their circle of friends or, by default, allow open access; (v) *YouTube* is a video-sharing system.

The classification of the various forms of communication in social media leads to a question: is there a difference between traditional social media and the new electronic networks? I would say there is no difference, as they all have a common element, namely the communication of information or opinions to a segment of the population which is outside the circle in which the news is generated. Consequently, at first sight, it should be considered that the rules which can be inferred from the judgments of the ECtHR must also be applied to social media. Thus point VI, *in fine,* of the above-mentioned resolution calls for prudence: "[judges] shall proceed with the utmost care if using social media".

In various international working groups dealing with the issues of independence, impartiality and integrity of judges, a series of questions have been raised that relate to the use of social networks by judges and the consequences that may result in the protection of the principles that are supposed to govern their actions, since it should not be forgotten that "the independence of judges is a right of every citizen, the protection and defence of which is a fundamental element of the judge's professional duties, and not a personal privilege deriving from his or her status"[11] (emphasis added). Under the ECtHR resolution, cited above, « judges shall be independent of any public national or international institution, body or authority or any private entity » (point II)[12].

The issue of social networking by judges has also been a subject of debate in the specialised

[10] US Judicial Conference Committee on Codes of Conduct, *Resource Packet for Developing Guidelines on Use of Social Media by Judicial Employees*, April 2010.

[11] General Council of the Spanish Judiciary, *Code of Ethics for the Judiciary*, Principle 1.

[12] "**II. Independence.** In the exercise of their judicial functions, judges shall be independent of any public national or international institution, body or authority or any private entity. They shall keep themselves free from undue influence of any kind, whether external or internal, direct or indirect. They shall refrain from any activity, expression and association, refuse to follow any instruction, and avoid any situation that may be considered to interfere with their judicial function and to affect adversely public confidence in their independence".

press. For example, on 24 May 2019, Colin Perkel published in *La presse canadienne* an article headed *La présence des juges dans les réseaux sociaux,* in which he asked whether it was fair, or even desirable, to require the judiciary to remain excluded and isolated from such social interaction.[13]

I believe that the basic rule remains the same as that which I have been defending: judges should be allowed to use social media. As indicated by the Doha Declaration[14], "[i]t is important that judges, both as citizens and in their judicial role, should be involved in the communities they serve", and therefore "[t]he public benefit of such judicial involvement and participation must ... be balanced with the need to maintain public confidence in the judiciary, the right to a fair trial and the impartiality, integrity and independence of the judicial system as a whole".

A distinction must be drawn between different situations:

1º *Institutional social media*. Media through which the courts announce their decisions, or explain the structure, functioning and administration of the justice system, etc. An example can be found on the website http://www.poderjudicial.es. These networks do not generally pose any problem and contribute to making justice more accessible and more transparent, and to strengthening public confidence in an understanding of how the courts work[15].

2º *Social networks made up of groups of individuals to discuss issues related to their profession*. For example, where a blog is created exclusively to discuss judgments on a specific point. Such blogs should not pose any major problems either, provide they are limited to an exchange of opinions and do not seek to impose legal views on a case being heard by a given judge.

3º The most important aspect is the *personal use of social networking*.

This is where the most sensitive issues arise.

(D) Independence on social media

None of the soft law documents concerning the participation of judges in social media and described as "ethical rules" do anything other than recommend caution, without imposing sanctions. For example, the Code of Ethics for the Judiciary, approved by the General Council of the Judiciary in Spain, expressly states in its preamble that "the disciplinary rules have nothing to do with judicial ethics", and adds that "it functions as a positive incentive since it aims at excellence", which translates into "the promise of good justice in so far as it incorporates the qualities necessary to achieve the goal assigned to it by the Constitution: the protection of citizens' rights". Thus, in point 9, it is stated that "judges must conduct themselves and exercise their rights, in all activities in which they are recognised in that capacity, in such a way as not to compromise or undermine society's perception of the independence of the judiciary in a democratic State governed by the rule of law". As I have already said, this document does not refer to the issue of social media at all; however, the opinion of the Judicial Ethics Commission dated 25 February 2019 (consultation 10/2018) [16] answers

[13] www://lapresse.ca/actualites/justice-et-faits-divers/actualites-judiciaires/201903/24/01-5219425. A few months later, on 30 October of the same year, Marine Babonneau published in Dalloz Actualité an article headed "Réseaux sociaux et pouvoir judiciaire : la nécessaire *« incarnation »?"* in which she referred to the case of a Spanish judge who, via Twitter, had given an opinion on the reasons for domestic violence, and reported on a conference about the influence of social media on the conduct of judges, held by the *École nationale de la magistrature française* and directed by Judge Clémence Caron, https://www.dalloz-actualite.fr/flash/reseaux-sociaux-et-pouvoir-judiciaire-necessaire-incarnation.

[14] UNODC, *Non-Binding Guidelines on the Use of Social Media by Judges*, The Doha Declaration: Promoting a Culture of Lawfulness, Global Judicial Integrity Network.

[15] Such media are mentioned at point 11 of the document cited in the previous footnote: "Institutional (as opposed to individual) use of social media by the courts can, in appropriate circumstances, be a valuable tool for promoting issues such as (a) access to justice; (b) administration of justice, in particular judicial efficiency and expedition of case processing; (c) accountability; (d) transparency; and (e) public confidence in, understanding of, and respect for, the courts and the judiciary".

[16] CGPJ, opinion of the Spanish Judicial Ethics Commission of 25 February 2019 (consultation 10/2018).

the questions raised about the use by judges of any social network. It reaches the following conclusions: (i) there is no reason why a judge should not use a pseudonym, but this does not mean that he or she can use it to circumvent the rules governing his or her actions; (ii) a distinction must be made between the closed groups I mentioned above and open-access groups (in the latter case, the analysis from an ethical perspective is more complex); (iii) when giving opinions on legal matters, it should be borne in mind that they may "compromise not only the appearance of impartiality" but also, in certain circumstances, affect the impartiality, independence and integrity of the judge himself or herself; (iv) the use of the words "friend" or "follower" on a social network does not compromise the independence and impartiality of the judge. Similar conclusions are set out in the above-mentioned opinion of the same Commission of 14 January 2021.

The conclusions of this opinion are in line with what has been said so far, namely, that in the exercise of their freedom of expression, judges may or may not express their legal opinions, but the appearance of independence and impartiality may be undermined, and therefore, in accordance with what the case-law of the European Court of Human Rights has emphasised, there is an ethical duty of care and restraint[17].

The regime described above must have its exceptions, which are none other than those relating, for example, to extreme political situations, failure by public authorities to respect fundamental rights or the principles of the rule of law, etc. Judges are entitled, in the exercise of their freedom of expression, to speak out in such cases, regardless of the means they use to do so.

The solutions adopted in the cases examined by the CJEU and the European Court of Human Rights are applicable.

In these circumstances, what would be the consequences of an "imprudent" exercise of freedom of expression in social media? The first answer is that, unless it is one of the cases for which a sanction is prescribed, according to the rules governing judicial discipline, it will always be necessary to preserve the judiciary's independence and impartiality, which are pillars of the rule of law. In other words, the constitutional system establishes the independence and impartiality of the judiciary as essential components, such that the legitimate exercise of freedom of expression will have consequences. Therefore, I believe that two groups of aspects can be distinguished:

(i) Aspects that are *external and specific* to each judge, for which the mechanisms of withdrawal and exemption exist. A judge who has legitimately expressed an opinion on legal issues that may be of interest to him or her may withdraw from a case, either before or after formulating that opinion. In other words, the judge may be suspected of bias or prejudice, or predisposition towards a particular solution, as the Bangalore principles state[18]. This situation may follow physical manifestations, previously expressed legal opinions, or membership of a particular political party[19]; it also applies to relationships with family or friends.

(ii) *Internal aspects*, for which the judge may, or rather must, withdraw. It is therefore logical

[17] An interesting comparative law study is that of Ordóñez Solís: "¡¡¡Pero bueno, los Jueces también están en las redes sociales!!!", *Diario LA LEY*, nº 8762, 16 May 2016. See also point V of the ECtHR Resolution.

[18] Bangalore Principles (Commentary). *Impartiality*. 2.1, § 57: "Bias or prejudice has been defined as a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to judicial proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction ...". Or as point III of the above-cited resolution states: "Judges shall exercise their function impartially and ensure the appearance of impartiality. They shall take care to avoid conflicts of interest as well as situations in and outside of the Court that may be reasonably perceived as giving rise to a conflict of interest. Judges shall not be involved in dealing with a case in which they have a personal interest. They shall refrain from any activity, expression and association that may be considered to affect adversely public confidence in their impartiality."

[19] Bangalore Principles (Commentary). *Impartiality*. 2.2, § 65: "Outside court too, a judge should avoid deliberate use of words or conduct that could reasonably give rise to a perception of an absence of impartiality. ... Partisan political activity or out of court statements concerning issues of a partisan public controversy by a judge may undermine impartiality. They may lead to public confusion about the nature of the relationship between the judiciary on the one hand and the executive and legislative branches on the other ...". An interesting case concerning the principle of impartiality as applied at the Spanish Constitutional Court is that of the withdrawal of the President Pérez de los Cobos on account of his membership of a political party, which he left shortly afterwards (see judgments 180/2013 of 17 September 2013 and 238/2013 of 21 October 2013, which dismissed one of the grounds for withdrawal under Article 219).

that the Spanish judicial system should see these as grounds for withdrawal, because it recognises the existence of external aspects, which allow any interested third party to seek the withdrawal from a trial of a judge who has expressed his opinion or who has a relationship of kinship or friendship with a person connected with the trial. At the same time, these aspects have consequences for the personal attitude of the judge, who will know that for these reasons he or she must stand down from the case in question. Thus, the grounds for exemption and withdrawal are concrete safeguards ensuring the effective impartiality and independence of the judge.

(E) Conclusion

Everything that has been said leads to one single conclusion: the principles of independence and impartiality of judges form an indispensable component of a State governed by the rule of law. The status of judges cannot prevent them from exercising their freedom of expression, regardless of the means they use to do so. Judges must, however, assume the consequences, otherwise the presumption of impartiality may be called into question. They will then be able to rely on grounds for withdrawing, or for being exempted, from a case, and it is only in that way that the principles of the rule of law can be upheld.

Abbreviations

ECHR European Court of Human Rights
CGPJ General Council of the Judiciary, Spain.
CJEU Court of Justice of the European Union.
UNODC United Nations Office on Drugs and Crime.