Eleventh opinion, of 16 October 2020, of the Ibero-American Commission on Judicial Ethics on the treatment of parties and judicial ethics. Reporting judge: Commissioner Miryam Peña Candia

1. Introduction

1. At the 15th In-person Meeting of the Ibero-American Commission on Judicial Ethics, held in Madrid on 3 and 4 July 2019, it was agreed to draw up an opinion with respect to judges' treatment of parties and its ethical dimension.

2. The collaborative nature of judges' work requires them to maintain relationships, on the one hand, with parties - especially lawyers and defendants or litigants - and, on the other, with members of their judicial office.

3. Judge's interpersonal relationships with parties, legal practitioners and members of the judicial office are affected by the contradictory nature of judicial proceedings and the competitiveness inherent in litigation. Issues are often raised in haste and it is sometimes necessary to take precautionary measures. Frequently, there are significant sums of money at stake. In essence, these are factors that can lead to situations of tension or contribute to the straining of interpersonal and even professional relationships. In fact, a large number of complaints from defendants refer specifically to inconsiderate treatment or abuse of authority on the part of the judge[1].

4. This opinion will focus on a very specific aspect of the ethical conduct in the judiciary: the judge's contact with the parties involved in legal cases outside the procedural acts governed by procedural regulations. The implementation of this interaction - and even its very existence within the framework of ethics - has been cause for more than a few doubts, debates and

[1] GENERAL COUNCIL OF THE JUDICIARY OF SPAIN (2019) *Report on the status, functioning and activities of the General Council of the Judiciary and the courts and tribunals in 2018*, Madrid, September 2019, p. 69, states that almost 14% of complaints made by citizens with respect to Spanish justice were based on what defendants classified as inconsiderate treatment. In Spain, this was the third most common cause for complaint after delay (41%) and disagreement with judicial decisions (28%).

questions. In fact, differences and divergent solutions have been noted in the various legislations.

5. The Commission, therefore, will devote itself to outlining some behavioural guidelines for judges to enable them to maintain a satisfactory relationship with litigators and the parties in conflict, ensuring proper adherence to the relevant principles of the *Ibero-American Code of Judicial Ethics*. It will also address the specific question of whether the judge should meet privately with any of the parties, and under which circumstances and conditions.

2. The ethical context of judges' relationships with parties and their lawyers

6. While it is postulated that there are universal ethical principles, derived from the general recognition of human dignity, it is no less certain that ethics are put into practice within a specific context - the 'here and now'. This means that when these universal principles are implemented, they materialise in line with experience, on both an individual and a collective level within every society, without losing sight of the need to ensure a more accessible and human process for defendants and litigants.

7. It should also be remembered that there are very different national and cultural contexts for judges' treatment of parties. Nevertheless, there is a minimum acceptable standard for judges' treatment of parties and their lawyers, mainly derived from the ethical principles of impartiality and courtesy.

2.1 Judges' impartiality and equal treatment of parties

8. Firstly, it should be noted that the impartiality of the judge and the equal treatment of parties involved in proceedings are ethical principles as well as fundamental guarantees of constitutional and legal due process.

9. It has been said that impartiality should not only be real but also apparent, to the extent that it is not enough for the judge to be truly impartial, but rather it is necessary that the community perceives them to be so. Without this, there would be serious repercussions on

public confidence and credibility with respect to the judicial system. It has also been said, and with reason, that 'it is not only being that matters but also seeming'. In other words, the ethical rules with respect to judges' relationships with the parties involved in proceedings seek not only to avoid any situation that might contaminate judicial discretion or create unequal treatment between the parties but also to ensure that judges' behaviour does not raise suspicions of favouritism[2].

10. What is not in dispute is that the aim of all rules and mandates on the matter - crystallised in the various codes of ethics that have been adopted in Latin America - consists not only in applying the principle of impartiality and guaranteeing procedural bilaterality but also in achieving a recognisable equidistance between the judge and the parties involved in the proceedings. This serves to preserve the image of the judge in charge of the dispute with respect to the confidence that they and the other legal professionals should inspire in the parties as well as society as a whole, which, ultimately, is fully aligned with the duty of transparency in public administration.

11. Notwithstanding the clarity of the legal and ethical duty that helps the judge remain absolutely impartial, the fact cannot be ignored that in reality, and in day-to-day judicial practice, situations may arise in which this essential principle could be compromised, if the judge is not well prepared and allows grounds for doubt or reasonable suspicion to arise about the equal treatment of the parties. Moreover, this becomes absolutely critical in the specialist court systems that deal with cases in which the rights of the most vulnerable populations are at stake, such as children and adolescents, workers, taxpayers, and so on.

12. At the same time, a judge who is totally isolated and detached from the specific reality surrounding the conflict in which the parties are immersed risks administering justice that is blind in the worst sense. With no contextual factors with which to judge with equity or to

[2] The European Court of Human Rights often repeats that 'justice must not only be done, it must also be seen to be done'; see, for example, the Judgement of the Grand Chamber, of 6 November 2018, in the Case of *Ramos Nunes de Carvalho e Sa v.Portugal*, Applications Nos. 55391/13, 57728/13 and 74041/13 (guarantees of disciplinary proceedings against judges), § 149.

accommodate the rules to the case, nor to understand the multiple variations that this could encompass, they instead present the parties with a dehumanised justice, which ultimately results in dissatisfaction with and social condemnation of the administration of the courts.

2.2 A more human judicial procedure managed by the judge

13. It is common knowledge that, at the present time and in light of the new demands imposed by the world today, the increase in social conflicts, the prolongation of proceedings and trial decisions, the inadequate preparation of judicial officials and even the lack of human interaction as a result of the digitisation of processes, mean that files may lay forgotten in a cupboard or on a computer, faceless, without history or humanity.

14. Every day, many people bravely decide to avail themselves of judicial protection. They not only hope for a rapid resolution to their claims but also trust in a more humane process, where they have a voice and there are ears ready to listen, where they are heard on equal terms and afforded equal treatment and equal opportunities, far from the cold and distant machinery of justice, entrusted to a third party who may be unknown but who, at the same time, should be endowed with ethical values that are supported by the laws that protect the pursuits of human life within society.

15. The law does not exist to govern robots. The legal rights which it enshrines are of the highest value to people - life, health, well-being, integral development, family, freedom and thousands of other issues that deserve closer ties to the reality of participants, whereby these become central to the proceedings. Consequently, the problem leads us to a single solution: the 'completeness' of the judge.

16. There is now an international trend toward humanising judicial proceedings, and in many countries and in certain branches of the law there is a preference toward oral procedures. These bring the judge closer to the unfolding of the case, make the evidence given palpable, help in understanding positions, respond to urgency and deadlines (or at least this is the intent) and implement the much-desired principle of immediacy as one of the pillars of the judiciary.

Nevertheless, other jurisdictions have not allowed judges this closeness to the case as it progresses, however lofty and laudable the idea may seem, until the time of pronouncing judgement, when the judge reassembles all the elements in their memory, often too late for the parties who have already borne the worst disenchantment with the courts, leaving citizens facing resignation.

17. Because of this, parties and their lawyers often seek to contact the judge in charge of the case to express their legal needs directly, and to ensure that the judge properly understands the particular circumstances of the case when issuing their ruling.

18. The judge's impartiality is essential to the process, to the extent that the judge is required not only to be impartial but also to appear impartial. Nevertheless, as a result of jurisprudence, both the judge's objective impartiality ('guarantees of the composition of the court') and their subjective impartiality ('their personal beliefs and behaviour') must be evaluated[3]. It is precisely from this perspective that ethical considerations are justified.

19. The different codes of conduct for judges must safeguard the principle of impartiality, including the right of defendants and litigants to receive equal treatment and not to be discriminated against in the implementation of the judicial function, as stipulated in Article 9 of the Ibero-American Code of Judicial Ethics. Closely related to this are the requirements of Article 13 on the need to 'avoid any appearance of preferential or special treatment toward lawyers and defendants or litigants, arising from their own conduct or that of other members of

[3] In Europe, both the European Court of Human Rights and the Court of Justice of the European Union have produced convergent jurisprudence on judges' objective and subjective impartiality. The Court of Justice states: 'As regards the condition of 'impartiality', within the meaning of Article 6(1) of the ECHR, impartiality can, according to equally settled case-law of the European Court of Human Rights, be tested in various ways, namely, according to a subjective test where regard must be had to the personal convictions and behaviour of a particular judge, that is, by examining whether the judge gave any indication of personal prejudice or bias in a given case; and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality. As to the objective test, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his or her impartiality. In this connection, even appearances may be of a certain importance. Once again, what is at stake is the confidence which the courts in a democratic society must inspire in the public, and first and foremost in the parties to the proceedings'. CJEU, Judgement of the Court (Grand Chamber) of 19 November 2019, *A. K. and Others v Sąd Najwyższy* (Independence of the Disciplinary Chamber of the Supreme Court), C-585/18, C-624/18 and C-625/18, ECLI:EU:C:2019:982, section 128.

the judicial office'.

20. It is also important to note the provisions of Article 11 of the Ibero-American Code. This article makes a significant contribution to the endeavour to guarantee the appearance of impartiality, which is equally as important as real and objective impartiality, due to its impact on citizens' trust in the legitimacy of the judicial system. It stipulates as follows: 'Judges are obliged to refrain from involvement in any cases in which their impartiality might be compromised or in which a reasonable observer might consider that there are grounds for thinking that this is the case'.

21. It is essential that the judiciary shares a set of ethical values that filter through to judges' daily tasks, since, in order to safeguard their integrity and perform their duties, they must not only understand these values but must live and breathe them as the supreme law and the highest duty. Parties should not fear those who practice these values in their daily work - values that guide how they seem, how they are and, above all, how they make just decisions - since these ethical values result in fair, or at least reasoned and reasonable decisions, to which the parties have access, always given free will as to the control that they need to implement and exercise their right to defence.

22. All those who sit in judgement have, as their foundations, the strength that not only seeks to implement, interpret and make courageous decisions, but also impels them to repress any feeling, action, intention or involvement that is extraneous to the case, the laws and the principles. This, ultimately, will enable judges to remain prudent, responsible, honest and impartial, as the supreme force that commands intent and obliges them to act in a certain way. In this respect, Article 16 of the *Ibero-American Code* requires that judges respect the right of parties to make arguments and challenges within the framework of due process. If this value is not upheld, parties have the recourse provided by the State to redress the omission.

23. Finally, the preamble to the *Ibero-American Code of Judicial Ethics* underlines the importance of judges' relationships with other professions. It states as follows: 'A judiciary

which has a Code of Ethics has greater legitimacy to require an equivalent response from other associated professions with respect to their members'.

3. The problem of whether judges should see parties to the case in private

24. The question of whether judges should see parties separately constitutes a highly controversial area. As can be seen from the deliberations in this opinion, private interviews between judges and parties are governed by different legal and ethical regulations in Latin American countries. On the one hand, there is a tendency to encourage judges' contact with parties, to the extent of recognising, as in the Dominican Republic that the judge's words provide comfort to the parties; by this perspective, procedures and formulas should be provided to enable judges to have contact with the parties. On the other hand, in countries such as Argentina, Chile and Colombia, this practice is not recommended at all.

25. These diverse ethical responses, seen in the comparative experiences in Latin America, suggest the need for an examination of two types of clauses governing judges' separate contact with parties (general clauses on impartial treatment and prohibitive clauses with some more or less restrictive exceptions) and a delineation of the provisions of the *Ibero-American Code of Judicial Ethics* and the experiences of Paraguay, Uruguay and Spain.

3.1 General clauses, prohibitions and exceptions

26. In the first place, some codes of judicial ethics include general provisions on judges' conduct that should be applied when a request is made to see one of the parties to the case in private.

27. Point VI of the *Brazilian Code of Judicial Ethics* stipulates that judges should 'resist and denounce pressure from hierarchical superiors, contracting parties and any others seeking to obtain undue favours, benefits or advantages as a result of immoral, illegal or unethical actions'.

28. Article 32 of the *Spanish Principles of Judicial Ethics* stipulates: 'Judges should at all times treat all persons involved in the proceedings with respect, showing due consideration for their psychological, social and cultural circumstances. Furthermore, they should maintain a tolerant and respectful attitude toward criticism of their decisions'.

29. The 8th Canon of the Puerto Rican *Canons of Judicial Ethics* (2005) states: 'Judges' conduct should avoid the possible appearance that their actions are susceptible to the influences of individuals, groups, political parties or religious institutions, public outcry, considerations of popularity or notoriety, or improper motivation'. Almost identical terms are employed in Article 4(f) of Guatemala's 2013 *Rules of Ethical Behaviour for the Judicial Body*.

30. In Peru, Article 5 of its *Code* stipulates: 'The judge must respect the dignity of every person, offering them appropriate treatment, without discrimination on the basis of race, sex, origin, culture, condition or any other grounds'. Point 2.1 of the *Code of Bolivia* states: 'A judge should perform their judicial tasks without favouritism, predisposition or prejudice'. Finally, Article 7 of El Salvador's *Code of Judicial Ethics* (2013) reads as follows: 'Recognizing that in every democratic society it is a citizen's right to be judged by a judge who is totally independent of internal or external foreign interests or pressures. Therefore, the judge should: (B) demonstrate that they are not subject to direct or indirect influences, whether internal or external'.

31. In the second place, the provisions of other codes of judicial ethics tend toward a prohibitive regulation of private meetings between the judge and one of the parties, establishing, as an alternative, that meetings may be held on an exceptional basis in the presence of the clerk or secretary to the court, and that the other parties must be notified and given the opportunity to receive the same treatment.

32. Thus, Article 21.3 of the Paraguayan Code prohibits judges from holding a private interview in their chambers with one of the parties or their representatives, to address matters related to the case, without the presence of the opposing party. In exceptional cases of

recognised urgency or need, however, they may do so briefly, provided the clerk of the court is present.

33. Similarly, Article 4.5 of the Judicial Code of the Province of Santa Fe, Argentina, prohibits judges 'except in cases where the law commands or empowers them, from holding private conversations with litigants or their counsel on the merits of the cases subject to their decision'. Where urgency justifies it, they may see one of the parties and their counsel, provided this takes place in their chambers and in the presence of the secretary of the court.

34. In the same vein, Article 2(a) of the Honduran Code of Judicial Ethics states that judges should 'Refrain from granting private interviews to any person who intends to influence their decisions, affecting their independence or impartiality'.

35. Mexico's legislation provides that judges should refrain from holding meetings with parties outside the court.

36. In Costa Rica, Article 38 of the Regulations for the Prevention, Identification and Satisfactory Management of Conflicts of Interest in the Judiciary, approved by the Full Court on 1 April 2019, concerns meetings with one of the parties to a judicial procedure. It states as follows:

> In the exercise of the right to effective judicial protection, the parties and third parties concerned, or the professionals who so require, will have the right, on equal terms, to be treated with respect and dignity and to be heard personally by the judges or administrative heads concerned. This may be refused, provided that it can be justified to the person that this may affect the effectiveness and efficiency of the provision of the public service.
>
> No unjustified discrimination may be made between those requesting a hearing, and this should involve a simple, preferably oral or electronic procedure. If any incident occurs that the official considers relevant, they should, as soon as possible, make a signed, concise record of the incident, in a register held by the office for this purpose.
>
> When circumstances so advise, a hearing may be granted at the reception area of the office or

with another duly authorised official present.

Those who administer justice are prohibited from disclosing opinions on the merits of a case that they are hearing.

37. In Chile, the increasing use of oral proceedings has made this kind of interview between judges and parties unnecessary. The holding of criminal law public hearings has effectively eliminated the problem; however, in civil cases, hearing one of the parties has always been viewed with suspicion, except in small claims not requiring legal counsel. It would, in fact, remove the judicial authorities from their inherent work in order to resolve other issues that are outside their responsibility, creating suspicion among citizens about the mere fact that one of the parties is in communication with the judge.

38. In Argentina, the codes for the provinces of Santiago del Estero, Corrientes and Córdoba, while stipulating that judges should refrain from holding meetings with one of the parties, nevertheless allow for the possibility of meetings, provided that the other party is made aware of the situation and that they enjoy the same right to request a meeting. The Dominican Republic's ethical regulations are drawn up in a similar way.

39. The *Ibero-American Code of Judicial Ethics* seeks to resolve the tension between judges' treatment of the parties and impartiality. In this respect, Article 9.2 of Costa Rica's Code of Judicial Ethics of 2000 states: 'In the treatment of parties and their lawyers, they should maintain an attitude of accessibility and respect, taking care that no contact allows for the belief that this treatment is privileged or beyond a functional relationship. With respect to other citizens, they should maintain the same attitude, respecting the role that corresponds to each person'.

40. In Argentina's Code for the Province of Córdoba, Rule 3.6 states: 'Equidistant treatment requires that when the judge or official grants a hearing to one of the parties to the proceedings, they offer the other party the same opportunity to be heard, inviting them to this effect'.

41. In short, few codes of ethical discipline include rules that absolutely prohibit judges from holding meetings with parties outside the provisions of procedural law. Nevertheless, both the general precautionary formulas and the prohibitions with exceptions included in most codes advise maintaining a proper and equal distance between judges and parties, always with a view to safeguarding impartiality.

3.2 Some comparative data on ethical solutions in Spanish-speaking countries: Paraguay, Uruguay and Spain

42. The experiences of Latin America may seem very similar, but they have certain distinct implications. An examination of the different ethical rules in force in Latin America reveals that judges' treatment of defendants and litigants, while always subject to the imperatives of impartiality and equal treatment, maintains a reasonable degree of flexibility, allowing the acceptance and satisfaction of the need for contact, within the specific contexts of each system and the particular characteristics of each social group. To this end, we examined experiences in Paraguay, Uruguay and Spain.

3.2.1 The ethical solution in Paraguay

43. The Paraguayan Code of Judicial Ethics, approved by the Supreme Court in Resolution No. 390 of 18 October 2005, contains very clear provisions on judges' behaviour with respect to the possibility of hearing parties in private.

44. On the one hand, as a matter of principle, Article 21 of the Paraguayan Code establishes that: 'It is the judge's duty to maintain personal and professional behaviour that instils in lawyers and defendants or litigants a deep sense of trust and respect in the administration of justice'. In this respect, subsection 3 states: '**Unless a legal rule so permits, the judge is prohibited** from holding a private hearing in their chambers with one of the parties or their representatives, without the presence of the opposing party, to address case-related issues. In exceptional cases of urgency or recognised necessity, they may do so **briefly, provided the**

clerk of the court is present'.

45. Taking into account the current Paraguayan legal provisions on transparency (Laws 5189/14 and 5282/14) and the criteria laid down by the Supreme Court, it is understood that a judge's attitude should be aligned with prudence and should be consistent with the use and discretion of their powers.

46. The intention of the legislation is to ensure that the judge is not compromised and, to this end, it grants them sufficient justification. People cannot be deprived of the application of equity. The judge is given the authority to decide, which is an expression of power.

47. In this respect, in 2006, the Advisory Council on Judicial Ethics in Paraguay issued an opinion on judges' hearings, according to which:

1. The purpose of the rule enshrined in Article 21(3) is, in addition to ensuring impartiality, to optimise the judge's time in the service of justice.
2. The rule is that the judge only hears the parties during the proceedings, when they have a legal obligation to hear them.
3. Nevertheless, the same rule establishes an exception, when the professional or defendant or litigant requests a hearing for reasons of urgency or reasons worthy of consideration.
4. The judge cannot refuse to hear them, unless there are duly justified reasons that prevent this. They must also hear the other party if they so request, in accordance with the principle of equality and impartiality.
5. The hearing must be held in the presence of the clerk of the court, or, if the clerk is unable to attend, another senior official of the court, preferably with the doors open and in brief[4].

48. In short, the current ethical solution in Paraguay involves considering a private interview between a judge and one of the parties an exception to the rule, while leaving the judge sufficient margin to allow it in specific, well-justified cases.

[4] Advisory Council on Judicial Ethics in Paraguay, *Advisory Opinion No. 1 of 27 September 2016, with respect to Article 21, subsection 3 of the Code of Judicial Ethics (Judges' hearings)*.

3.2.2 Legislation and practice in Uruguay

49. Uruguay's positive law includes a very clear provision in Article 94 of the Organic Law on the Judiciary, which states:

> 'Judges will abstain: (1) from expressing or even insinuating their opinion on matters on which they are called by law to judge, outside the occasions when procedural law allows it; (2) from hearing any argument that the parties, or third persons acting on their behalf or under their influence, attempt to make in a form other than that established by law'.

50. Although its interpretation leaves no room for reasonable doubt, following the natural and obvious sense of the words, it is common judicial practice throughout Uruguay for judges to hear counsel for one of the parties and, on occasion, the parties themselves. Furthermore, it is often frowned upon, by both lawyers, parties and society as a whole, if judges do not hear lawyers. It is considered uncourteous, disagreeable and insensitive. This opinion is even more widespread in the small towns and cities of Uruguay's interior.

51. The Uruguayan Judicial College addresses the topic in an initial training module on judges' attitudes, conveying the risks which such conduct incurs, as well as the measures that can minimise or avoid them. In this vein, it is taught that, before agreeing to a private hearing, the judge should have all the information necessary to assess whether or not they should do so. The judge should ensure that they know the identity of the person who is asking for a hearing, their profession and the matter that they intend to discuss in the interview. This information should be gathered by a duly trained official in order that the judge can evaluate the appropriateness of holding the requested hearing. Knowing the purpose for the meeting allows the judge to assess whether it is sufficiently relevant to distract them from their daily tasks. It also allows the judge to be alert to possible deviations from the conversation toward matters that might compromise them ethically.

52. Lawyers' training allows them to thoroughly understand the limits that the judge will impose on the intended conversation, more easily than the parties, who have no bases with which to evaluate these limits and are more likely to talk about prohibited issues. This basic difference means that, in most cases, direct contact with parties places the judge in uncomfortable situations that mean they have to more frequently remind the parties of the limits of the interview. It is both predictable and likely that the party will attempt to make improper arguments when they are able to address the judge directly. Many judges, therefore, will not have direct contact with parties, unless accompanied by their lawyer.

53. The subject matter of the proceedings should be another factor to consider in assessing the possibility of contact with any of the parties in a private hearing. In special or sensitive social matters (such as cases of family, domestic or gender-based violence), direct contact between the parties and the judge may be more appropriate, in particular to provide peace of mind to parties when the situation so requires. At the same time, in strictly material matters (civil and commercial), it does not seem advisable to meet with the parties. In all cases, private hearings should be held with the lawyers for the parties, rather than the parties on their own.

54. It is important to differentiate the situation of jurisdictional bodies with powers which work very closely with the community; in these courts, direct contact between the parties and the judge is customary, since in many cases, legal representation is not even possible, although this situation is in most cases expressly provided for by law. In all cases when a judge refuses an interview, the decision must be communicated in a polite and reasonable manner. The basis for the denial of the interview should be given clearly and precisely, and it is suggested that the decision is made in writing or that the legal representative is consulted to advise the party on the point.

55. In Uruguay, therefore, it is common practice for judges to see counsel in the presence of the clerk, secretary or other official of the court, a measure that aims to avoid irrelevant or

inappropriate arguments, and generally succeeds. Finally, the reason for refusing to hear counsel for one of the parties is not only to avoid contaminating judicial decisions but also to avoid suspicions of impartiality which might stain their image. The rule that applies in this respect is that it is not only necessary to be impartial but also to be seen to be impartial. It is this rule that should guide judges' conduct in all their actions and not merely with respect to the specific issue of private hearings. There should be no place in a hearing for familiar language or a greeting with a kiss directed at one of the parties, even when there is a relationship of long standing (a commonly occurring hypothesis in Uruguay), nor should the judge attend a procedure outside the court with the lawyer of one of the parties, who often, on their own part or through their lawyers, offer to convey the judge in their private vehicle. Not only should judges behave in a way that avoids any doubt over their impartiality, but they should also maintain positive behaviour that builds confidence in their equidistance from the parties in the case - behaviour that will be judged by the entire community which they serve.

3.2.3 The provisions of the *Principles of Judicial Ethics* in Spain

56. In Spain, the *Principles of Judicial Ethics* (2016) refer to 'models of behaviour relating to justice as the provision of a service, such as courtesy, diligence and transparency. Their degree of compliance is perceived directly by those who go to court, and this contributes decisively to the formation of public opinion on justice. For this reason, they cannot be disregarded as of "minor" importance'.

57. With respect to the principle of independence, the Spanish Code of Judicial Ethics refers in Section 2 to the need for the judge to exclude from their decisions 'any interference unconnected with their assessment of the whole of the evidence presented [and] the actions of the parties to the procedure'.

58. In relation to the principle of impartiality, Section 10 states: 'Judicial impartiality is the apartness of the judge from the parties, with whom they must maintain an equal distance, and from the object of the proceedings, with respect to which they must have no interest

whatsoever'.

59. In addition, Section 14 of the Spanish Code states: 'Impartiality entails special vigilance with respect to compliance with the principle of equal opportunities for the parties and other participants in the procedure'.

60. With respect to integrity, Section 24 of the Code stipulates: 'In their personal relationships with professionals connected to the administration of justice, judges should avoid the risk of projecting an appearance of favouritism'.

61. The Spanish Commission on Judicial Ethics had the opportunity in 2018 to rule on requests to judges for a hearing or interview with the lawyer of one of the parties[5]. This opinion refers to the principle of transparency, which in Spain is set out in Section 14 of the 'Charter of Citizens' Rights to Justice' (Non-law proposition approved by plenary session of the Spanish Parliament on 16 April 2002), according to which: 'Citizens have the right to be seen personally by the judge or the secretary of the court in respect of any incident related to the functioning of the judicial body'.

62. In the opinion of the Spanish Commission on Judicial Ethics: 'an interview with the counsel for only one of the parties is something that is foreign to the procedure, something extraordinary, which can affect the impartiality of a member of the court, not so much because it may give grounds for a recusal, but because the judge may be seen to be unduly influenced by one of the parties'. As the Spanish Commission on Judicial Ethics further explains:

> The main risk arising from an interview between the presiding judge and the lawyer of one of the parties is that it might unduly influence their decision. In the mind of anyone who has to resolve a conflict, and this includes judges, certain biases can operate unconsciously. If undetected, they may have an undue impact on the decision. One of these types of bias is confirmation bias. If, before starting to study a case, a presiding judge has contact with one of the lawyers, who then conveys to them their idea of the case without any opportunity for

[5] Spanish Commission on Judicial Ethics, *Opinion (Consultation 1/2018) of 23 October 2018. Principle of impartiality: request for a hearing or interview with the lawyer of one of the parties*

challenge by the other party at that time, there is a risk that they will unconsciously assimilate that first idea. Later, on the basis of that first idea, they are prejudiced when they evaluate any other idea.

63. The advice given by the Spanish Commission on Judicial Ethics to a judge from whom one of the parties requests a private interview, in the specific case of appeals proceedings, is as follows:

I. It would be appropriate to ask the reason or justification for the interview and its subject matter, if possible, through a member of staff in the professional's offices.
II. Then, determine whether it justifies taking the risk, as outlined above, of being unduly influenced by one of the parties, in view of the reasons given by counsel for requesting the interview.
III. When it is not considered justifiable to take this risk, it is best to refuse the interview and defer to the appropriate procedural channel, generally by the submission of a brief informing the judge or rapporteur of what they wanted to convey.
IV. In the event that it is considered justifiable to take such a risk, we must be aware of this risk in order to avoid any arguments or comments about the disputed issue in the appeal that may influence us, and to ensure that the procedures for hearings and making arguments set out in the procedural rules should not be unduly extended, especially when this has been barred.
V. In some cases, it may be appropriate to bring it to the attention of the other lawyer so that they may also be present.

64. In short, judges' private meetings with one of the parties is viewed in Spain with particular suspicion. The presence of both parties is certainly preferred, without completely excluding the possibility of holding an interview to address issues that cannot influence the will of the presiding judge.

3.3 The provisions of the *Ibero-American Code of Judicial Ethics*

65. Article 15 of *the Ibero-American Code of Judicial Ethics* provides a clear and sagacious rule for resolving this tension: 'Judges should endeavour not to hold any meetings with one of the parties or their lawyers (whether in or, with greater reason, outside their offices) that the counterparties and their lawyers may reasonably consider unwarranted'.

66. The preamble to the *Ibero-American Code* states: 'sometimes, within the limits of

ethically permissible behaviour and for reasons of opportunity and coordination, codes of conduct choose a given course of action from among several possibilities; for example, while in principle there may be various options for establishing the ethical basis for authorising a judge to meet with the lawyers of the parties, the fact that a code chooses one of these options dispels any doubts that can legitimately be raised among those the code addresses'.

67. The *Ibero-American Code* therefore advocates two principles that must be properly reconciled: on the one hand, the principle of impartiality; and, on the other, the principle of transparency.

68. With respect to the treatment of parties and their lawyers, the principle of impartiality requires the judge to maintain, as stated in Article 10, 'an equal distance from the parties and their lawyers throughout the proceedings', avoiding 'any conduct which might reflect favouritism, predisposition or prejudice'. Article 13 stipulates that 'judges should avoid any appearance of preferential or special treatment toward lawyers and defendants or litigants, arising from their own conduct or that of other members of the judicial office'.

69. Article 15 of the *Ibero-American Code* offers a solution to the issue of private interviews with one of the parties. As cited above, this provision reads: 'Judges should endeavour...'. Simply put, balance should be sought between the two declarations. The verb 'prohibit' implies a command from those in authority that a certain thing is not to be done, while the verb 'endeavour' expresses an intent to achieve an objective or purpose.

70. At the same time, the principle of transparency in judicial proceedings has consequences and, as indicated in Article 57 of the *Ibero-American Code*, judges should 'endeavour to provide useful, relevant, comprehensible and reliable information, without infringing the law in force'. This transparency, which must be extended toward the media, is restricted by the provisions of Article 59, which instruct judges to 'take particular care to ensure that the legitimate rights and interests of the parties and lawyers are not adversely affected'.

71. In short, the judicial virtues relevant to the treatment of the parties from the perspective

of the *Ibero-American Code of Judicial Ethics* are, above all, courtesy and diligence.

72. Article 49 of the *Ibero-American Code* enshrines the virtue of courtesy, which is applicable to all those with whom the judge has a relationship. In other words, courtesy is 'the way to externalise the respect and consideration that judges owe to their colleagues, other members of the judicial office, lawyers, witnesses, defendants and litigants and, in general, all those who are involved in the administration of justice'. Similarly, Article 50 of the *Ibero-American Code* requires that judges, from an ethical point of view, 'provide the explanations and clarifications that are requested of them, to the extent that these are appropriate and do not entail a violation of any legal rule'.

73. A specific expression of diligence in the judicial arena, which is of particular relevance to the treatment of parties, is the duty established by Article 76 of the *Ibero-American Code*, whereby 'judges should ensure that proceedings are held with the utmost punctuality'.

4. Conclusion

74. The judicial process should be increasingly humane and accessible to the public, without this affecting its transparency or raising doubts about judges' impartiality. Whatever the ethical rules that are applied, these must safeguard the principles of the equality of the parties and the impartiality of the judge.

75. In Latin America, there is a noticeable divergence of national solutions to the issue of requests for private hearings between one of the parties and the judge. In some countries, there is a strict system in place to prohibit interviews, with exceptions for urgency and with the precaution of informing the other party and, where appropriate, with the presence of the secretary of the court. In other countries, however, such meetings are not prohibited, but rather are customary or encouraged, although they remain subject to the utmost prudence of the judge.

76. In those cases where the country's legal culture allows it, the granting of private

hearings to a single party or their lawyers should be subject to certain strict conditions and rules which prevent its good purpose to be bent toward improper ends that might culminate in an adverse impact on the judge's impartiality and peace of mind, or raise doubts about their objectivity and impartiality in decision-making.

77. In particular, it is of the utmost importance to observe certain behaviours for the purposes of due transparency. Thus, for example, these hearings can be general, i.e., accessible to all defendants or litigants and their representatives involved in the proceedings over which the judge presides, with a schedule that is determined in advance and duly disclosed. These hearings should, as far as possible, be held in the presence of officials or clerks of the court, to avoid the judge's impartiality from being called into question. In these cases, it is the judge's fundamental duty to perform their duties with the moral strength to ensure that their impartiality is not vulnerable to the mere presence in their chambers of the defendant or litigant or their representative without the presence of the opposing party.

78. By indicating specific dates and times at which to hear defendants or litigants and representatives, all on an equal footing, with the simple requirement to be announced as normal by the secretary's office, the judge safeguards equal treatment; neither party should consider a hearing for their counterpart unjustified or suspicious, because they have the same opportunity. This kind of formal and general hearing may allow the judge to have closer contact with the specific case, transcending the coldness of the written word and bringing a more human aspect to the process over which they preside. In turn, this may help the parties perceive that their case and their story also have a human form and a voice, and their concern, which is normally expressed distantly to the judge, is now received by a thinking human being and not by a cold, unreflecting machine.

79. The judge's proximity to the case is not intended to bring about a disproportionate relationship with the parties but to make them more present in the reality of the case, always observing the restrictions, firmly upholding the attitude of respect for equality and impartiality

as the supreme legal values, and with a view to providing better administration of justice in the courts.

80. Thus, the ethical rules applicable to judges' treatment of parties leave a margin for judges' consideration. In this way, taking into account the judicial tradition of their country, the specific characteristics of the case and the nature of the jurisdiction, they may decide, in each specific case, whether or not to grant hearings to one of the parties, provided that the appropriate safeguards are in place, i.e., provided that they comply with the requirements for disclosure of the action and the equal treatment of the parties, and that they keep in mind the principle of bilaterality, which is one of the cornerstones of due process.