December 2022, Vol. 10, No. 2
ISSN 2163-758X

Freedom of Expression of Judges in their Academic Research

Valentina Díaz

Universidad Mayor, Santiago, Chile

Abstract

Freedom of expression allows for the democratization of the judiciary. Judges have the right to freely express their thoughts, ideas, and opinions by any means of communication. Such freedom is a basis in academia, involving the ability to explain the conclusions of an investigation as a statement based on reasoning and evidence. Conclusions may be right or wrong, but they are freely expressed. However, the exercise of this freedom entails limitations: the maintenance of neutral, objective, and impeccable conduct of judges. These limitations guarantee the principles of impartiality and independence in the administration of justice-the principles that seek to preserve the dignity of the jurisdictional functions and the impartiality and independence of the judiciary. Judges may speak and write freely, as long as they do not promote ideas that may compromise impartiality and independence. Indeed, the freedom of expression of persons exercising jurisdictional functions is subject to greater restrictions. But the restriction to this right does not imply that any manifestation or expression issued by a judge may be restricted.

Key words: freedom, independence, restrictions

Introduction

Judges can publish academic papers, write in newspapers, give their opinions on social networks, and pronounce their point of view in different media. This state of affairs is relatively new; in the past judges were more reserved when it came to giving public statements. Nowadays their participation and opinion on contentious issues is increasingly expected. On the other hand, when participating in academic work, which is the subject of this article, judges express their opinions openly, exchanging ideas and debating them without fear of reprisal or criticism. This increased public exposure raises new questions about judicial independence. Thus, divergent interests are at stake that must be weighed against freedom of expression. Now, when judges express their opinions in a context outside of academic work and express it in judicial decisions, their freedom of expression may be restricted, as they cannot take sides in any case, or their rulings may be perceived as impartial. So not all cases are clear regarding the expression of a judge's opinion, raising several questions: Can judges participate in academic work? Are they allowed to express their opinion without infringing on their freedom of expression? All these questions require a careful balance since judges, on the one hand, enjoy the right to freedom of expression like all other members of society, but on the other hand, their participation cannot be impartial. This paper aims to give a brief comparative overview of how national jurisdictions address the potential conflicts between freedom of expression and judicial independence.

Comparative Overview

December 2022, Vol. 10, No. 2
ISSN 2163-758X

Judges are traditionally expected to exercise considerable restraint in the exercise of their freedom of expression in the interest of judicial independence since judges cannot disclose confidential information concerning litigation of which they are aware in exercising their judicial functions. In view of this, when communicating their views, they should do so with caution and refrain from responding to public criticism of their judicial activities. The case is different concerning legal issues that they comment on in legal journals, conferences, academic papers, newspapers, etc. In most countries, judges are allowed, and in some are even encouraged, to participate in public debates about the law, the legal system, and the functioning of the judiciary in general. This demonstrates that, despite the differences, there are several similarities in this respect as all countries seek to balance freedom of expression with the authority, impartiality, and independence of the judiciary. In Chile, judges are largely protected from any sanction unless their speech is directly related to the administration of justice. The opinions expressed publicly by judges are considered a private and personal matter; therefore, their freedom of expression is protected. However, it is necessary to question the freedom of expression if any violation of the prohibitive norms is at stake. The measures adopted to ensure that situations that transgress the norm do not occur are limited to repressive measures, such as a reprimand and dismissal, which represent the most serious reprisals against freedom of expression if the opinion of a judge is considered to be impartial or against the norm. This is reflected in the case of Urrutia Laubreaux vs. Chile in which in 2004 the Supreme Court of Justice of Chile authorized Judge Urrutia to attend the "Diploma on Human Rights and Democratization Processes". On November 30, 2004, Judge Urrutia informed the Supreme Court that he had passed the diploma course and submitted his final paper on the human rights violations that occurred during the Chilean military regime. The Supreme Court forwarded the work submitted to the competent body to discipline Mr. Urrutia and subsequently returned the academic work to him, informing him that the Supreme Court had considered that it contained "inadequate and unacceptable assessments" for the said court. On March 31, 2005, the Court of Appeals of La Serena decided to sanction Judge Urrutia with a disciplinary measure of "written censure". After an appeal, the Supreme Court upheld the challenged resolution and reduced the sentence to a "private reprimand", which lasted 13 years, affecting his judicial career. On May 29, 2018, and in compliance with the recommendations of the Merits Report, the Supreme Court of Justice of Chile vacated the sanction imposed on the victim. In the judgment the Court found that it was not by the American Convention to sanction expressions made in an academic paper on a general topic and not a specific case, such as the one made by Judge Urrutia. The Court stated that in such a case the right to freedom of expression was violated and that Chile was responsible for the violation of Article 13 of the American Convention on Human Rights, about the obligation to respect and guarantee such rights, enshrined in Article 1.1 of the same, to the detriment of Judge Urrutia.

Academic freedom about freedom of expression

The relationship between academic freedom and freedom of expression has been demonstrated by United Nations bodies and by the Inter-American Human Rights system itself. However, there are certain aspects of academic freedom that go beyond the relationship with freedom of expression which has a direct impact on the rights to personal security, the rule of law, and democracy. Academic work or research carried out by a judge promotes the development of knowledge and its progress. This freedom

December 2022, Vol. 10, No. 2
ISSN 2163-758X

allows for the transmission of experience and knowledge. This implies that academic publications should be free, open, and safe spaces in which ideas should be exchanged and debated without fear of violence or reprisals. A judge, who elaborates on a given issue and does research, presenting the result of that research in the form of a monograph with the character of a thesis, has the freedom to choose the topic, without fear of transcending the limitations of the program that follows the lines of research and cannot avoid drawing the conclusions if they come from the research. One may disagree with the conclusions, the procedure, or the research, but the academic work should be evaluated from the point of view of academic standards. Therefore, any other kind of evaluation violates the academic freedom of research if it disagrees with the results or conclusions reached. Therefore, a judge who exposes his point of view in academic work has total freedom to express himself as any other person, without being compelled to impinge on the impartiality or being subject to sanctions established by the legal doctrine.

Freedom of expression and its regulation in the law

Freedom of expression, as already mentioned, is the right to perform actions that show the intention of a person to give a message or content that helps the democratic debate. Its main objective is to make possible a public discussion, useful for life and the community in which we live, contributing to the free development of one's personality. This right can only be intervened for the protection of the rights of others when impartiality is affected, and for this purpose, it enjoys the following specific guarantees (Escobar 2006):

1. Prior censorship is prohibited: prior intervention by the public authorities to prevent or modulate an academic work, a publication, a message, or opinion is not allowed, according to the Constitutional Court.
2. Administrative sequestration is prohibited: The administrative authority may not remove from circulation or restrict the media in which an idea or content is expressed.

This freedom of expression is protected in the international field of human rights, in articles 8 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The American Convention on Human Rights in Latin American protects freedom of expression by prohibiting prior censorship, regardless of the cause, in Article 13 in relation to the obligation to respect and guarantee the rights indicated below:

1. Everyone has the right to freedom of thought and expression. This right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
2. The exercise of the right provided for in the preceding paragraph shall not be subject to prior censorship but shall be subject to subsequent liability, which must be expressly established by law and be necessary to ensure:
    a. respect for the rights or reputation of others, or
    b. the protection of national security, public order, or public health or morals.
3. The right of expression may not be restricted by indirect means, such as the abuse of official or private controls of newsprint, radio frequencies, or of schools and

December 2022, Vol. 10, No. 2
ISSN 2163-758X

apparatus used in the dissemination of information, or by any other means designed to impede the communication and circulation of ideas and opinions.

4. Public spectacles may be subject by law to prior censorship for the exclusive purpose of regulating access thereto for the moral protection of children and adolescents, without prejudice to the provisions of subsection 2.

Conclusion

In conclusion, judges have recognized the right to freedom of expression. The exercise of this right is limited by the duties and responsibilities derived from their profession, such as the principles of independence and impartiality, which constitute an essential element of the rule of law. The judges' right to freedom of expression cannot be limited by their status as such. In addition, it does not matter what means they use to exercise this right; they must abide by the consequences that their exercising of this right entails, because it can destroy the presumption of impartiality. An impartial legal process not only harms the citizen's right to judicial guarantees, but also harms the judiciary itself. But as far as the opinion refers to academic works, the expressions made by the judges on a general subject cannot be sanctioned, because it is not a specific case that affects the impartiality of the judge.

References

Climent Gallart, J. A. (2018). La jurisprudencia del Tedh sobre la libertad de expresión de los jueces. *Iuris Tantum Revista Boliviana de Derecho*, *25*, 524-535.

Corte IDH: Caso Urrutia Laubreaux vs. Chile, (Excepciones Preliminares, Fondo, Reparaciones y Costas), Sentencia de 27 de agosto de 2020. Serie C No. 409

Dijkstra, S., (2017). The freedom of the judge to express his personal opinions and convictions under the ECHR. *Utrecht Law Review*, *13*(1), 1–17. DOI: http://doi.org/10.18352/ulr.371

Escobar, Roca G. (2006). "Medios de comunicación", en *Materiales del Curso Derechos Humanos y Democracia,* del Programa Regional de Apoyo a las Defensorías del Pueblo en Iberoamérica (AECI, Universidad de Alcalá), Madrid.

Rodríguez, A. R., Brand, J. L. E. M., & Eloy, J. L. (2012). *La regulación del derecho a la libertad de expresión desde una perspectiva comparada: su protección en América Latina.* Tribunal Electoral del Poder Judicial de la Federación.

Seibert-Fohr, A., (2019, 19 April). The independence of judges and their freedom of expression: An ambivalent relationship. Available at SSRN: https://ssrn.com/abstract=3375038 or http://dx.doi.org/10.2139/ssrn.3375038

Trias, E. R. (2021). Libertad de expresión, independencia, imparcialidad: los jueces en las redes sociales. Un estudio de las decisiones del TEDH. *Revista española de derecho constitucional,* 41(122), 13-45.

Venice Commission (2015). Report: on the freedom of expression of judges. *Opinión*, 806.

December 2022, Vol. 10, No. 2
ISSN 2163-758X

Author Notes

Valentina Diaz Pizarro is a law student at Universidad Mayor de Chile. She works as a research assistant at the research center for society and health at the same university. She is enthusiastic about research work based on the protection of human rights and research related to international law. Her participation in the 7th Global Issues Conference on freedom of expression of judges in academic work boosted her assertiveness and determination to present her point of view in an international forum.

Email: valentina.diazp@mayor.cl

ORCID: 0000-0003-1883-6968