
JUDGES AND THE MEDIA: COOPERATE NO MATTER WHAT, A PUBLIC SERVICE REQUIREMENT

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Traditionally, relations between the judiciary and the media have been built on the principle of the public hearing. Mirabeau¹ would say that “the interests of the accused would be sufficiently guaranteed by the public hearing. They themselves demand nothing more: that they may have suspect judges, prevaricators, enemies, is of little importance to them. The public hearing is the only means of defence that they ask for.” The public hearing is also considered, in Article 6 of the European Convention on Human Rights, as one of the requirements of the right to a fair trial. But its function does not stop there. The very same Comte de Mirabeau points out that “this public hearing, this free gathering of citizens must henceforth keep an eye on the judges.” By the same token, the Spanish Constitutional Court, in its Decision 96/1987, underlined that the ultimate purpose of this principle of the public hearing is twofold: “On the one hand, to protect the parties from a judiciary not subject to public scrutiny and, on the other, to maintain society’s trust in the courts. In these two meanings, the public hearing is [at the same time] one of the fundamentals of a fair trial and a pillar of the state of law”.

Nevertheless, the position, both of the judiciary and the media, changed in the course of the 20th century. In Europe, the traditional state of law became the constitutional state of law. Judges are no longer “the mouth that pronounces the words of the law” (Montesquieu, 1748). Constitutions have assigned them the mission of being guardians of the freedoms enshrined in this same fundamental text and implementing citizens’ rights. Laws are only valid if they incorporate those values in their precepts that the Constitution has introduced into the legal system.

On their side, the media gained the status of fourth power in the course of the 20th century, revealing themselves to be essential in keeping watch over political power and thus becoming one of the fundamental pillars of the state of law. They are called upon to keep an eye on the other powers with the essential function of *watchdog* of democracy.

In this context, judiciary and media share the same status as powers having no democratic legitimacy (for they are not elected by the people) who are none the less called upon to play a vital role in the functioning of democ-

Judiciary and media share the same status as powers having no democratic legitimacy. Who are none the less called upon to play a vital role in the functioning of democracy

1. Honoré Gabriel Riquetti, Comte de Mirabeau, more commonly known as Mirabeau, born on 9 March 1749 at Le Bignon-Mirabeau, died on 2 April 1791 in Paris, was simultaneously or successively a French revolutionary, as well as a writer, diplomat, freemason, journalist and French politician.

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racy. They are part of what Pierre Rosanvallon calls “the reflexivity” of democracy, which turns towards itself to check the conformity of society with the founding principles of the social pact.

However, we criticise the judiciary and the press for straying from the respective functions that the state of law has assigned to them. But these criticisms are ambivalent because they are contradictory. On the one hand, we criticise judges and the media for not reaching the standard hoped for; on the other, we criticise their excesses in relation to this same standard. We criticise judges for not being sufficiently independent, or being too independent, and we denounce media which do not have enough freedom, at the same time criticising those that go too far in the exercise of such freedom. In the press, we often read criticisms against the judiciary’s decision-making bodies –the High Judicial Councils– in essence still susceptible to political influences. We do not perceive a significant discrepancy between the actions of judges and what political, social, economic and media powers expect of them. But we also come across criticisms of the fact that judicial independence makes checking the checker and the ensuing corporatism difficult. We then reprimand certain judges for their activism or for operating what is referred to as “creative jurisprudence”.

As far as they are concerned, we often wonder whether the media are truly independent. We criticise their dependence on the press magnates, but we feel the need to curb their power in contributing to the creation of a favourable opinion of certain political leanings or certain economic interests. As Tzvetan Todorov has said: “As a challenge to the established authority, the freedom of expression is valuable. As part of the established authority, it must, in its turn, be restricted” (Todorov, 2012: 170-172). In the West, the value put on the freedom of expression tends to consider it an absolute value, over and above other fundamental rights and freedoms. This feeling has resulted in a climate in which it is becoming more and more difficult to find shared values, often replaced by the increasing primacy of the freedom of expression presented, occasionally by the very same media, as the only common link. This freedom –of which journalists are the principal guarantors– is limited, when it comes to court cases, by other fundamental rights and freedoms such as the presumption of innocence, the right to honour, the right of image or personal privacy and, very recently, the right to be forgotten.

These complex relations can be explained using the symbol of the play of images reflected by mirrors positioned opposite each other. This metaphor suggests a series of reflections in which the image becomes progressively smaller and further away as it fades to infinity. The judiciary looks at itself in the mirror of the media and, for their part, the media find their image reflected in the judiciary. With each movement to and fro, this image becomes smaller, more remote.

First image: the judiciary and the media as allies

The first image encountered is of the powers. The judiciary and the media, the third and fourth powers, look at each other and do not see themselves as so different: paradoxically, both are now considered as essential to democracy, even though they are not elected powers. In the constitutional state of law, judges have taken on a role as challengers to the established

authority or as a counter-majoritarian power, where certain questions can be raised in spite of a lack of interest from the majority political power. For their part, the media are essential to safeguarding political pluralism, a fundamental value of the democratic state, as Article 1 of the Spanish Constitution states. The media are thus particularly important players in public debate in that they exert the necessary criticism that underpins the “deliberative democracy” defended by Jürgen Habermas².

In several European countries, particularly Spain, the media and the judiciary have been complementary in fighting political corruption and, therefore, executive power. On the one hand, the press has denounced a number of cases, which were then followed by judicial inquiries. On the other, judges have used the media to be able to further a proceeding which, within the judicial world, was about to be closed. The press has been very important in uncovering cases of corruption that it has tracked in detail and sometimes denounced, or in revealing the precarious situation of the administration of justice to public opinion in order to put pressure on the government and stimulate public action. Occasionally, the executive meets the demands of judges after a campaign in the media incited by them in response to their impotence against the executive whenever it is a question of calling for an improvement in their working conditions. Therefore, there is a tacit agreement between judges and journalists when the two powers act as allies.

Second image: the judiciary and the media as rivals

The expectations created by this alliance have not always been rewarded. In a number of cases, journalists have started a campaign against a judge who failed to follow the path that they had pointed out to him. In this respect, the following words from Anne Marie Frison Roche clearly express these dangers:

“We ask the judge for a new kind of perfection: not only must he be perfectly prudent and learned, he must also be perfectly human. Indeed, we not only ask the judge never to make a mistake, to have a thorough knowledge of the law and, of course, equity, that he is always just. We also ask that he have a perfect understanding of the human being who has recourse to him, that he has experienced what he has experienced, that he has suffered what he has suffered ... We have everything to fear when a phantom takes hold of society, even the sacrifice that such a society make of the figure” (Frison-Roche, 1999).

The media and the judiciary have become antagonistic owing to the confusion of the different functions that one power or the other ought to fulfil. This antagonism manifested itself in certain symptomatic cases like the Garzón affair in Spain. In the trial of the former examining magistrate number 5 of the national court of justice³, the press accused the Spanish judiciary of having used the same judiciary to commit a “judicial crime”, one of the gravest of accusations, which would call into question the entire judicial system or even the state of law. Indeed, Judge Garzón was accused and finally found guilty of having allowed the tapping of telephone conversations between the accused in a case of political corruption and their counsel. The Supreme Court considered that there was no criminal evidence against the lawyers and, consequently, that this measure

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2. Born on 18 June 1929 in Düsseldorf, Jürgen Habermas is a German theoretician in political philosophy, one of the principal representatives of the second generation of the Frankfurt School.

3. Judge Baltazar Garzón was found guilty and forbidden from holding office for 11 years in the verdict by the Supreme Court on 10 February 2012

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impinging on the fundamental right of the defence was not justified. But the verdict against Garzón was not fully accepted by public opinion as he had been a courageous (and media-friendly) judge in fighting for universal jurisdiction regarding crimes against humanity – in the case of the trial of General Pinochet –as well as in fighting organised crime and political and economic corruption– in the cases against ETA and the Gürtel affair⁴.

Third image: different languages

In this shared field of keeping an eye on the other powers, as mentioned earlier, the possibility of collision and interception of the respective images is twofold and it derives sometimes from the use of different languages and sometimes from the fact that the judiciary and the media are called upon to keep each other in check.

Indeed, the disparities between the media and the judiciary are accentuated by the differences in language between the two. The most typical appreciation of the judge's performance is his summing up, not only in resolving a conflict, but also that his verdict is founded on the law, which is guaranteed by the reasoning on the facts, on their being proven and on the application of the law. This summing up, fundamental in rendering the judge's link with the law visible, does not excite a great deal of interest for the media, who are interested only in the result of the proceeding: how many years in prison did the accused get, was he acquitted, etc. Indeed, judicial reasoning, which is vital in highlighting the judge's legitimacy before society, in giving him the opportunity to express himself, is difficult to find in the media, particularly the audiovisual media. For judicial reasoning is traditionally difficult for the general public to grasp; it is written in old-fashioned, technical language. The judgement is thus not correctly adapted to the laws of communication, for the essential part of the judgement, the grounds, through which the judge attempts to persuade the parties as well as society of the soundness of his decision, are given no attention in the media.

On the other hand, the media often use images, with their evocative power. This essential value of the image in the media is not shared in the field of justice, for it may lead to snap interpretations and therefore unfounded conclusions.

Fourth image: the judiciary and the media as public service

The judiciary today is not simply a state power; it is also a public service. The welfare state that was developed in Europe after the Second World War brought about a broadening of citizens' rights, in addition to major criminal trials: education, health, pensions, welfare rights, etc.

The consequence of the broadening of the law's field of application was an increase in the role of the judge. We need the judge throughout our lives: to regulate professional conditions, to divorce, to defend us against the abuses of large service companies and dubious banking practices, to resolve claims related to car accidents, the payment of rent, problems between neighbours, etc.

4. A case of political and financial corruption still under investigation after the start of inquiries conducted by Judge Baltasar Garzon, implicating a presumed network of corruption within the Partido Popular (PP).

The Welfare State then has a new source of legitimacy: the correct running of the services that it offers to citizens. Unfortunately, the judiciary does not always function correctly. In Spain's case, the judiciary has not undergone a modernisation process like the one that has taken place in other public services, such as health or education. The judiciary continues to be too slow and its organisation is far from appropriate to the modern parameters imposed by computer applications.

These system malfunctions are often picked up by the press, but their occasionally excessive visibility is in danger of bringing about a loss of the judiciary's legitimacy in the eyes of the citizens. In the surveys regularly organised by the General Council of Judicial Power in Spain, a surprising result comes up again and again: the image that public opinion forms of the judiciary is worse for those who have never been justiciable than for those who have had personal experience of the judiciary. We could conclude from this that the image of how the judiciary operates is not always a true reflection of what is put forward in the media.

In addition, the judiciary is very often a subject that receives media attention, which makes it very easy to manipulate. For instance, to increase a sense of insecurity, it would suffice to gather together the most dramatic general news items every day. On the other hand, to have people believe that the policies on security are effective, it would suffice not to give them any attention in the media.

As regards the treatment of judicial scandals, Antoine Garapon⁵ points up a practically anthropological difference between North American and French public opinion – and, by extension, I might even say European public opinion. In the United States, people do not question the judicial system after a one-off malfunction. Conversely, in Europe, it would be called into question even though judicial scandals continue to be exceptions to the rule⁶.

In any event, the workings of the judiciary are currently the focus of social debate. In the criticisms of the workings of the judiciary by the press, there are two none the less essential questions, which are frequently neglected:

- In a democratic system, the judiciary is not a sovereign power. The judiciary is a delegated power that works with means not its own, provided by the executive power, and with laws which have been adopted by the legislative power. Once again, we should insist on the different spheres of the state powers if we are to obtain an objective critique of the workings of one or other of them.
- The information provided by the media does not draw a distinction between the different spheres of responsibility. The function of judges is to judge, but they do not have any direct responsibility in "the administration of the administration of the judiciary", i.e. the human and material resources and their organisation.

For its part, the judiciary has front row seats to witness the malfunctions of the media, for it is the judges that citizens seek out when their rights are not respected by the media. It is the judiciary that must decide whether or not the right to honour or the right to the protection of privacy has been violated by the media. It is the judges who must decide in cases of defamation and abuse. But worst of all is when there is an abuse by the media

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5. French jurist born in 1952, Secretary General of the Institut des Hautes Etudes sur la Justice and presenter of the programme *Le Bien Commun* on France Culture.

6. Garapon, Antoine. "Justice et médias, Entretien avec Antoine Garapon", http://www.dailymotion.com/video/xejte2_justice-et-medias-entretien-avec-a_school

which affects the right to honour or to one's image, or else the very recent right to be forgotten, there is often no effective judicial response, which leads to even further erosion of the trust that citizens put in the judiciary.

There is also a contradiction between the short-term logic of information and the rhythm of justice, which needs detachment. Justice occasionally asks that the debate be adjourned, that the drama be suspended

Fifth image: different contexts

The judiciary and the media reflect reciprocal distorted images of each other by using different contexts. It is no accident that we believe there to be a convergence between the judicial process and Greek tragedy⁷. This convergence is not uncommon in thinking on the judge's functions. Otfried Höffe⁸ mentions trials before the Areopagus tribunal, created by Athena, to demonstrate the existence of procedural principles in ancient law (Höffe, 2000: 87-92). Along the same lines, Luigi Ferrajoli cites the constitution of the Areopagus tribunal as the representation of the end of the cycle of vengeance in Greek mythology (Ferrajoli, 2006: 6).

Antoine Garapon compares the French and North American judicial systems, speaking of the importance of the trial in *common law* culture: "What makes the trial a political drama of irreplaceable value, in spite of all its imperfections, is that it stages not only the confrontation of two accounts, two versions of the facts, it also creates a tension (and not a conflict) between the general moral norms and their concrete application. It is the place of practical knowledge, the meeting point of gods and men, as it occurred in Greek tragedy." (Garapon and Papadopoulos, 2003: 115)

Indeed, justice happens in a room in which the performance of a trial takes place. Facts are reconstructed before the judge, which, very often, have assumed a veritable drama for the participating parties. As in the theatre, it presents a degree of formalism and discrepancy in relation to the facts necessary to attain the objectivity which is indispensable to the judgement. Conversely, the media strive for closeness, immediacy, live action, the informal, unorganised approach in the face of the object of the information. The audiovisual media scrutinise the faces of the characters, searching for the most intimate of looks. In it, we look for practically immediate news, whereas the rhythm of justice is slower.

There is also a contradiction between the short-term logic of information and the rhythm of justice, which needs detachment. Justice occasionally asks that the debate be adjourned, that the drama be suspended. Once the various instances have been exhausted, the proceeding ends on a judgement, which will earn what is called the "sanctity of the judged instance", respected by everyone. Conversely, for the media, the judgement is the starting point for debate. Although they consider this debate on the judgement a legitimate critical exercise, it may lead to the continuation of the proceeding outside the court room and without the procedural guarantees ensured by the judges.

Sixth image: the challenge of the Internet

Media and judges are confronted with the challenge of the information and communication technologies, which call their traditional role into question.

7. The creation of justice is symbolised in the episode in Aeschylus' *Oresteia* in which the creation of the Areopagus tribunal by the goddess Athena, with the intention of putting an end to the series of assassinations set in motion by Agamemnon after killing his daughter Iphigenia at Tauris as a sacrifice to the gods for having the wind in his favour and reaching the Trojan War on time.

8. Born in 1943 in Leobschütz, Otfried Höffe is a Professor at the Faculty of Philosophy at Tübingen University.

Today, information is presented as a disorganised field where unknown characters give their opinion on certain facts from the amorphous cloud of the Internet, using the social networks. The origin of the information is often dubious, the information is transformed into communication and it becomes difficult to establish priorities between the data that reaches us. The information hides behind excess data, and becomes masked by information pollution.

Along the same lines, the judiciary, traditionally anchored in a territory, related since its origin to the sovereignty of the state, has trouble acting in the delocalised context of the Internet, with no visible borders or authorities that can cooperate as interlocutors.

In the virtual world of the Internet, everyone can be journalist and judge at the same time. And yet both professions demand a certain degree of necessary connection to guarantee that they function correctly. Traditional judges and media are public players who base themselves in a territory or a community space that the Internet tends to erase.

Seventh image: disempowerment

Throughout this criss-crossing of images, judges and journalists may find themselves frustrated with the loss of their respective power or the erosion of their competence.

We are now witnessing a decline in the law that inevitably also translates as a decline in the role of the judge. We may have the impression that the really important cases are taken away from the competence of the judges. Not only organised crime, but also arms and drugs trafficking, or problems that directly affect the people.

Article 35 of the European Stability Mechanism⁹ provides that “In the interest of the EMS, the Chairperson of the Board of Governors, Governors, alternate Governors, Directors, alternate Directors, as well as the Managing Director and other staff members shall be immune from legal proceedings with respect to acts performed by them in their official capacity and shall enjoy inviolability in respect of their official papers and documents.” It is especially grave that this *de facto* impunity has been accepted without excessive complaint by the Member States of the EU and public opinion.

The effects of the economic crisis have weakened media structures, making them more dependent on public and private funding to ensure their survival. The slump in advertising has accentuated these effects, particularly in print journalism, much of which is currently in the red and dependent on major economic and financial groups.

This crisis is happening at a time when disenchantment with politics is shifting people’s hope towards the judiciary or the media, hoping that they will come up with a regeneration initiative that reaches far beyond their capabilities. In this final image, at the very back of the mirror, judiciary and media find themselves standing over a void, a frustration which, as Jean Pierre Dubois says, “may engender a terrifying symbolic violence”¹⁰.

In the virtual world of the Internet, everyone can be journalist and judge at the same time

Throughout this criss-crossing of images, judges and journalists may find themselves frustrated with the loss of their respective power or the erosion of their competence

9. Created by the European Council in March 2011 and approved by the treaty signed by the Member States of the euro zone on 11 July 2011, it came into force after being ratified by the German Constitutional Court on 12 September 2012.

10. Words reported on the occasion of the round table organised by the LDH during the 3rd meeting on books and the press regarding human rights which was held on 12 and 13 April 2008, reproduced in the article *Justice presse et médias: de Zola à Outreaux* in the periodical *Mouvements*, on 14 November 2008, <http://www.mouvements.info/Justice-presse-et-medias-de-Zola-a.html>

Denis Salas defends the position that “the place of intellectual denunciation is cruelly vacant today and it is for this reason that, in the end, the journalist, the magistrate, or even the barrister, want to fill this void”¹¹. Judiciary and media have been observing each other since their respective failures, their reciprocal fears, but conscious too of their utility to the good health of democracy and its quality, disposed to renew their old alliance, on two conditions:

First of all, a better understanding of each other. In general, judges do not know much about journalists, and journalists do not know enough about the law. Mutual rapprochement could make journalists the mediators between the counter-majoritarian requirements of the state of law and the general public. And then a clear differentiation of roles that would prevent the interferences of the past, the cause of the weakening of the two challengers to the established authorities to the benefit of the political and economic powers.

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¹¹. Idem.