

THE USE OF SOCIAL MEDIA BY JUDGES AND HOW THEIR IMPARTIALITY MAY BE AFFECTED

THEMIS COMPETITION

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1. INTRODUCTION

In Spain, over an 80% of people use social media at least every 24 hours. We use social media to communicate between us, to post our opinions and to share our intimacy. However, fundamental rights are implicated in that process.

Every law student has the fundamental right of freedom of speech, which includes the right of posting on social media about any topics. Nevertheless, there is a change in a law student's life at the very moment you become a judge. Once you belong to the Judiciary, you are no longer just yourself, but a representative of the Law.

In the end, the essential issue is that you are always a judge, even when you are not at court. However, what influence does one's job have on his social media handling? From our own personal experiences, we found out that there are 3 ways to proceed: you can delete your social media profiles, and try to delete your digital footprint, you can maintain them in the same way that you used to do or you can adopt an anonymous profile. These three reactions obey to a different conception of the freedom of speech.

The way in which we want to approach the topic is to maintain a simple thesis shared by the members of this team. Afterwards, we will contrast our thesis with the different legal configuration of the fundamental rights of freedom of speech and the right to an independent and impartial trial. In the end, we will challenge our thesis with the exposition of different opinions emitted by different institutions regarding the use of social media by the Judiciary. As a consequence of it, we defend that: **a Judge has to use social media as he would behave in any other public situation, guided by the principle of prudence and the need to inspire trust in the Justice.**

2. METHODOLOGY AND MATERIALS

A. Methodology and thesis

In order to approach the subject, this report will go through some theoretical points. To begin with, we will present a brief remind of the current position of freedom of speech. Secondly, we will make an explanation on the ethical principles that may be affected because of the freedom of speech. Finally, we will expose the legal framework that must be applied to Spanish Judges. After the framework is fixed, we will raise and try to answer some questions which can be grouped into four categories: Use of social media, identification as a judge, content of posting and interactions in social media.

B. Materials

The main sources of information to expose different perspectives of the incidence of social media to the independence and impartiality of the Judiciary are the following.

i. CGPJ Ethical principles

In first place, because of the proximity and mandatory application among the Spanish Judiciary, the Ethical Principles of the Judicial Committee will be exposed. These principles were adopted on the 20th of December 2016 by the General Council of the Judiciary (CGPJ) of Spain. The document had previously been elaborated by a group of experts which included Magistrates representatives and some other experts. The aim of the principles is to gather the values and behaviour rules shared by the Judiciary.

However, the background of the document is the international frame in which several documents regarding judicial ethical integrity have been approved. In this sense, there are the Principles of Bangalore approved by the United Nations. The document divides the principles in four groups: independence, impartiality, integrity and a forth group that encompass courtesy, diligence and transparency.

Secondly, the document arises a new institution (the Judicial Integrity Committee) which has the function to answer the doubts that members of the Judiciary may expose. In relation to this labour, on 25th of February 2019, the Committee published the Dictamen 10/2018 related to the use of social media between the members of the Judiciary and the potential influence it may have into the ethical principles of the Judge.

ii. The Bangalore Principles of Judicial Conduct of 2002

This document was adopted by the Judicial Group on Strengthening Judicial Integrity, within the scope of the United Nations. It develops the fundamental right according to which everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of rights and obligations and of any criminal charge. The purpose of the document is to establish standards for ethical conduct of judges, designed to provide guidance to judges and to afford the judiciary a framework for regulating judicial conduct. The document is divided in seven parts that refer to independence, impartiality, integrity, property, equality, competence and diligence.

iii. Doha Declaration by UN Global Judiciary Integrity Network.

This Declaration was entitled “The Risks and Benefits of the Use of Social Media by Judges”. The aim of the panel was to identify and address some of the fundamental ethical implications for members of the judiciary regarding their on-line presence or use

of social media, and to also provide practical recommendations and guidelines for judges on how to use social media ethically and responsibly.

In particular, the Declaration approaches the ethical problems potentially arising from judicial use of social media, including the possible creation of bias, prejudice or conflict of interest, whether real or perceived, the current lack of formal guidance for judges, the need of general rules and guidelines for the use of social media by individual judges and the need of specific recommendations on how the judges should conduct themselves.

iv. The Code of Conduct for Judicial Employees of United States Courts.

This Code includes the ethical canons that apply to judicial employees and provides guidance on their performance of official duties and engagement in a variety of outside activities. In the United States, the judiciary has several codes of conduct, approved by the Judicial Conference of the United States, that serve as primary sources of ethical guidance for judges and judicial employees. In what the Code of Conduct for Judicial Employees is concerned, it applies to all online activities, including social media. The main ethical considerations refers to confidentiality, avoiding impropriety in all conduct, not lending the prestige of the office, not detracting from the dignity of the court or reflecting adversely on the court, not demonstrating special access to the court or favoritism, not commenting on pending matters, remaining within restrictions on fundraising, not engaging in prohibited political activity and avoiding association with certain social issues that may be litigated or with organizations that frequently litigate.

v. Ibero-American Judicial Ethical Code

This document comes as an expression of the labour of the Ibero-American Judicial Summit. It has been adopted as a code of direct application in some countries but other countries have developed those principles adopting new ethical codes applicable to judges. As a result of this Code, an Ethical Commission was created. The aim of the Code and the Commission reveal the existence of an Ibero-American judicial area with shared judicial values that seeks to strengthen existing effective ties and seek to create a framework of cooperation among Ibero-American judges.

3. PART 1: FREEDOM OF SPEECH

As George Washington once stated, *“if freedom of speech is taken away, then dumb and silent we may be led, like sheep to the slaughter.”*

In Spain, we can find that freedom of speech is consecrated as a fundamental right in article 20 of our Constitution. This means that people are allowed to express and spread

freely their beliefs, ideas and opinions orally, in writing and throughout any other means of communication. However, we must set a limit to that right so that insulting and unnecessary expressions are not protected by our Supreme Law, given that this right clash with the right of honor and intimacy of the rest of the citizens. Another issue that we must take into account is that public figures are forced to bear a higher risk of having their personal rights affected.

When it comes to European regulation, it is article 10 of the European Convention on Human Rights that states that *“everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”*

When there is a conflict between freedom of speech and privacy, there are some criteria based on the Axel Springer versus Germany case-law that we may apply: Whether the publication contributes to a debate of general interest, how well known is the person concerned and what is the subject of the report, the prior conduct of the person concerned, the method of obtaining the information and its veracity, the content, form and consequences of the publication and, finally, the severity of the sanction imposed. According to the European Human Rights Court resolution, comments on matters of general interest or political issues generally enjoy a high level of protection of freedom of expression, so the margin of appreciation left to authorities is particularly narrow.

The European Court of Human Rights (ECHR) has stated that Judges have the same rights as everyone. However, these rights can be subjected to some particular restrictions based in the preservation of the labour that they develop¹. As a result, there are some specific characteristics which lead to some restrictions to Judiciary members².

¹European Court of Human Rights, 9th July 2013, Di Giovanni vs. Italy

²Ibero-American Court of Human Rights, 5th October 2015, López Leone vs. Honduras.

When it comes to using social networks, we can mention some regulation in the different European countries, there are no official international guidelines and very few national ones on how judges should behave on social media.

As for the United States of America, the First Amendment stated that “*Congress shall make no law... abridging freedom of speech*”. In fact, last year, the United States Supreme Court ruled in *Packingham vs. North Carolina* case-law that social-media platforms are the new “public square” and access to them is a constitutional right.

4. PART 2: ETHICAL PRINCIPLES CONCERNED IN THE USE OF SOCIAL MEDIA BY JUDGES

a. Spanish legal frame

Social networks have become a significant part of social life and an important means of expressing people’s own opinion. Given the nature of judicial office, the use of social media by judges, may affect some of the basic principles on which the Judicial Power is built, such as, impartiality, integrity, propriety or independence. These judicial principles have been traditionally protected in national and international legislation.

The Spanish Constitution, in its article 117, states the independence, irremovable, responsibility and submission to law of Spanish judges. Regarding independence, the Spanish Constitutional Court has declared that it entails the submission to law in the exercise of the judicial function, without being tied to any instructions of public authorities. In respect of judicial impartiality, the Spanish Constitutional Court distinguishes between subjective impartiality, which refers to the existence of no personal relations with the parts in the process, and objective impartiality, which implies the existence of no interest or connection between the judge and the conflict.

In order to ensure the confidence in judicial independence and impartiality, the Spanish Law of Judicial Power establishes some legal guarantees. This Law states the incompatibilities and prohibitions of judges, which are aimed at avoiding any link between judges and political power as well as at preventing judges from the exercise of any other economic or professional task. These restrictions include the prohibition of exercising any civil service but the judiciary, the prohibition of exercising any commercial activity or the ban on being part of any political party. In addition to these incompatibilities, there is a fundamental article in the Spanish Law of Judicial Power targeted to protect the judicial independence and impartiality regarding a specific ongoing judicial procedure; that is article 219, which regulates judicial disqualification,

also referred as recusal, as the process by which a judge voluntarily or at the request of a party, removes himself from hearing a particular case because of bias, conflict of interest, relation to a party, attorney or witness, or for any other reason.

b. European Legal Frame

At a European level, the European Convention of Human Rights, states in its article 6 the right to a fair trial, which includes the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The ECHR has declared that it requires independence from the other branches of power, that is the executive and the legislature, and also from the parties (Ninn-Hansen vs. Denmark). Concerning impartiality, the Court refers to it as an absence of prejudice or bias, and has distinguished between a subjective approach, that is, regarding the personal conviction of a given judge in a particular case; and an objective approach, that is, determining whether a judge offers sufficient guarantees to exclude any legitimate doubt in this respect (Kyprianou vs. Cyprus; Piersack vs. Belgium; Grieves vs. the United Kingdom). This perspective is very revealing with regard to the use of social media by judges, as it implies that judges must not only be impartial, they must also be seen to be impartial.

c. Global Legal Frame

Finally, in a global scale, is especially relevant the Bangalore Principles of Judicial Conduct, which identify the following values of the judiciary: independence, impartiality, integrity, propriety, equality, competence and diligence. They are intended to establish standards of ethical conduct for judges worldwide. Its relevance lies on the fact that the United Nations Social and Economic Council, by resolution 2006/23.

5. PART 3: FREQUENTLY ASKED QUESTIONS

1. Use of social media by judges

According to the Spanish Principle of Judicial Ethics³, the essential ethical principles according to which the members of the Judiciary must abide are independence, impartiality, integrity, courtesy, diligence and transparency.

The Ethical Commission of the CGPJ has stated that the use of social media can have an influence in the respect of the principles number 9⁴, 16⁵, 17⁶, 22⁷, 24⁸, 29⁹ and 31¹⁰

³ CGPJ Ethical Code for the Judiciary approved on 20th September 2016.

⁴ CGPJ Ethical Code for the Judiciary approved on 20th September 2016. 9. The judge must behave and exercise their rights in any activity in which they are recognizable as such in a way that does not compromise or impair the perception that a democratic society and subject to the rule of law has on the independence of Power Judicial.

⁵ Op. cit 16. Impartiality also imposes the duty to avoid conduct that, inside or outside the process, can put it into question and damage public confidence in justice.

related to independence, impartiality and integrity. The Ethical Commission has highlighted the need to respect the dignity of the jurisdictional function. It is necessary to preserve the independence and appearance of impartiality, as well as managing the trust of society in the administration of justice¹¹.

When addressing the way in which judges access social media, we must start from the fact that such social media constitutes a vehicle for social relationships and information of mass use in today's society¹². Because of that judges must be able to access social media, but when doing so they must take into account the risks that are generated in relation to respect for the principles of judicial ethics. The Commission exposes that *“the participation of judges in social media is not contrary to the Principles of Judicial Ethics, but the manner of presenting and intervening may generate risks in relation to respect for the principles of judicial ethics, which may be affected in any case”*¹³.

At a global level, we can highlight the position taken by the **Global Judicial Integrity Network**¹⁴. It remarked the importance for judges to have a basic knowledge of social media¹⁵ in order to fulfil the Bangalore Principles. In conclusion, the Conference stated that *“social media actually offers a great opportunity for courts to meet the needs of their public and promote transparency for the purpose of supporting trust and confidence. Because of that, judges and courts should board that train”*. In this sense, the Conference encouraged the institutional use of social media by the courts given that, in appropriate circumstances, it can be a valuable tool for promoting certain issues that

⁶ Op. cit. 17. The judge must ensure the maintenance of the appearance of impartiality in coherence with the essential character that material impartiality has for the exercise of jurisdiction.

⁷ Op. cit. 22. Integrity requires the judge to observe conduct that reaffirms trust of citizens in the Administration of Justice not only in the exercise of jurisdiction, but in all those facets in which it is recognizable as a judge or invokes its condition such.

⁸ Op. cit. 24. The judge in their personal relationships with the professionals linked to the Administration of Justice should avoid the risk of projecting an appearance of favoritism.

⁹ CGPJ Ethical Code for the Judiciary approved on 20th September 2016. 29. The judge must be aware that the dignity of the judicial function involves demands on their behavior that do not apply to other citizens.

¹⁰ Op. cit. 31. The judge, as citizens, have the right to freedom of expression that will exercise with singular prudence and moderation in order to preserve their independence and appearance of impartiality and maintain social trust in the judicial system and in the jurisdictional bodies.

¹¹ Ethical Commission CGPJ Opinion (Consultation 10/2018), 25th february 2019. Point 5

¹² Op. cit. Point 5

¹³ Op. cit. Point IV Conclusion 1

¹⁴ Session Report Template for Substantive Sssions Launch of the Global Judiciary Integrity Network (9-10th April 2018, United Nations Vienna).

¹⁵ Op. cit, page 8. “While judges living in a modern world seek to conduct normal lives in a digital age, and try to balance their personal freedoms with their professional accountability, social media presents them with dangerous potential traps. Candid remarks on social media can indicate preferences and bias that undermine impartiality, and may even highlight potential conflicts that impact a judge’s integrity”.

have public interest. There was a recommendation for judges to educate their family members about how their online activities can cause security risks for their relatives¹⁶.

The Committee on Codes of Conduct Judicial Conference of the United States has settled¹⁷ that we must take into account two factors: the immediate capacity to communicate with exponential numbers of people, and secondly the limited possibility to effectively control that communication. These considerations implicate Canons of Ethical Behaviour 2¹⁸, 3D¹⁹, 4A²⁰, and 5²¹ of the Conduct Code for Judicial Employees. In addition, the Committee focuses on the eventual damage to the principle of impropriety²². The risk extends to the possible decrease of the prestige of the office, detracting the dignity of the court or, demonstrating special access to the court or favouritism, not commenting on pending matters and engaging in prohibited political or professional activity. When analysing the wide range of internet tools and platforms, the Committee concludes that different types of social media will implicate different Canons and to varying degrees. The Committee states that there is an obvious distinction between social networks that offer personal connections and professional networks. There is however a limitation in the use of specific professional social networks: *“Judges should be allowed to use sites like Linked In, which is a professional version of Facebook and a business-oriented social networking site - so long as the judge is not connected with any attorney who is reasonably likely to appear before the judge. A judge must avoid connecting with such attorneys”*²³.

¹⁶ Op. Cit. Page 9. Recommendation 2.

¹⁷ Resource Packet for Developing Guidelines on Use of Social Media by Judicial Employees. Page 6.

¹⁸ Resource Packet for Developing Guidelines on Use of Social Media by Judicial Employees. Page 6. A judicial employee should not engage in any activities that would put into question the propriety of the judicial employee's conduct in carrying out the duties of the office...

¹⁹ Op. cit. Duty of Confidentiality. 1. A judicial employee should avoid making public comment on the merits of a pending or impending action and should require similar restraint by personnel subject to the judicial employee's direction and control. This proscription does not extend to public statements made in the course of official duties or to the explanation of court procedures.

²⁰ Op. cit. Outside Activities. A judicial employee's activities outside of official duties should not detract from the dignity of the court, interfere with the performance of official duties, or adversely reflect on the operation and dignity of the court or office the judicial employee serves...

²¹ Op. cit. A judicial employee should refrain from partisan political activity; should not act as a leader or hold any office in a partisan political organization; should not make speeches for or publicly endorse or oppose a partisan political organization or candidate; should not solicit funds for or contribute to a partisan political organization, candidate, or event; should not become a candidate for partisan political office; and should not otherwise actively engage in partisan political activities.

²² Op. cit. Page 24. “Common sense and the integrity of the judiciary—Canons 1 and 2. Judicial employees are expected to avoid impropriety and conduct themselves in a manner that does not detract from the dignity and independence of the judiciary. These principles extend to social media activities. Common sense counsels discretion in the nature and subject matter of Internet postings.”

²³Session Report Template for Substantive Sessions Launch of the Global Judiciary Integrity Network (9-10th April 2018, United Nations Vienna). Additional Observations.

In the **Ibero-American Ethical Code**, there are many principles that are implicated. The Opinion of the Ethical Commission assures that there are no specific dispositions that limit the use of social media among Judiciary. However, it would be mistaken to conclude that Judges can use social media indiscriminately²⁴. According to that document, the principles more implicated with the use of social media are independence (principle 3²⁵, 7²⁶ and 8²⁷), impartiality (principle 11²⁸, 12²⁹, 13³⁰ and 15³¹), institutional responsibility (principle 43³²), courtesy (principle 52³³), transparency, confidentiality, prudence and integrity. These principles, in relation with social media use of Judges, can be summoned up by principle 55, which “*The Judge must be aware that the exercise of the jurisdictional function implies requirements that do not apply to the rest of citizens.*” On the other hand, the Opinion of the Ethical Commission of Ibero-America pointed out that “*there are no dispositions that specifically limit the use of social media... there are no restrictions nor special duties regarding the employment*”.

2. Identification of the user as a Judge

The Ethical Commission of the CGPJ has answered that question. Firstly, it concluded that “*judges can be publicly presented as such in social networks*” but the Ethical Commission believes that they “*should make a prior ethical assessment on how to present themselves and evaluate to what extent their identification in social networks as members of the Judiciary, either directly, or indirectly through an alias, can condition the contents, opinions or behaviours that they make public in these social networks, as*

²⁴Ibero-American Ethical Commission Opinion of 30th November 2015 related to the use of social media among Judiciary. Page 3.

²⁵ Ibero-American Ethical Code. Article 3. The judge, with their attitudes and behaviors, must show that does not receive direct or indirect influence of any other public or private power, whether external or internal to the judicial order.

²⁶ Op. cit Article 7.- The judge is not only ethically required to be independent but also not to interfere in the independence of other colleagues.

²⁷ Op. cit Article 8°.- The judge must exercise with moderation and prudence the power that accompanies the exercise of the jurisdictional function.

²⁸ Op. cit Article 11.- The judge is obliged to refrain from intervening in cases in which his impartiality is compromised or in which a reasonable observer can understand that there is reason to think so.

²⁹ Op. cit Article 12.- The judge should try to avoid situations that directly or indirectly justify depart from the cause.

³⁰ Op. cit Article 13.- The judge must avoid any appearance of preferential or special treatment with the lawyers and with the persons involved, stemming from their own conduct or from that of the other members of the judicial office.

³¹ Op. cit Article 15.- The judge should try not to hold meetings with one of the parties or their lawyers (in their office or, a fortiori, outside it) that the counterparts and their attorneys can reasonably consider unjustified.

³²Op. cit Article 43.- The judge has the duty to promote in society an attitude, rationally founded, of respect and trust towards the administration of justice

³³Op. cit Article 52.- The judge must show a tolerant and respectful attitude towards the criticisms directed to his decisions and behaviors

well as their reactions to third-party publications.”³⁴ Moreover, the Ethical Commission states that judges “*must also be aware that the more data of their "judicial identity" they contribute, the greater the risk that their interventions and publications may affect issues related to judicial ethics, especially in the perception of others about judicial independence, appearance of impartiality and integrity.*”³⁵ The opinion of one judge may be seen as a generalised opinion in the whole court or even the judicial collective. We cannot forget the difference among the access to restricted groups formed exclusively by judges, groups in which other people are allowed³⁶.

In relation to the use of **fake or anonymous identities on social networks**, the Ethical Commission has considered there is no ethical disadvantage in the presentation in social networks using an alias. Nevertheless, it warns against using those methods to develop a reprehensible behaviour under the cover of an alleged anonymity³⁷.

Regarding the **United States**, when a judicial employee identifies himself as such on a social networking site it affects Canons 2 and 4 of the Guide³⁸. The position of this Committee is more restrictive in relation with the identification of the Judge as it considers that “*the Committee’s position that social media policies should, at the very least, restrict judicial employees from identifying themselves with a specific court or judge on social networking sites*”³⁹. In relation with the different treatment of personal and professional social media, it excludes the second ones from this prohibition⁴⁰.

There is a completely opposite position of the **Global Judiciary Integrity Network Conference**⁴¹. According to them, members of the Judiciary have the chance to use their real names or to use a pseudonym⁴². It is a personal decision to disclose their judicial status on social media, provided that doing so is not against ethical standards and existing rules⁴³. This position has been confirmed by the Conference of Vienna of April 2018: “*judges can use social media e.g. Facebook and even identify themselves as judges - so long as they do not comment on their work or on pending cases. Also, they*

³⁴ Commission CGPJ Opinion (Consultation 10/2018), 25th february 2019. Point IV Conclusion 2

³⁵ Op. cit. Point IV Conclusion 3

³⁶ Commission CGPJ Opinion (Consultation 10/2018), 25th february 2019. Point 6. Page 7.

³⁷ Op. cit. Point 6. Page . 6

³⁸ *Guide to Judiciary Policy, Vol. 2B, Ch. 2 Page 224*

³⁹ Op. cit. Page 224.

⁴⁰ Op. cit. “*The judicial employees, with the permission of their court or judge, may state their association with the court or judge on professional networking sites like LinkedIn*”.

⁴¹ Non-binding Guidelines on the Use of Social Media by Judges. Global Judiciary Integrity Network.

⁴² Op. cit. Point 11

⁴³ Op. cit. Point 10

can use social media so long as they don't do anything that looks like an ex parte communication or suggest that anyone is in position to influence the judge"⁴⁴.

Another suggestion is that judges separate private and professional identities and, therefore, judges should maintain their social media accounts as either exclusively private or exclusively professional⁴⁵.

The **Ibero-American Ethical Commission** recommends judges to evaluate the potential consequences of identifying himself as a judge. Additionally, in case that identification was caused not by the judge's will, be aware of the responsibility that being a Judge implicates⁴⁶.

3. Content published in social networks

a. General appreciation

The third block of questions is related to the content of the publications or interventions and to the reactions to third-party publications. In relation to this point, the Ethical Commission CGPJ has tried to determinate the influence of the publication of particular opinions, legal opinions, and reactions to other publications ("I like", sharing, retweeting , etc.) into the Great principles of judicial ethics⁴⁷. People may post personal opinions regarding different matters, convey their knowledge in a particular subject or they can even react to other people's publications with "likes", "dislikes", sharing or retweets. Although this way of using social networks may affect the most important principles of judicial ethics, it can also favour the accomplishment of ethical duties such as the pedagogical function that judges can play in explaining the law.

b. Confidentiality duty

Strictly linked to the impartiality and integrity, the **Ethical Commission CGPJ** has fixed the obligation of judges to show, in any case, reservation regarding data that may harm the parties or the development of the process⁴⁸. It comes as a conclusion of No. 19 of the Principles that judges, in their social life, can express their considerations but always with subordination to the duty of prudence in their public statements and to the prohibition of revealing data of issues that have been known by them. The release of information related to one's own cases compromises two important aspect of the

⁴⁴ Session Report Template for Substantive Sssions Launch of the Global Judiciary Integrity Network (9-10th April 2018, United Nations Vienna). Point IX. Additional observations, if applicable.

⁴⁵ Op. cit. Point 13

⁴⁶Ibero-American Ethical Commission Opinion of 30th November 2015 related to the use of social media among Judiciary. Page 7. Recommendations.

⁴⁷ Commission CGPJ Opinion (Consultation 10/2018), 25th february 2019. Point IV .8

⁴⁸ CGPJ Ethical Code for the Judiciary approved on 20th September 2016. Principle 19

judicial function: the appearance of impartiality and the confidentiality obligation. There must be a subordination of the contribution by the judge of reflections and opinions to the duty of prudence in his public statements.

There is a similar caution in the **United States Guidelines for Judicial Employees**. As previously explained, it is recommended to avoid making public comment on the merits of a pending or impending action or disclose any confidential information received in the course of official duties. In the same direction⁴⁹ it includes posting a “status update” on a social networking site that broadly hints at the likely outcome in a pending case; making a comment on a blog that reveals confidential case processing procedures; sending a tweet that reveals non-public information about the status of jury deliberations⁵⁰. Finally, these Canons state an additional and expansive duty of prudence to judges. The Committee further advises that judicial employees who are on the judge’s personal staff refrain from participating in any social media that relate to a matter likely to result in litigation or to any organization that litigates in court⁵¹.

The **Ibero-American Ethical Commission** remarks the duty of confidentiality⁵² regarding the cases of every judge because of the “*duty of absolute reserve and professional secrecy*”⁵³. The infraction of this duty is extremely harmful not only when contents are published in mass media, but also when it is posted in social media. Nevertheless, it must also be said that social media can also become an efficient tool to provide transparency of the Judiciary. In order to avoid infractions of secrecy duty, transparency should be facilitated by the Judiciary institutions, not by the individuals⁵⁴.

c. Allowance on posting personal opinions

The publication of personal opinions can compromise, according to the **Ethical Commission CGPJ**, not only the appearance of impartiality referred to in principle No. 17, but also to one's own impartiality, independence and integrity. This warning is referred to any kind of posts and certain reactions to third-party publications⁵⁵.

There may be a coincidence between the principle no. 16 that imposes on the judge the duty to avoid conducts that could call into question their impartiality and harm the

⁴⁹ Guide to Judiciary Policy. Vol. 2: Ethics and Judicial Conduct

Pt. A: Codes of Conduct. Ch. 3: Code of Conduct for Judicial Employees. Canons 3 and 4A

⁵⁰ Resource Packet for Developing Guidelines on Use of Social Media by Judicial Employees. Page 16.

⁵¹ *Guide to Judiciary Policy, Vol. 2B, Ch. 2 Page 225*

⁵² Ibero-American Ethical Principles Code. Principles 61 and 62.

⁵³ Ibero-American Ethical Commission Opinion of 30th November 2015 related to the use of social media among Judiciary. Page 6.

⁵⁴ Op. cit. Page 6.

⁵⁵ Commission CGPJ Opinion (Consultation 10/2018), 25th february 2019. Point 9

public trust in justice and, on the other hand, the principle No. 9 that requires the judge a behaviour in the exercise of their rights that does not compromise or harm the perception that society has about the independence of the Judicial Power. It should also be remembered that principle 22, when referring to integrity, requires the judge to observe in all facets in which a judge is recognized as a conduct that reaffirms the confidence of citizens in the administration of justice.

The **Global Judiciary Integrity Network** has stated as conclusions 16 and 17 that “*the existing principles relating to the dignity of the courts, judicial impartiality and fairness apply equally to communications on social media*” and “*judges should avoid expressing views or sharing personal information online that can potentially undermine judicial independence, integrity, propriety, impartiality, or public confidence in the judiciary*”⁵⁶.

In contrast, judges are advised to avoid expressing views or sharing personal information online that can potentially undermine judicial independence, integrity, propriety, impartiality, or public confidence in the judiciary. This principle applies regardless of whether or not the judge has chosen to disclose his or her real name or judicial status on social media platforms, since the use of a pseudonym offers no guarantee that their real names or judicial status will not become known.

It comes as a conclusion that judges can post about personal opinions in social media in the same way as they have been expressing their opinion before the appearance of this technology, that is to say, avoiding undermine the public confidence in justice.

In relation to this point, the **Ibero-American Ethical Commission** has warned about the risks of exposing a personal opinion. The danger comes from the impossibility to control the potential audience of the communication and the impossibility to control the proper understanding of the opinion exposed. Some opinions can be separated from the context in order to devaluate the appearance of impartiality of the Judge⁵⁷.

d. Political activity on social media

There is not a specific disposition or recommendation of the **CGPJ Ethical Judicial Committee** about this issue. However, at this point article 127 of the Spanish Constitution establishes a limitation to political and union activity to Judges and Magistrates: “*Judges and Magistrates as well as Prosecutors, while they are active, may not hold other public positions, nor belong to political parties or unions*”.

⁵⁶Non-binding Guidelines on the Use of Social Media by Judges. Global Judiciary Integrity Network. Conclusions

⁵⁷Ibero-American Ethical Commission Opinion of 30th November 2015 related to the use of social media among Judiciary. Page 4.

In the United States, **Canon 5 of the Employees' Code** specifically addresses political activity recommending refrain concerning political activity⁵⁸. In addition to these general statements, Canon 5C demands that in the social media context, judges and judicial employees should avoid any activity that affiliates the judge or employee to any degree with political activity. This includes but is not limited to posting materials in support of or endorsing a candidate or issue, “liking” or becoming a “fan” of a political candidate or movement, circulating an online invitation for a partisan political event (regardless of whether the judge/employee plans to attend him/herself), and posting pictures on a social networking profile that affiliates the employee or judge with a political party or partisan political candidate⁵⁹. While Canon 5B of the Employees' Code permits certain nonpartisan political activity for some judicial employees, the Codes specify that all judges, members of judges' personal staffs, and high-level court officers must refrain from all political activity. To the extent that it is impractical or impossible to modify such previous endorsements or statements, the Committee suggests posting on social media the following statement: *“I have taken a position that precludes me from making further public political comments or endorsements and this site will no longer be updated concerning these issues.”*⁶⁰

Finally, the Ibero-American Ethical Commission fixed that it is mandatory for the judge to look independent to an ordinary observer. As a result, he cannot take part in political parties' positions and should not, generally, exteriorize positions that could show him as potentially influenced by groups or certain people⁶¹.

4. Interactions in social media

a. General approach

Social networks success is strictly related to the chance of users not only to post their own opinions or experiences, but also to comment others' ones. As a consequence of this, the judge has the ethical duty of being extremely careful when expressing opinions, making personal assessments and reacting to others' assessments, especially when it can be recognized as a member of the Judiciary, and this caution must be maximized in access to a media of communication with the power of diffusion of social networks.

⁵⁸Guide to Judiciary Policy. Vol. 2: Ethics and Judicial Conduct Pt. A: Codes of Conduct. Ch. 3: Code of Conduct for Judicial Employees. Canon 5 “A judicial employee should refrain from inappropriate political activity.”

⁵⁹Guide to Judiciary Policy, Vol. 2B, Ch. 2 Page 225-226

⁶⁰Op. cit. Page 226

⁶¹Ibero-American Ethical Commission Opinion of 30th November 2015 related to the use of social media among Judiciary. Page 4.

The Ethical Commission of CGPJ has linked this duty with some principles. As provided for in principle No. 31⁶², when dealing with the ethical perspective of the exercise by the judge of freedom of expression, which must always preserve the values of independence, impartiality and integrity. In this regard, the judge's performance on social networks must take into account the provisions of principle No. 3⁶³ that commits the judge to the promotion in society of an attitude of respect and trust in the Judiciary.

This must be related to the principle of courtesy that bonds the judge with the parties in the scope of the process. Its extent must inform on the ethical level any action of the judge in the that it can be recognized as such because, without a doubt, it will contribute to fostering the positive attitude of respect and trust of society in the Judicial Power.

The principle No. 24 of Spanish Principles of Judicial Ethics requires the judge to avoid the risk of projecting an appearance of favouritism⁶⁴. It is necessary to remind that the terms "friend" or "follower" that are used in some social networks do not have the same meaning as outside that context. Even though appearing as a "friend" or "follower" of another does not have to affect, by itself, the appearance of impartiality, neither can the risk be ruled out that such action could affect independence or impartiality⁶⁵.

In this sense, the Ethical Commission states that there is not an ethical duty to limit the contacts of judges in social networks. However, neither the plurality of contacts cancels the risk that the participation of the judge in social networks can be misinterpreted by third parties and affected the appearance of impartiality or independence⁶⁶. As a result of the previous, it will be the prudence that must preside over the exercise of the freedom of expression of the judge that determines the impropriety.

This same position is shared by the **Global Judiciary Integrity Network**, which concluded that Judges should be aware that concepts like “friending”, “following”, etc., in the social media context, can differ from conventional usage and may be less intimate or engaged. However, where the degree of interaction, online or otherwise, becomes

⁶² CGPJ Ethical Code for the Judiciary approved on 20th September 2016. 31. The judge, as citizens, have the right to freedom of expression that will exercise with singular prudence and moderation in order to preserve their independence and appearance of impartiality and maintain social trust in the judicial system and in the jurisdictional bodies.

⁶³ CGPJ Ethical Code for the Judiciary approved on 20th September 2016. 3. The judge must assume an active commitment to the proper functioning of the system as well as promoting in society an attitude of respect and trust in the Power of Attorney Judicial and exercise the judicial function in a prudent, moderate and respectful manner with the other powers of the State

⁶⁴ 24. The judge in their personal relationships with the professionals linked to the Administration of Justice should avoid the risk of projecting an appearance of favoritism.

⁶⁵ Commission CGPJ Opinion (Consultation 10/2018), 25th february 2019. Point 14

⁶⁶ Op. cit. Point 14

more personally engaged or intimate, judges, should continue to observe the Bangalore Principles of Judicial Conduct, necessitating, in appropriate situations, circumspection, disclosure, disqualification, recusal, or other actions similar to those established for conventional offline relationships. To avoid any risk, it is advisable to review periodically content and relationships, to exercise caution in accepting or sending friend requests from or to parties or their legal representatives during any pending court proceedings and event to seek guidance of approved social media experts and/or judicial ethics advisers whenever there is uncertainty as to either online relationships or content. Ultimately, it is advisable for judges to exercise prudence and diligence when creating online friendships or accepting online friend requests.

The **Ibero-American Ethical Commission** considered that being part as a simple observer in a social media network that has a forbidden purpose can be interpreted as an adhesion to the contents exchanged within⁶⁷.

b. Is it possible to follow and be followed by lawyers and legal offices?

The **Ethical Commission CGPJ** has stated that in order to fulfil those principles there is a specific duty of prudence when being in contact with professionals linked to the Administration of Justice who have any real or hypothetical intervention in the court or tribunal where the judge exercises his functions⁶⁸.

The use by the judge of formulas of contact with third parties in social networks is likely to generate an appearance of favouritism. Such risk acquires greater relevance in contact with professionals linked to the Administration of Justice who have any intervention or possibility of intervention in the court or tribunal where the judge exercises his functions. To avoid this appearance, judges must assess the origin of not establishing or interrupting those contacts that could contribute to generating it.⁶⁹

United States Committee⁷⁰, in relation with the Improper Communications with Lawyers and Others, has advised against the exchange of frequent messages, “wall posts,” or “tweets” between a judge or judicial employee and a “friend” on a social network who is also counsel in a case pending before the court. Despite social media exchanges don’t directly raise an appearance of impropriety issue; rather, any frequent interaction between a judge or judicial employee and a lawyer who appears before the

⁶⁷Ibero-American Ethical Commission Opinion of 30th November 2015 related to the use of social media among Judiciary. Page 4.

⁶⁸ Commission CGPJ Opinion (Consultation 10/2018), 25th february 2019. Point 14

⁶⁹ Op. cit. Conclusions IX

⁷⁰Guide to Judiciary Policy, Vol. 2B, Ch. 2 Page 223.

court may “put into question the propriety of the judicial employee’s conduct in carrying out the duties of the office.”⁷¹

A similar concern arises when a judge or judicial employee uses social media to comment about the competence of a particular law firm or attorney. Of course, any comment or exchange between an attorney and the judge must also be scrutinized.

Finally, the **Global Judiciary Integrity Network** concluded the need that “during any pending court proceedings, and as a general rule, judges should exercise caution in accepting or sending friend requests from or to parties or their legal representatives, and engaging in any other social media interactions with them. The same applies to witnesses or any other known interested persons”⁷². A judge should not be friends with lawyers or parties in disputes who have cases pending in their courtroom or who might appear before the judge. That is generally prohibited because it may be viewed as giving the attorney an unfair advantage and also may give the appearance of impropriety. It would create issues that can't be overcome even by disclosure - and if this occurs, the judge should “unfriend” the attorney and disclose this fact in the case⁷³.

The **Ibero-American Judicial Commission** highlights the bond between this situation and the possible appearance of lack of impartiality. It considers that those doubts can come from interactions with lawyers, from the simple fact of admitting them in social media. This risk is increased when the lawyer has already a case in the court, because it can undermine the duty to “*to promote in the society an attitude, rationally founded, of respect and trust towards the Administration of Justice*” principle 43.

c. What kind of language should judges use?

The way of expressing opinions to other people's publications by the judge must avoid generating or increasing tension. Some social networks encourage precipitation in the emission of comments and leave little room for nuances, which hinders reflection, typical of prudence, and facilitates that on occasion the reaction to other people's opinions is disproportionate, disproportionate or little respectful. It is always advisable to re-read the opinions and reactions before publishing them.

In the relationship with other users of social networks, and particularly when there are debates on controversial issues, the principle of courtesy must inform on the ethical

⁷¹Op. cit. *Page 4. Canon 2*

⁷²Non-binding Guidelines on the Use of Social Media by Judges. Global Judiciary Integrity Network. Conclusion 29.

⁷³Session Report Template for Substantive Sessions Launch of the Global Judiciary Integrity Network (9-10th April 2018, United Nations Vienna). Additional Information

level any action of the judge to the extent that it contributes to a positive attitude of respect and trust of society in the Judicial Power.⁷⁴

Therefore, prudence and courtesy should determine the terms and tone of participation in the debate and the decision, if any, to continue the conversation or to end it.⁷⁵

The **Global Judiciary Integrity Network** has concluded that judges should be circumspect in tone and language and be professional and prudent in respect of all interactions on all social media platforms. It may be helpful to consider in respect of each item of social media content what its impact on judicial dignity might be. The same caution applies when reacting to social media content uploaded by others⁷⁶.

Judges should treat others with dignity and respect, not use social media to trivialize the concerns of others, or make remarks that discriminate on any prohibited ground.⁷⁷

Finally, the **Ibero-American Ethical Commission** demands “*a tolerant and respectful attitude towards the critics to the Judges’ decisions and behaviors*”⁷⁸.

6. CONCLUSIONS

Through this paper we have been able to confirm our first impression: there are no clear rules to which a judge can abide in order to automatically preserve the Ethical Principles when using social media. However, it must not be a surprise, as there are no those clear rules either in social media or real life. The lack of clear rules does not mean that judges have the same right and same duties as the other citizens. The conflict between personal freedom and respect to some Ethical Principles can’t be the excuse to restrict individual fundamental rights limitlessly.

Our team has come to the conclusion that it is necessary to establish some rules about social media use by Judiciary members. However, we consider appropriate the approach that is being made to the issue by different institutions. It is recommendable to provide Ethical Principles to be followed, but it is unadvisable to fix concrete, certain, inflexible rules. On one side both societies and judges are different in every country. Secondly, the individual way of behaving of individual judges is an area of freedom that should not be limited. The concept of prudence is different between states which have different

⁷⁴ Commission CGPJ Opinion (Consultation 10/2018), 25th february 2019. Conclusions XII

⁷⁵ Op. cit. Conclusions XIII

⁷⁶Non-binding Guidelines on the Use of Social Media by Judges. Global Judiciary Integrity Network. Conclusion 16

⁷⁷Op. cit. Conclusion 17

⁷⁸Ibero-American Ethical Commission Opinion of 30th November 2015 related to the use of social media among Judiciary. Page 5.

conceptions of freedom of expression. Even inside a country, every individual judge deserves the freedom to post all contents that considers appropriate within prudence.

There is a common opinion that there are different social networks which have different risks. Whereas Facebook or Twitter are more likely to affect impartiality or dignity, professional networks as Linked In can lead to a lack of appearance of impartiality.

Judges, in the exercise of their freedom of expression, can express their particular opinions on social networks, as well as reacting to third-party publications in the ways usually used by users of social networks. When you agree to use a social network, each of your announcements becomes a form of public speaking. This means that you have accepted the risk that your statement will be freely interpreted or taken out of context.

Another issue we must take into account is that all posts on social networks are permanent. The published content of social networks remains there forever.

When it comes to political posts, there is no clear position. We consider that, as a general rule, judges who take part in social media should not make political comments or endorsements and should not post or share anything that conflicts with the dignity of their judicial office or which affects the judiciary as an institution. However, those limits are not as clear when it comes to concrete actions developed through the legislative or executive institutions as passing laws.

In relation to the confidentially duty, judges should avoid any reference to matters directly or indirectly related to the matters of which they are aware. This is due to a special awareness with the possibility of generating an appearance of favouritism, especially when contacting with professionals linked to the Administration of Justice. A judge should not be friend in social media with lawyers or parties in disputes who have cases pending in their courtroom or who might appear before the judge. We exclude from this conclusion the Linked In connections that are strictly limited to posting legal reforms, jurisprudence and legal opinions.

In the interactions with other users, the principle of courtesy must inform on the ethical level any action by the judge to the extent that it contributes to a positive attitude of respect and trust of the society in the Judiciary.

We are Judges but we are also citizens who have the fundamental right to express our opinions and our thoughts. We must be prudent and responsible of our posts as we are of our words.