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FREEDOM OF EXPRESSION OF JUDGES' COMMUNICATION

It is essential that the judicial function be public, discreet and professional. Its legitimacy as a public authority is obtained through the recognition of judgments, in which there is an identification between decisions and society. But what type of communication must be made by the judiciary, and especially by judges, to provide information about their activities and, thus, provide that their interaction with citizens strengthens the society by generating a greater connection between the sovereign and the public power?

Keywords: expression, rights, information, judges, self-censorship.

1. INTRODUCTION

Information is an instrument by which knowledge is acquired. Therefore, information and its exchange become vital for any democratic system since it allows citizens to understand what is happening in the country and form an opinion. Hence, information is of intrinsic importance for society, positing itself as a fundamental right and recognizing itself as a human right.

This research departs from the premise that the judicial function must be public, discreet, and professional. Its legitimacy as a public authority is obtained through the recognition of judgments, in which there is an identification between decisions and society. But what kind of communication must be made by the judiciary, and especially by judges, to provide information about their activities and that their interaction strengthens the society by generating a greater connection between the sovereign and the public power?

One of the elements that strengthen democracy is the communication of ideas. In the present study, it is the information provided directly or indirectly by judges that must be carried out and meet certain criteria. In the first scenario, we have the information

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that occurs about a case that is in process, in which advertising is limited because it is the subject of a judgment not yet resolved. Another form of communication occurs when a judge gives an opinion on a matter that is not related to the functioning of the judiciary, in which it expresses its discernment as a professional opinion. There are also live sessions using institutional communication channels. There is also an opportunity to make available to the public a draft judgment that will be considered for voting in the session of the court. No less important, it is the private communication that the judge sometimes makes with the representatives of the parties, who lobby for their proposals and concerns to produce a solution that favours them. Finally, documents relating to the proceedings or documents forming part of a file have been leaked several times, in which the judge is responsible for the protection of that information because, although they are public documents, there is a legal duty not to disclose them publicly.

Freedom of expression is certainly one of the pillars of any democratic system, but it is not an absolute right. Here, the weighting of this right with the right to information of the petitioners and society to understand the work of judges has to take place. So, this investigation will try to find out which communication system is the ideal one for the judges to inform the parties and the community, under what conditions they should communicate by safeguarding their freedom of expression and, on the other hand, protect the rights of defendants by striking a balance between these fundamental rights.

The purpose of this study is to analyse the forms of communication of judges, to generate some guidelines on ethics that the judges should abide by so their actions are not compromised or censored, the image of the judiciary is taken care of, and no obstacles or interference are generated to the impartially of judges. But at what time and under what circumstances the head of a court could discuss a case and be sanctioned for non-compliance by a Council of Honour?

So, this work makes an analysis of the best communication model for judges. The communication model that will be proposed should allow the debate of ideas, the analysis of judicial work, and above all, propose the criteria to regulate this issue.

First, the relationship between democracy and the judiciary will be examined, which will address the autonomy of this public power, judicial independence, tenure and job stability of the judiciary, legality as a guiding principle of the judiciary, the impartiality of the judiciary, the publicity of the jurisdiction and the protection of personal data, all with the aim of creating a theoretical framework that indicates the qualities and activities of the judiciary. In the second section of the paper, the information on the judiciary will be unravelled. The freedoms and limits of communication of the judges will be analysed in three stages: i. institutional (accountability), ii. the development of their work (right to information), and iii. personal (private-lobbyist care). To conclude this section, two communicative models on the exercise of the freedom of expression of judges will be presented: the proper self-censorship and the possibility of creating a code of communicative ethics in judicial matters. This research will be concluded with several conclusions and proposals that will capture the focus of attention on the communication of judges.

In this way, the paper will elaborate on the right to information, the limits of publicity, due accountability, and the ways in which judges, the parties and the mass media currently communicate.

The current system of communication of the judiciary and also that of judges will be reviewed formally and informally. It is important to note that this work does not intend to restrict the freedom of expression of judges but to ensure that there are guidelines for preserving impartiality, certainty, professionalism, publicity and information to society.

It is a question of guaranteeing and protecting the fundamental principles of publicity and information of society, which must be balanced with the freedom of expression of judges in a combination that attests to an independent and objective jurisdiction, and at the same time, protects the right of privacy of individuals.

2. DEMOCRACY AND THE JUDICIARY

The first issue to be considered is how a democratic system grants public power for its exercise.[1] This is through honestly elected representatives and fair elections so that they can return to various principles, values, and goods and achieve their goals as a social group. It also decides what form of power distribution will be available, as well as the form of government.

Since the transition from the absolutist to the modern state, the custom of concentration of power was banished. To begin with, it would no longer be a private power derived from divine authority; rather, it would be the people who would choose and recognise public authorities, in addition to being part of decisions in public affairs. Power was also devolved to a single person, and a system of distribution of functions between various public powers (executive, legislative and judicial) was created.[2] A fundamental point was also to abrogate the despotic power of the rulers. They would now be limited by the rule as a means of defending the people against arbitrariness.[3]

Thus, the constitution became the instrument for placing and protecting the principles, values and assets of society, and, on the other hand, the determination of the functions of public authorities and the banishment of the concentration of power in a single authority.[4]

From what can be observed, there is a link between democracy and the division of powers that makes it possible to create a system of balances and curb power with the same power. This organization, which is born from democracy, allows there to be no concentration of power, to avoid abuses and, above all, that there is the legitimacy of public institutions.[5]

With regard to the establishment of the judiciary as part of the functions of the state, it should be borne in mind that, in order not to be manipulated or subjugated to private

[1] Anselmino, V. 2016. La división o separación de poderes. *Revista Anales de la Facultad de Ciencias Jurídicas y Sociales,* 13(46), pp. 188-203.

[2] Solozabal, J. 1981. Sobre el principio de la separación de poderes. *Revista de estudios políticos,* 1981(24), pp. 215-234.

[3] Caballero, A. 2000. J. La transición del absolutismo al Estado moderno, In: López Ayllón, Sergio (ed.), *Transiciones y diseños institucionales*, UNAM, México: UNAM, pp. 19-47.

[4] Bonilla, D. 2015. La arquitectura conceptual del principio de separación de poderes. *Revista Universitas,* 2015(131), pp. 231-276.

[5] Laski, H. 2000. *Authority in the modern state*. USA: Kitchener, USA, p. 28.

interests, the judiciary must enjoy autonomy and independence from the authorities (public, private and factual). As the analysis will show, this implies autonomy for the judiciary as a power of the union, which allows it to administer itself without external interference.

3. PROTECTION OF PERSONAL DATA

The privacy of any court case must be safeguarded by the judge, guaranteeing the secrecy of the proceedings and that some type of information is not disseminated while it is *sub iudice*.

This has two objectives: firstly, that there is no interference in the work of a judge and to prevent the opinion of third parties from becoming relevant to its judgment; secondly, that the data contained in the file be protected and continue to be private, as it is of a personal nature or represents sensitive information.

But there is one basic aspect to this clash of rights, the right to information and the right to privacy, which must be kept in mind by the authorities:

> "The right to be able to freely make certain decisions concerning one's life plan, the right to protection of certain manifestations of physical and moral integrity, the right to honor or reputation, the right not to be presented in a false guise, the right to prevent the disclosure of certain facts or the unauthorized publication of certain types of photographs, protection against espionage, protection against misuse of private communications, or protection against disclosure of information communicated or received in confidence by an individual."[6]

In relation to our main topic, we can observe a space that must be immaculate and secret, that becomes a limit to authority, and that guarantees that the information contained and derived from the judicial case will remain in pendent until the case is over.

It can be observed that various international instruments guarantee the right to privacy as a way to protect the private sphere and, above all, not to disclose certain facts or acts.

However, if one of the parties to the proceedings decides that the information shall be made public, it must be made public because of a system of automatic exit in which the right to privacy and the protection of personal data can be waved only with the express consent of the owner of the right.

> "The right to privacy includes the right to the privacy of information, which is the right that allows anyone not to disseminate information of a personal or professional nature, linked to his or her private life. This right cease to apply when the holder of the right gives his consent to the disclosure of the information."[7]

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[6] Registro 165823, Primera sala de la SCJN. Novena época, Tomo XXX, Diciembre de 2009, p.277, con rubro*: Derecho a la vida privada. Su contenido general y la importancia de no descontextualizar las referencias a la misma*. Amparo directo en revisión 2044/2008. SCJN.

[7] Registro 168944, Tribunales Colegiados de Circuito. Novena Época. Semanario Judicial de la Federación y su Gaceta. Tomo XXVIII, Septiembre de 2008, Pág. 1253, con epígrafe*: Derecho a la intimidad. Su objeto y relación con el derecho de la autodeterminación de la información.* Amparo en revisión 73/2008. SCJN.

With this jurisprudential criterion concluded, the theoretical framework and the trouble are to be addressed. What is discussed further is whether judges enjoy the freedom of expression and under what circumstances the right to information is protected, the acts of the judicial authorities can be publicised, and the privacy of the parties to the proceedings and the third parties is guaranteed.

4. THE INFORMATION OF THE JUDICIARY

At the beginning of this section, we must stress the importance of the elements which lay in the basis of this work: the freedom of expression of the judge and the right to information of the society, as well as the process of balancing these two rights.

It can be seen that freedom of expression and the right to information are the pillars of a democratic system.[8] Laurence Whitehead points out that both rights are essential in a democracy:

"• Citizens have the right to express themselves without danger of severe punishment, on broadly defined political issues.
• Citizens have the right to seek alternative sources of information. In addition, alternative sources of information exist and are rarely protected by law".[9]

Democratic regimes share a number of minimum elements for genuine democracy. One of the conditions for calling a regime "democratic" is that citizens have the right to seek alternative sources of information. Information responds to the need of the human being to express himself and to know what others have expressed. Its importance for society is so great that it belongs to the category of fundamental human rights.

As beings of freedom, we must have the right to express ourselves, to inform and to be informed, and such a natural prerogative must be guaranteed by the state and the conditions for its realisation defined by society. Society is the one which defines the limits of the process of generating and using information and assigns to information its value and function.[10]

In general, the free flow of information is one of the conditions of a free society and constitutes an element of a democratic society. Public information is a catalyst for social participation: those who have more and better information have greater opportunities to participate and influence decision-making on public policies, programs and projects, both public and private.

The right to information is a fundamental condition of the adequate performance of public officials and the efficient use of public funds. With free access to information, we will be able to put our authorities on trial to see if we should continue to place our trust and representation in them. At the same time, the right to information allows state officials to publicise their activities.

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[8] Águila, R. 2000. *Manual de ciencia política*. Madrid:Trotta, p. 159.

[9] Whitehead, L. 2003. *Democratization*. Oxford / Chicago University Press, pp. 10-11.

[10] Quezada, B. P. (Coord.). 2001. *Derecho de Acceso a la Información Pública en los Estados.* México: Universidad Iberoamericana, p. 28.

This is a subjective public right of social interest, which since the Universal Declaration of Human Rights implies the exercise of three distinct but interrelated powers: receiving, researching and disseminating information.

Public information has been established as a public good that serves to control public and governmental affairs, with the state and its various bodies effectively guaranteeing information and preventing it from being impeded. Thus, freedom of information protects democracy from autocratic temptations and actions aimed at ignoring citizens' opinions and generates checks and balances in the exercise of power.[11]

What needs to be clarified is how much freedom a judge can have and what issues a judge can discuss and make public because, although he is still a citizen, no less true is that his position does not allow him to exercise the same rights as others.

5. FREEDOM OF EXPRESSION AND LIMITS OF THE JUDGE'S COMMUNICATION

This section will analyse the freedom of expression and the expression of ideas of the judges. For example, although it was mentioned that they cannot make public their opinions in a pending case, they can express their opinion in other areas, such as in academia or legislative work:

Judges should necessarily be involved in the discussion of reforms and other legal matters.

Beyond the general recognition it receives in major international human rights treaties, the right to freedom of expression is included in a number of specific instruments related to the independence of the judiciary.[12]

But judges must refrain from making judgements that, for an observer, might compromise their power to administer justice independently and impartially. On the other hand, it is necessary to present the principles that should govern the judiciary and the rights and freedoms of judges in a democratic state based on the rule of law.

6. GUIDELINES FOR THE CONDUCT OF THE JUDICIARY [13]

The Bangalore Principles of Judicial Conduct call upon judges to refrain from compromising the requirements of their office by providing that: "A judge, like any other citizen, has the right to freedom of expression, [...], but when exercising these rights and freedoms, they will always behave in a manner that preserves the dignity of judicial functions and the impartiality and independence of the judiciary".[14]

The same declaration deals with the independence of the judiciary, which "shall be guaranteed by the State and proclaimed by the Constitution or legislation of the country.

[11] Peschard Mariscal, J. 2005. A *10 años del derecho de acceso a la transparencia*. Mexico: INAI, p. 154.

[12] CIJ. 2005. *Principios Internacionales sobre la Independencia y Responsabilidad de Jueces, Abogados y Fiscales – Guía para Profesionales*. Ginebra, pp. 39 - 40.

[13] UNODC. 2018. *Bangalore Principles of Judicial Conduct*. Available at: https://www.ohchr.org/sp/professionalinterest/pages/independencejudiciary.aspx (11. 7. 2022).

[14] UNODC. 2013. *Comentario relativo a los Principios de Bangalore sobre la conducta judicial. New York: Naciones Unidas,* p. 17.

All governmental and other institutions shall respect and abide by the independence of the judiciary".[15] The importance of the judiciary in the constitutional framework is noted.

Thus, while its independence is guaranteed, it also obliges the judiciary to ensure that judicial proceedings are conducted in accordance with the law, as well as respect for the rights of the parties.[16]

With regard to the rights and freedoms of judges, the following was considered in this document:

> "In line with the Universal Declaration of Human Rights and like other citizens, members of the judiciary shall enjoy the freedoms of expression, belief, association and assembly, except that, in the exercise of those rights, judges shall conduct themselves at all times in a manner that preserves the dignity of their functions and the impartiality and independence of the judiciary."[17]

It can then be deduced that judges have their rights, but that they must exercise them without harming the integrity of the judiciary and showing that their arguments are professional and adhere to the norms.

As far as our research topic is concerned, the Bangalore Declaration confirms that: "[j]udges shall be bound by professional secrecy with respect to their deliberations and confidential information obtained in the course of their duties, unless they are public hearings, and shall not be required to testify on such matters". With regard to the right to information of the parties and society, the Bangalore Declaration proposes that:

> "An obligation to answer to others, especially those who may feel aggrieved by the judge's actions, contradicts the independence of the judiciary. With the exception of the expression of judicial grounds or other procedures provided by law, a judge is not obliged to report on the merits of a case, even to other members of the judiciary. If a decision revealed such incompetence as to constitute an offence deserving of a disciplinary process, the judge would not be "reporting" to this very remote situation, but answering a charge or responding to an official investigation conducted in accordance with the law."[18]

Similarly, with regard to the judge's freedom of expression, it is stated that outside the court, a judge must avoid the deliberate use of words or conduct that may reasonably create a perception of a lack of impartiality. It no longer enjoys the same freedom as other citizens but rather a freedom that is limited in order to guarantee certain individual rights.

> "By definition, partisan activities and statements lead a judge to publicly choose one side of the debate over another. The appearance of bias will be accentuated if, as is almost inevitable, the judge's activities generate criticism or rejection. In short, the judge who uses the privileged platform of jurisdictional functions to enter the partisan political arena jeopardises public confidence

[15] *Ibid.*

[16] *Ibid,* p. 25.

[17] *Ibid,* p. 43.

[18] *Ibid*, p. 81.

in the impartiality of the judiciary. There are some exceptions. These include comments by a judge on an appropriate occasion in defence of the judicial institution or his statements to explain specific legal issues or certain decisions to the community or to a specialised hearing, or the defence of fundamental human rights and the rule of law. However, even on such occasions, the judge must be concerned to avoid, as far as possible, participation in topical polemics that can reasonably be seen as politically partisan."[19]

In the exercise of his duties, he/she has absolute freedom as long as he/she is professional, impartial and objective. But what role a judge could or should play in the media:

"The media have the role and the right to gather and disseminate information to the public and to comment on the actions of the administration of justice, including court cases before, during and after the trial, without violating the presumption of innocence. This principle should only be set aside in the circumstances provided for in the International Covenant on Civil and Political Rights. If the media or interested members of the public criticise a decision, the judge must refrain from responding to such criticism in letters to the press or in occasional comments while in office. A judge should only speak on the basis of his or her judgements in the conduct of his or her cases. It is generally inappropriate for a judge to publicly defend his or her judicial decisions."[20]

It should be noted that it is possible to report, without disseminating information, on the case being tried. Here, moderation is the key to the control of what information is being provided to society.

A characteristic of judges is that they must observe the principle of integrity in performing judicial activities. This supports his/her work and the image of the judge before the social conglomerate:

"Integrity is the attribute of righteousness and probity. Its components are honesty and judicial morality, and to be good and virtuous in his behaviour and character. Integrity thus defined has no degrees. Integrity is absolute. In the judiciary, integrity is more than a virtue, it is a necessity. A judge must always, not only in the performance of his judicial duties, act honestly and appropriately for jurisdictional functions; be free from all fraud, deceit and falsification; and to be good and virtuous in his behaviour and character. Integrity thus defined has no degrees. Integrity is absolute. In the judiciary, integrity is more than a virtue, it is a necessity." [21]

The conduct of a judge should therefore reaffirm public confidence in the integrity of the judiciary. Not only that the integrity of justice be secured, but it must also be shown

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[19] *Ibid*, p. 57.

[20] *Ibid*, p. 60.

[21] *Ibid*, p. 66.

to the public how this is done. [22]

As a subject of constant public scrutiny, a judge must accept personal restrictions that may be considered a burden on ordinary citizens and must do so freely and voluntarily.[23]

In particular, a judge shall behave in a manner consistent with the dignity of judicial functions.

> "Every judge must expect constant scrutiny and public comment and must therefore accept personal restrictions that ordinary citizens may consider a burden. The judge must act freely and voluntarily even if these activities are not viewed negatively when carried out by other members of the community or profession. This applies to both the judge's professional and personal conduct. The legality of the judge's conduct, while important, is not the full measure of its correction. Returning to the issue of the rights and freedoms of judges, the Bangalore Declaration states that: Every judge must expect constant scrutiny and public comment and must therefore accept personal restrictions that ordinary citizens may consider a burden. The judge must act freely and voluntarily even if these activities are not viewed negatively when carried out by other members of the community or profession. This applies to both the judge's professional and personal conduct."[24]

The legality of the judge's conduct, while important, is not the full measure of its appropriateness.

Returning to the issue of the rights and freedoms of judges, the Bangalore Declaration states that:

> "A judge, when appointed, does not relinquish the rights of freedom of expression, association and assembly enjoyed by other members of the community, nor does he abandon his previous political ideas or cease to have an interest in political issues. However, restraint is needed to maintain public confidence in the impartiality and independence of the judiciary. In defining the appropriate level of participation of judges in public debate, there are two fundamental considerations. The first is whether the participation of the judge is likely to undermine confidence in his or her impartiality. The second is whether such participation may unnecessarily expose the judge to public attack or be incompatible with the dignity of judicial functions. If any of these cases occur, the judge should avoid such participation."[25]

A limit is then set on public proceedings and on their statements in the role of judges, which guarantees integrity and impartiality and is based on the understanding that their independence is not absolute since they are the image and materialisation of the judiciary.

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[22] *Ibid*, p. 67.

[23] *Ibid*, p. 67.

[24] *Ibid*, p. 69.

[25] *Ibid*, p. 88.

> "A judge should not take an inappropriate part in public polemics. The reason is obvious. The very essence of being a judge is the ability to view controversial issues objectively and fairly. It is equally important for the public to see that the judge demonstrates estrangement, lack of predisposition, absence of prejudice, impartiality, openness of mind and the balanced approach that is the hallmark of a judge. If a judge enters the political arena and participates in public debates - opining on controversial issues, participating in disputes with public figures in the community or openly criticising the government - will not give the impression of acting fairly when acting as a judge in court. Nor will the judge be considered impartial when he has to adjudicate on disputes relating to matters on which he has expressed views in public; nor will he be considered impartial, and that is perhaps most important, when public figures or ministries that the judge has previously publicly criticised act as parties, litigants or even witnesses in the cases that fall to him to rule."[26]

A judge who has declared himself/herself homophobic, for instance, or who has expressed his/her political preference, who favours the poor, who supports evangelicals, and so on, could be seen as lacking impartiality.

By the same token, it has been shown that it is best for judges to refrain from publicising their hobbies, predilections, preferences, or tastes.

In order to continue with the issue of the information it administers, possesses, monitors and controls, the judge should understand the types of communication which the judiciary and the judges can use in order to give effect to the right to information of society.

7. MODELS OF COMMUNICATION OF THE JUDICIARY

The judiciary, as a public institution, has the public duty to inform society of its activities. This can be done through various instruments. First of all, it can regularly publish information about its work in order to secure its transparency and accountability. That can be done in various ways, such as through open justice projects, live transmission of sessions, and by ruling on requests based on the right to information.

Therefore, transparency and access to public information are the basic inputs for civil society to have contact with public institutions. In this way, it is also possible to know how the bureaucracy works, to evaluate its achievements and, where necessary, to sanction it. In this way, access to information can enable communication between the government and the public.

In the exercise of his/her functions, the judge has at his disposal various means, including electronic ones, to make public statements. While doing that, he/she is allowed to present his/her opinions of a professional nature, but it is not appropriate for him/her to comment on the cases which are dealt with by another judge. He/she can also have conversations and interviews with journalists, but with limits already mentioned.

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[26] *Ibid*, p. 89.

> "There are limited circumstances in which a judge can speak properly about a politically controversial matter, specifically when it directly affects the functioning of the courts, the independence of the judiciary (which may include remuneration and benefits), fundamental aspects of the administration of justice or the personal integrity of the judge. However, even in such matters a judge must act with great restraint. While it may be correct for a judge to address public submissions to the government regarding such matters, the judge should not be seen in a "lobbying" action before the government or as if to indicate how it would rule if certain situations were brought before the court. In addition, a judge should remember that his or her public comments may be taken as a reflection of the views of the judiciary; sometimes it is difficult for a judge to express an opinion that is held publicly as a personal point of view and not as that of the judiciary in general."[27]

Here special consideration should be given to the hearings that judges hold with the parties to the proceedings, during which the parties might try to influence the decision in the case.

8. LOBBY

The democratic system is made of a set of values and principles that allow the stability of the same by enabling the renewal of the authorities in a peaceful and orderly way through periodic and free elections in which all citizens can participate actively or passively. The citizens should have the possibility to realise their right of assembly to exchange information and discuss public affairs without censorship or sanctions. [28]

Lobbying is a political prerogative that enables the contact of citizens with public authorities and is designed to provide them with the opportunity to intervene in the actions of government institutions.[29] This intervention informs and forms the public agenda in politics. Lobbying is also regarded as the art of political persuasion.[30] It is an instrument of influence on politics. It can take place for a variety of reasons and at all stages of the legislative process with regard to the actions of public officials and the actions of the judiciary.[31]

The link between the two arises when lobbyists contact public servants to present their offers or opinions to them and try to influence them in relation to their work, prior to which the public officials will act only in accordance with their convictions, commitments

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[27] UNODC. 2013. *Comentario relativo a los Principios de Bangalore sobre la conducta judicial.* New York: Naciones Unidas, pp. 89-90.

[28] Whitehead, L. 2003. Democratization. Oxford / Chicago University Press, p. 20. Águila, R. 2000. *Manual de ciencia política.* Madrid:Trotta p. 156.

[29] Miller, C. 1998. *Practical Techniques for Effective Lobbying*. London: Thurgood, p. 3.

[30] Zetter, L. 2008. Lobbying. The art of Political Persuasion. Harriman, p. 3.

[31] Goldstein, K. M. 2008. *Interest Groups, Lobbying and Participation in America*. Cambridge: Cambridge University Press, p. 6.

or interests. In the broadest sense, public policy lobbying involves the attempt to affect laws, regulations, court decisions, and other types of public decision-making with political repercussions.[32]

In our case, lobbyists try to persuade magistrates by providing additional or special information to influence the judge's final decision. As far as our subject is concerned, lobbying is also carried out with the representatives of the judiciary.[33]

The main job of the judicial branch is to resolve civil and criminal disputes. However, as bureaucratic agencies, their internal work is not as public.

In democratic systems, courts have the power to interpret laws and their regulations, but laws rarely cover every eventuality that may occur in practice. Thus, courts often clarify the content of laws to say what the law "really means".[34]

There is another form of communication with the judiciary found in the procedural institute of *amicus curiae* (friends of the court) [35] that allows certain collective entities to present before the court their opinion on a matter discussed by the court and which also provides these entities with the possibility to attend the hearing with the parties. As such, *amicus curiae* is a manifestation of the right to information and to discuss a specific topic.

The Institute of *amicus curiae* can also be used by the collective entity organized around a common interest to put pressure on the courts. Courts often decide on very important matters (e.g., abortion, affirmative action, civil rights, immigration, etc.), and in some cases, particular interests. But these private hearings are regulated in different ways in different countries:

> "a) A judge is not obliged to accept the request for a private meeting; b) The judge should ascertain the purpose of the meeting before deciding whether to accept the request; c) The judge may consider whether the meeting should include members of the prosecution and the defence. Frequently, the requested meeting addresses issues of the criminal branch of the court (e.g., representatives of Mothers Against Drunk Driving) d) The request of the special interest group should be made in writing to avoid misunderstandings and the judge should confirm the meeting and the basic rules of the discussion in writing; e) The absolute prohibition of communication with the parties on specific cases must be respected and clarified to the applicant before the beginning of the meeting; f) The judge must decide whether the presence of a court clerk during the meeting is appropriate. Such a presence would avoid any future misunderstanding of what was discussed at the meeting. It

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[32] *Ibid*, p. 57.

[33] Goldstein, K. M. 2008. *Interest Groups, Lobbying and Participation in America*. Cambridge: Cambridge University Press, p. 16.

[34] *Ibid,* p. 40.

[35] Organised interests could be also used as a means of putting pressure on the courts under the *amicus curiae* ("friend of the court") formula. Courts often decide on very important matters (e.g., abortion, affirmative action, civil rights, immigration), and in some cases, particular interests "inform the Court of their views on the possible implications of their decision and encourage the adoption of a decision favouring them in the dispute". An amicus report is essentially a note that presents the views of an organized interest on a case to the court that decides it. Kober-Smith, M. 2000. *Lobbying*. London: Cavendish, pp. 31 - 40.

would also protect the judge from an awkward situation if his words were later incorrectly quoted".[36]

These private meetings could result in decisions no longer in line with the law but in accordance with the private commitments in which personal benefits override the public interest. Political corruption can be recognized where there are:

1. A public official,
2. Breach of trust placed in him by the public,
3. Damage to the public interest,
4. A public official is aware that his conduct is aimed at meeting a personal and private interest, which is contrary to the rules,
5. The conduct of a public official benefits a third party by providing it with access to a good or care, which it would not otherwise obtain. [37]

The problem occurs when lobbyists succeed in convincing judges and magistrates to privilege their interests so that both obtain benefits, rewards or profits, forgetting the common good, abandoning their independence and their impartiality, and preventing the realisation of justice.

A matter that has become a custom is when judges receive the parties to the conflict in private as part of their right to a hearing. But we must bear in mind that the parties seek to influence the decisions of the judge.

Now, in case of a private appointment, this should be known to the other party, which should be entitled to participate directly or through their representatives. In order to continue the analysis, the use, enjoyment and limits of the public expressions that judges carry out in the exercise of their judicial function will be further investigated.

9. THE EXERCISE OF JUDGES' FREEDOM OF EXPRESSION

Freedom of expression is a constitutional right, also called the free expression of ideas, which has already been introduced. However, it is important to point to the Judicial Code of Ethics, which talks about the origin and basis of this right:

> "By virtue of the innovative transformations that society experiences every day, it is natural that judges in their daily interrelationship become involved in this dynamic, as happens in other sectors, giving rise to interest leagues that could affect their free conscience and essential role in the delivery of justice. It is, therefore, very useful to have there the references identifying the values and principles relating to the exercise of the judicial function."[38]

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[36] *Ibid*, p. 40.

[37] Heidenheimer, A. 2007. *Political corruption*. USA: Transaction Publishers, p. 42.

[38] SCJN. 2004. *Código de ética del Poder Judicial de la Federación*. Mexico: SCJN, p. 4.

Interesting as well is the role assigned to the use of the media and the right to information:

> "Every day society seeks to be informed and the state has been strengthening the channels of access to public information, conditions that make it question or make judgments that may transcend the judge's free conscience, by virtue of the fact that their judicial acts are subject to public scrutiny by means of social impact instruments, which may lead to a loss of confidence in the organs of administration of justice if they do not act with independence, impartiality, objectivity, professionalism and transparency."[39]

From what can be observed, there is an ethical responsibility of judges when using their freedom of expression that guarantees the independence of the judiciary, but which is not absolute. The judge must be prudent,[40] considering the importance of his/her duties, keeping in mind that he/she does not have the same rights as citizens and that, on the contrary, he must protect the privacy rights of the parties in the cases he is to decide on. It is essential to recognise that the judge can make public statements, but this is until it makes the case *res judicata.* This case law establishes guidelines to protect the right to privacy:

> "In short, we seek to prevent the dissemination by third parties of information about the privacy of others without the consent of the holder. Hence, if the interference with the private life of the injured third party consists in the dissemination by other members of his family of facts that concern their private lives and which involve him, as the cause of the affliction suffered by them, then such dissemination cannot be considered to be arbitrary or abusive. This is so because it was carried out in the exercise of their legitimate right to disseminate information of their own, insofar as it is truthful, and that the expressions used are constitutionally protected because they are not absolutely vexatious, that is, offensive, oppressive or impertinent, depending on the context."[41]

Accordingly, it is declared the duty of the judge to keep private any case that he is discharging, and which occurs to his good judgment in the use of public statements.[42] And here comes the final conclusion of this analysis, and that is that the judge must have recourse to self-censorship, or there would be an ethics committee to judge his actions, and he might be punished.

No one doubts that judges are expected to behave according to certain standards both inside and outside the court. Is it simply a matter of personal decency, or is a certain

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[39] *Idem.*

[40] Coaguila Valdivia, J. 2016. Modelo de juez complejo y Estado Constitucional de Derecho, *Revista de Investigación Perú*, 8(3), pp. 93-121.

[41] Registro 2005525. Primera Sala. Décima Época. Gaceta del Semanario Judicial de la Federación. Libro 3, Febrero de 2014, Pág. 641, con epígrafe: Derecho a la vida privada. Alcance de su protección por el estado. Amparo directo 23/2013.

[42] See: MacKay, W. 1992. Judicial Free Speech and Accountability. Should judges been seen but not heard? *National journal of constitutional law*, 1993(3), pp. 159-180.

professional group expected to observe certain standards of conduct in their own interest and in the interest of the community? Since this is the fundamental question, some elementary observations need to be made.[43]

9.1. The proper self-censorship of the judiciary

In this model called the "self-censorship model" (Jon Elster's concept),[44] the judge is free to make any statement, but he`s responsible for them and responds if he provokes any criminal harm or he could be sued for damage in civil courts, there is liberal conduct.

> "This is so for reasons strictly linked to the type of activity they have chosen to carry out, which requires intense public scrutiny of their activities. In the case of privacy, it may sometimes be a matter of public interest for the dissemination and general knowledge of data which, from certain perspectives, may be described as private, are clearly connected to aspects that it is desirable for citizens to know in order to be in a position to properly judge their performance as public servants or officials. With the right to honor something similar happens the following: the activities carried out by persons with public responsibilities are of interest to society, and the possibility of criticism that the latter may legitimately direct them must be understood in a broad sense."[45]

Thus, while judges must guarantee the right to information, they must also protect the right to privacy:

> "It also guarantees the right to have privacy in order to have control over the publicity of the information of both the person and his family. This translates into the right to self-determination of information involving the possibility of choosing which information in the person's private sphere can be known or which must remain secret, and designate who and under what conditions may use such information. In this context, the right to privacy imposes on public authorities, as well as individuals, a number of obligations, namely: not to disseminate personal information, including personal data, confidentiality, banking and industrial secrecy and, in general, non-interference in the privacy of individuals; the state, through its organs, must take all measures to ensure the effective protection of this right."[46]

One could say that there is a clash of the right of freedom of expression of the judge, on the one hand, and of the right to public information, on the other.

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[43] UNODC. 2013. *Comentario relativo a los Principios de Bangalore sobre la conducta judicial. New York: Naciones Unidas*, p. 31.

[44] Elster, J. 2020. *Constitunacionalism and democracy.* Cambridge: Cambridge University Press, pp.1-18.

[45] Libertad de expresión y derecho a la información. Su importancia en una democracia constitucional. Tesis: 1a. CCXV/2009. Novena época. Semanario judicial de la Federación y su Gaceta. Tomo XXX, Diciembre de 2009. Pag. 287. Amparo directo en revisión 2044/2008.

[46] Registro 1000815. Sala Superior. Tercera Época. Apéndice 1917-Septiembre 2011. VIII. Electoral Primera Parte - Vigentes, Pág. 223, con rubro: Libertad de expresión e información. Su maximización en el contexto del debate político. Amparo en revisión 73/2008.

As already mentioned, there must be criteria to control the freedom of expression and information that the judge performs, but always trying to maintain the privacy of citizens. In resolving the conflict between freedom of expression and the right to information, as opposed to the right to privacy, the specific case should be considered in order to verify which of these rights should prevail by distinguishing, in the case of public persons to the greatest or least projection of the person, given their own position in the community, as well as the way in which they themselves have modulated the public knowledge about their private life.

To conclude on the topic of communication models, it is possible to establish a set of guidelines that the judge must take care of when making a public statement or using the mass or electronic media.

9.2. Guidelines for the Communication of Judges

Ethical standards can also be used with this function, but in an ethical trial, there is no reason that can be invoked by the defendant for a breach of ethics that happened deliberately. In other words, an Ethics Committee can accept reasons that would be unacceptable if it acted as a legal tribunal.[47]

Because it is not a subject of this paper, a series of guidelines is proposed that would qualify whether a judge should be responsible for communications made by him or by a third party on his behalf.[48] According to the guidelines, when a judge violates the privacy rights of a party, such conduct should be subject to the evaluation of the ethics committee.

These guidelines explain their objective, guiding principles, parties' rights and obligations, actions and defences, precautionary, the integration and selection of the committee to judge possible violations, the characteristics of this process (standing, claim, defence, evidence, conclusions, resolution), the type of penalties, and so on. Also, the guidelines inform the plaintiff of his/her judicial rights to claim the reparation of civil or administrative damage where applicable.

Any accusation or complaint against a judge for judicial and professional performance shall be dealt with promptly and impartially in accordance with the relevant procedure. The judge shall have the right to be heard impartially. At that initial stage, the examination of the matter will be confidential unless the judge requests otherwise.[49]

10. COMPARATIVE LAW

In the case of disclosure of private information, we have several different regulations worldwide. For example, in the US and Canada, there is an ethics statute for judges which points to the limitations of the freedom of expression in his/her work of judges. In addition, the European Charter on the Status of Judges identifies restrictions on the professional

[47] Ibero-American Code for Judges, p. 3.

[48] Moran, J. 2015. Courting Controversy: the problems caused by extrajudicial speech and writing. *Victoria University of Wellington Law Review*, 2015(46), pp. 453-494.

[49] UNODC. 2013. *Comentario relativo a los Principios de Bangalore sobre la conducta judicial*. New York: Naciones Unidas, p. 45.

manifestation of judges outside the courts: [50]

> "However, this right is not absolute, but is subject to certain limitations inherent in the judicial function. In the case of judges, the unrestricted exercise of the right to freedom of expression may compromise their independence or impartiality, for example, if they disclose information on a specific case to one of the parties or to the media. Judges should therefore refrain from undermining the right to a fair trial, including the presumption of innocence, especially in *sub judice* cases. In this regard, the European Charter on the Status of Judges stipulates that "[j]udges shall refrain from any conduct, action or expression that affects confidence in their impartiality and independence."[51]

The following are some cases in which judges were punished for failing to exercise due caution or, as stated, for self-censorship in the use of their freedom of expression or expression of ideas, *i.e.* for their activities that violated the rights of others and compromised the independence of the judiciary.

11. RELEVANT CASES

Here some cases are presented as examples of the freedom of expression of judges. In the Netherlands, the judges complained about working conditions and because the robes of the Supreme Court judges were very long. For that reason, they organised and presented their protests through Twitter so that the citizenry could know about these problems. Similarly, in Hungary, the Chief Justice criticised the legislature and the coalition government for their legal reforms of the judiciary.[52]

In the case of *Pitkevich v Russia*, the freedom of expression of a judge was discussed. The complainant was about a judge making references of religious nature during the proceedings, which might have generated a bias and affected a judge's independence. So, he was asked to refrain from such behaviour,[53] but there were persons who asked to review all the cases he had already decided as a judge.

Should the judges' discussions be part of the public debate? In the case of *Kudeshkina v Russia*, the judge openly opined against a judgment which served to his critics to ask for his removal from office, because these statements were made during the election campaign and in indirect support of a candidate. Eventually, the judge was suspended from office.[54]

In *Holm v Sweden*, the European Court of Human Rights found a violation of the right of expression of a judge. This case evolved around the political activities of one of the

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[50] Dijkstra, S. 2017. The Freedom of the Judge to Express His Personal Opinions and Convictions under the ECHR, *Utrecht Law Review*, 13(1), pp. 1-17.

[51] CIJ. 2005. *Principios Internacionales sobre la Independencia y Responsabilidad de Jueces, Abogados y Fiscales – Guía para Profesionales*. Ginebra, pp. 39-40.

[52] Dijkstra, S. 2017. The Freedom of the Judge to Express His Personal Opinions and Convictions under the ECHR, *Utrecht Law Review*, 13(1), p. 2.

[53] *Ibid,* p. 8.

[54] *Ibid,* p. 9.

jurors, who was against the judge because he was part of the Swedish Social Democratic Workers' Party (SAP). So, it had to be decided if this person could be part of the jury. The European Court decided to support the judge to preserve his impartiality, and the precedent that was made is important because it shows that it should not be allowed for the jury to express animosities against the judge.[55]

The European Court of Human Rights has ruled on a number of cases concerning the freedom of expression of judges, notably in interviews or in their letters in the media.

> "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". [56]

In another case, the freedom of expression of judges in the US was discussed. Judge Posner wrote the book "An Affair of State: The Investigation, Impeachment, and Trial of President Clinton".[57] In this text, Richard Posner considered that President Clinton was accused of perjury, fraud, inciting crime, and making false statements in government. But these crimes were not brought as charges by the appointed prosecutor, so they could not be discussed as part of a court case. Richard Posner invoked in his book The First Amendment and opined that the citizens had the right to criticize any authority.

However, Professor Lubet was of the opinion that the role of any judge should not go beyond the actions and statements made at trial and that the rest was an excess of his freedom of opinion, in addition to the fact that Judge Posner highlighted the way in which prosecutors and lawyers act, affecting their impartiality and independence.

12. CONCLUSIONS

1. The judges shall be responsible for maintaining the social and democratic rule of law. They have a duty to re-establish the rule of law and to make society feel that their rights will be respected and protected.

2. The conduct of judicial proceedings shall be governed by a set of principles which shall secure the proper administration of justice. The most important of these are autonomy, legality, impartiality, independence, professionalism and publicity.

3. The courts are committed to legality and professionalism. For law is only a means, and justice is a social yearning. It is not enough to have rules; the judiciary should be of the same capacity to preserve its independence as the other two branches of power (the executive and the legislature). In order to exercise its functions, it needs to have jurisdiction in the first place and that it has independence so that its acts are only done in accordance with the law.

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[55] *Ibid,* p. 12.

[56] *Ibid*.

[57] Posner, A. R. 1999. *An Affair of State: The Investigation, Impeachment, and Trial of President Clinton.* New York.

4. It may be inferred from this that democracy and judicial independence are interrelated, since the greater the democracy, the greater the independence of the judiciary. Consequently, when justice is guaranteed, the state and the political system as such are legitimate.

5. The basic conditions for a fair trial are: the independence, legality and stability of the judge's office. In addition, the judge must be limited by legality and publicity so that his or her judgements are made public. It must also act objectively and professionally to ensure that judgements are impartial.

6. The right to information is one of the guiding principles of democracy since it allows for the free exchange of ideas. In the case of judges, however, certain considerations must be taken into account in order not to affect a case or the image of the judiciary. For this reason, a special communication regime was proposed that would not infringe on their right to expression, but would also ensure the good image of judges and protect the rights of parties to the proceedings.

7. Information and the possibility of exchanging it is a fundamental right in modern democracies. "The right to information contributes significantly to the construction of social reality or, more specifically, to that form of social reality that is democratic society".[58] This prerogative allows us to state our views and to know the views of others. However, the right to information is not an absolute right but has some limitations, such as the right to privacy, public morality, etc.[59]

8. It is useful to mention that judicial independence is also envisaged as a human right. Thus, this institutional principle is in the basis of judicial tasks, and consequently, a petitioner can count on an effective and honest administration of justice.[60]

9. Independence must not be regarded as an absolute right. In the case of the communication of judges about the work they or third parties do, a set of rights must be safeguarded by means of an ethical paradigm that establishes the ways to exercise or make communication in the exercise of their duties.

10. Lobbying is a democratic element that allows certain organised groups to have contact with the authorities to explain their position on a particular issue. However, the threat or temptation might occur when lobbying involves an offer of financial or other benefits for a judge or a future reward as a way to influence the judge so that both parties come out with benefits at the expense of the common good.

11. Lobbying is a complex and heterogeneous phenomenon. This requires an understanding of the variations of the behaviour of a plethora of individual lobbyists, functioning at different levels of government, on behalf of different organisations, in relation to a seemingly infinite variety of information, who use a wide range of techniques to achieve various types of gains.[61]

12. The relationship between lobbyists and representatives of the state presupposes collaboration, which is supposed to take place for the realisation of a common good. But the

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[58] See: Morales Campos, E. 2011. *Derecho a la información, bien público y bien privado: acceso comunitario y acceso individual*. Mexico: Universidad Nacional Autónoma de México.

[59] Peschard Mariscal, J. 2005. *A 10 años del derecho de acceso a la transparencia*. Mexico: INAI, p. 129.

[60] See: CIDH. 2013. *Garantías para la independencia de las y los operadores de la justicia*. Costa Rica.

[61] Nownes, J. A. 2006. *Total Lobbying*. Cambridge: Cambridge University Press, pp. 2-3.

reality is that not all public officials are perfectly virtuous and that most lobbyists represent organised economic interests, so there must be legal mechanisms for lobbyists and public servants not to damage the democratic system and for corruption to be punished. If there is no regulation for this relationship between lobbyists and public officials, one could be confused about who they represent, whether their constituents or a particular company(s).[62]

13. Corruption is not only tied to individual strategies and opportunities but also to the degree of realisation of a system of values and how persuasive legal norms are. Anti-corruption discourse must revolve around morality. Fighting corruption must be seen as an effort by the government, the private sector and civil society to change institutions, have new and effective laws, punish the dishonest behaviour of public officials, and reward the conscientious behaviour of citizens.[63]

14. Two formal and two informal models of the judicial communication system can be found. In the first scenario, the judges have full freedom to express themselves by assuming full responsibility for the handling of the relevant information and safeguarding information, such as personal data or witness protection. In the second case, the judge can give his opinion but with limits established in a code of ethics or in the rule as to the need to safeguard the rights of third parties and to preserve the impartiality and good reputation of the judiciary. In the case of the informal ones, the debate takes place on whether a judge should have a private hearing with the parties, and if it takes place, it is carried out in the presence of all parties, and a detailed record of the meeting is made. Another way in which information is given is through leaks to the media, which. Although some authorities consider them illegal, many people believe that if it is public, information should be disclosed, as was the case with the Pentagon documents in the United States of America.

15. It can be said that it would be appropriate to regulate certain types of communication in order to protect the image of the judiciary and, with them, safeguard its social legitimacy.

16. Freedom of expression is a human right held by all people, but it is not absolute. In the case of judges, they do not enjoy this right in the same way as other citizens since their profession subjects them to special rules, especially their right to association, assembly, expression, and privacy. The judge's reasoning and decisions should leave no scope for doubt in his independence and impartiality. Legality is his ruling principle, and his personal affairs should not affect his professional sphere. The prudence and wisdom of judges should not be reflected only in their judgments but also in their acts of public speech.

17. This research is not an attempt to curb the freedom of expression of judges or restrict the right of the parties and society to information. The paper is about the question of how to exercise responsible communication between judges and citizens, which would be to benefit to both the judiciary and the parties to the proceedings.

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[62] Kayser, R. 2010. *So damn, much money.* Vintage books, p. 3.

[63] Sampson, S. 2005. Integrity Warriors: Global Morality and the Anti-corruption Movement in the Balkans, In: Dieter H. & Cris S. (eds.), *Corruption, Anthropological Perspectives.* London, p. 111.

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