The fourteenth opinion of 12th March 2021 of the Ibero-American Judicial Ethics Committee on inappropriate relations that may occur between the judiciary and politics or between these and the independent practice of the legal profession. Ethical proposals in the face of *revolving doors*. Speakers: Committee Members Hernán A. De León Batista and Fernando A. Castro Caballero.

1. At its virtual meeting on 17th July 2020, the Ibero-American Judicial Ethics Committee (CIEJ) of the Ibero-American Judicial Summit agreed to draft an opinion on judges and politics, as well as on the alternation between serving as a judge and practising law on behalf of private interests: ethical proposals in the face of *revolving doors*.

2. *Revolving doors* is a situation in which there is free movement between senior posts in the public and private sectors ***and between politics and the judiciary.*** This movement occurs in different directions, from public institutions to private companies and *vice-versa*, or from the judiciary to the independent practice of law and *vice-versa*, or from parliament and national government to the high courts of justice and *vice-versa*. There are also revolving doors within the judiciary itself, in countries with multiple top-level courts. Personnel may move from one court to another without any merit-based competition when high-ranking judges do one another favours, a practice known as "I appoint you, you appoint me."

3. The revolving door phenomenon poses significant problems for representative democracy as it can cause serious conflicts of interest between the objectives that should be pursued by an independent and comprehensive judiciary and those of a political system at the service of society. On the other hand, one should not ignore that the guarantee of a judge's complete impartiality must be real and apparent, as set out in Article 11 of the Ibero-American Judicial Ethics Code. Complying with this condition

becomes more complex for judges who have alternated judiciary posts with the practice of law or political activism.

4. The necessary independence between politics and the justice system is part of the constitutional design of a social and democratic rule of law. This design is based on the tripartite division of public power, which is a precondition for the necessary balance in executing the primary tasks required by a politically organised society. Alternatively, viewed from another perspective, the exercise of politics goes as far as the justice system allows. In this regard, judicial independence is an essential condition for true reciprocal control between the different branches of government, as explained in depth by the theory of checks and balances, so deeply rooted in the constitutional doctrine of the United States of America.

5. In this regard, James Madison[1], in *The Federalist Papers*, Number 51 (8th February 1788), with undeniable mastery, pointed out:

> *"But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others. The provision for defence must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government*

[1] James Madison, (born 16th March 1751, Port Conway, Virginia, USA, died 28th June 1836, Montpelier, Virginia, USA), was the fourth president of the United States (from 1809 to 1817) and is considered to be a great political thinker and one of the founding fathers of his country. At the Constitutional Convention of 1787, he influenced the planning and ratification of the U.S. Constitution and collaborated with Alexander Hamilton and John Jay in the publication of the essays collected together as *The Federalist Papers*. His contribution to constitutional doctrine has earned him the popular title "Father of the Constitution" of the United States. As a member of the new House of Representatives, he sponsored the first ten amendments to the Constitution, commonly called the Bill of Rights. He was Secretary of State during Thomas Jefferson's presidency when the Louisiana Territory was purchased from France. The War of 1812 was fought during his presidency.

would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself. A dependence on the people is no doubt the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions. This policy of supplying by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power; where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other; that the private interest of every individual, may be a centinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the state."

6. Politics, which is appropriately reflected in legislative activity and the exercise of government, is supported by electoral processes involving parties and movements with diverse ideologies, whose main objective is to win seats in the legislative bodies and positions of executive power at different territorial levels. One of the greatest difficulties facing those exercising national policy is the accumulation of commitments and pressures from powerful individuals and groups with substantial economic and political interests. These individuals and groups tend to pull strings within the legislative body to promote and pass laws favourable to them and influence the government to adopt decisions advantageous to them.

7. That is why it is so important to have independent, upstanding judges committed to defending the nation's highest interests. Judges aware of the importance of their role in democracy and willing to rein in politicians' excesses to maintain the balance between the powers. In other words, judges are responsible for ensuring that the general interest prevails over petty private interests and neutralising political power whenever it becomes permeated by influence-peddling and corruption.

8. So, it is disastrous for the rule of law when a justice system's decision-making positions are occupied by politicians with known party sympathies or lawyers with political ambitions and no judicial vocation. Instead of controlling the excesses of the other branches of government (which is the judges' role), those in such positions are more likely to incur in the absurdity of putting the judiciary at the service of party members or political allies to obtain rewards to further their future ambitions.

9. For a career politician infiltrating the judiciary, it is normal to want to make a quick return to politics and to use the judicial office for that purpose. This is only to be expected from someone who does not identify with the spirit of the judge's robe and who sees the judiciary as a springboard to a political career.

10. In general terms, we can identify three revolving door scenarios affecting the judiciary: 1) Moving from the judiciary to politics and from politics to the judiciary. 2) Switching from judiciary to private practice and back. In other words, how often someone moves from the court to the law firm and from the law firm to the court, almost seamlessly. 3) Judges moving from one constitutional judicial body to another.

11. To prevent these revolving door situations, or at least mitigate their adverse effects, some Latin American countries have enshrined in their domestic legislation a series of disqualifications and incompatibilities for holding the highest positions in the judiciary and for moving from these to other senior national government positions. They also expressly prohibit judges and magistrates from intervening in matters involving issues in which they have conflicts of interest, as long as there is no legal impediment, or face losing their jobs or criminal proceedings.

12. Some countries, on the other hand, have no legal regulations in this respect. These countries leave it to each official's ethical judgement whether or not to apply for a particular position or participate in the election of different candidates or intervene in the decision on each matter submitted for his or her consideration.

13. The *principle of separation of powers* is based on their functional separation. The division viewed from the perspective of the State's bodies or powers (Executive, Legislative and Judicial) and the personal differentiation between the members of each (Ministers, Congressmen, Judges and Magistrates) that together make up the State. In this sense, the *judicial independence* perspective, on which we should focus, depends to a certain extent on successfully *transposing* these bases into the legal and institutional design of the judiciary.

14. In an ideal legal-judicial world, typical under the constitutional rule of law, judicial independence is the judge's quintessential personal and functional vocation. As well as independence, the judge must have irremovability, except for political, criminal, disciplinary or ethical responsibility reasons that seriously affect his or her performance. Thus, a judge who is trying or handling legally-mandated cases must do so effectively, efficiently, following due process of law, and within a reasonable time. Furthermore, the decisions are reasoned and legal based on facts and the law as submitted for judgment, with justice and equity, according to adequate judicial ethical training, which aligns with the judge's integrity and institutional responsibility. This is certainly basically the model envisaged by the Ibero-American Judicial Ethics Code.

15. It is important to note that most of the world's legislatures have no provisions to prevent a judge from moving directly from the judiciary into politics or *vice-versa*, nor is there any prohibition on occupying specific particularly sensitive posts, where his or her judgement could be compromised.

16. This reality contrasts with the right of every citizen to have recourse to a court that is ***competent, independent and impartial***, as enshrined in Article 14 of the International Covenant on Civil and Political Rights and in regional instruments such as the European Convention on Human Rights, Article 6, which reflect the importance of the

judiciary in engineering the rule of law[2]. However, as a judge's primary duty, impartiality has always been a controversial issue in some countries, as their decisions have been constantly questioned because of suspected political links, which may influence the perception of their independence.

17. In this sense, the judiciary is designed on a dynamic basis. It encompasses the whole set of expectations for judicial and administrative progress, expectations which cover all civil servants to whom the Constitution assigns the task of judging. In other words, because judges and magistrates belong to the same professional body, they are subject to the same Statute, to the same legal regime of rights, powers, and duties. However, the moral, social and legal norms are translated into **duties** of a different nature. These norms determine the conduct that a person must put into practice. However, fulfilling a legal duty should not be seen only as fulfilling a commitment to the administration of justice, strictly emphasising only the legal aspect, and separating it from other possible duties with similar content. So, when one asks what the essence of legal duty is, one must necessarily look for the answer within the same concept of legal norm, but without leaving aside the fact that the contents of a legal duty can occur together and so resemble the contents of **moral and social duties**.

18. The foundation of a true judiciary is the independence of its judges. This independence is understood to be essential for ensuring fulfilment of their functions by preventing interference by superiors, private individuals, or other government bodies.

[2] Recent case law of the European Court of Human Rights and the Court of Justice of the European Union has reiterated the importance and legal significance of the separation of powers. For example, the European Court of Human Rights in Strasbourg has noted that "the notion of the separation of powers between the executive and the judiciary has assumed growing importance in its case-law" (Grand Chamber judgment of 6th November 2018, *Ramos Nunes de Carvalho e Sá v. Portugal*, Applications Nos. 55391/13, 57728/13 and 74041/13). The Court of Justice in Luxembourg has repeated the idea in the same terms. For example, in its judgment of 19th November 2019, *A. K. and Others v. Supreme Court of Poland (Independence of the Disciplinary Chamber of the Supreme Court*, C-585/18, C-624/18 and C-625/18, EU:C:2019:982, in firmly guaranteeing judicial independence in Poland: "In accordance with the principle of the separation of powers which characterises the operation of the rule of law, the independence of the judiciary must in particular be ensured in relation to the legislature and the executive."

Institutionally, independence includes endowing the Judicial Branch with the power to manage its own financial and human resources without the intervention of the other branches of government. However, in return, judges must be genuinely committed to administering justice and manifest their commitment in their daily behaviour and decisions. This is the only way to honour the enormous independence granted to them in exercising their functions and justifying it to other citizens.

19. Most national legislations prohibit judges from being active members of political movements or parties. Practising as a judge is widely held to be incompatible with any other professional work, with the sole exception of academic activity (including writing about and teaching law). However, there is a very favourable leave of absence regime in several countries that allows judges to return from politics to their former court. This makes it advisable to adopt rules consistent with constitutional principles that prevent or discourage the transition from the judiciary to politics or to return from politics to the previously held office of judge.

20. In Spain, Article 127.1 of the 1978 Constitution provides that: "*Judges and magistrates, as well as prosecutors, while on active service, may not hold other public office or belong to political parties or trade unions*." Likewise, article 395 of the Organic Law of the Judiciary of 1985 establishes this prohibition: "*Judges and magistrates may not belong to political parties or trade unions or be employed in the service of such parties or unions.*" In this rule, the Organic Law of the Judiciary prohibits judges: "*To address to the powers, authorities and public officials or official corporations, congratulations or censures for their acts, or attending, in their capacity as members of the Judiciary, any public events or meetings that are not judicial in nature, except those whose purpose is to attend the King or for which they have been summoned or authorised to attend by the General Council of the Judiciary*." This prohibition is complemented by a system of incompatibilities and leave of absence that is generally very beneficial for anyone who decides to move into politics and then return to their judicial position.

21. Indeed, the transition from the judiciary to public or private activities in Spain is only dissuasive for Supreme Court justices, as in doing so, they lose that status and, if they return to judicial functions, they do so only with the status of magistrate. In other cases, however, moving from the judiciary into politics usually involves making a special service declaration. This declaration allows the judge to reserve his or her judicial post. The time spent on special service leave is included in calculations for promotion, seniority, and retirement pensions. The only legal prevention for those who return to their judicial post is that they must "*abstain from, and where appropriate may be prevented from intervening in any matters in which political parties or groupings, or those of their members who hold or have held public office, are parties*."

22. In Colombia, a constitutional reform was approved in 2015 to expressly prohibit re-election to the following positions: Magistrate of the Constitutional Court, the Supreme Court of Justice, the Council of State, the National Commission of Judicial Discipline and the National Electoral Council, Attorney General of the Nation, Attorney General of the Nation, Ombudsman, Comptroller General of the Republic, and National Registrar of Civil Status. No such former judge shall be eligible for nomination for another such office or election to a popularly elected office until one year after he or she has ceased to hold office. (Article 126, National Constitution, amended by Legislative Act No. 02 of 2015). This prevents a high-level judicial office from being used for a campaign to move without a continuity plan to another Court or occupy the other high-level national government posts mentioned therein, thereby preserving the judiciary's independence and proper performance.

23. Moreover, Article 3 of the Colombian Anti-Corruption Statute (Law 1474 of 2011) prohibits any public servant from providing, personally or through an intermediary, assistance, representation or advisory services in matters related to the functions of their position, or allowing this to occur, for up to two years after leaving office, concerning the agency, body or corporation in which he or she served, and from providing

assistance, representation or advisory services to those who were subject to the inspection, oversight, control or regulation of the body, corporation or agencies with which he or she was linked. This prohibition has no time limit concerning matters that the public servant has known about by reason of his or her functions and in which decisions were taken concerning specific subjects. This provision implies a severe disqualification for judicial officers who are entering the legal profession.

24. The 1991 Constitution strengthened judicial independence in Colombia with the creation of the Superior Council of the Judiciary, which administers the budget of the Judicial Branch and the judiciary. It also prepares the lists of eligible candidates to fill vacancies for Supreme Court and Council of State justices. They are elected for individual eight-year terms by a qualified majority of the respective corporations. The nine judges of the Constitutional Court, on the other hand, are elected by the Senate of the Republic from three-person shortlists sent by the Supreme Court (3), the Council of State (3) and the President of the Republic (3), also for individual eight-year terms. Finally, the Superior Council of the Judiciary has six members, two elected by the Supreme Court, three by the Council of State and one by the Constitutional Court, also for individual eight-year terms.

25. Unlike the cases described above, in Uruguay, there is no legal regulation against *revolving doors* between politics and the judiciary, probably because there is no need to combat this phenomenon since there is only one Supreme Court and the way judges and magistrates are elected prevents the politicisation of the justice system.

26. In effect, Uruguay's system for appointing Supreme Court justices ensures that the system does not become politicised. The General Assembly is a meeting of both chambers, Deputies and Senators, and a two-thirds majority is required. Otherwise, as a subsidiary criterion, once ninety days have elapsed since the post to be filled became vacant, the most senior appellate court justice is automatically appointed. This system avoids any interference by the Executive Branch in office and requires the political

agreement of at least two of the parties with parliamentary representation, which avoids linking the designation to a particular political group.

27. Also, article 251 of the Uruguayan Constitution provides that: "*The offices of the judiciary shall be incompatible with any other remunerated public function, except the exercise of teaching in higher public education in legal matters, and with any other permanent honorary public function, except those especially connected with the judicial function.*"

28. In response to a request submitted by a Montevideo civil judge to keep his judicial office in reserve while he held a public office, as well as a political one, the Supreme Court of Justice ruled that Article 251 of the Constitution cited above "*resolves the point categorically and unequivocally, so that no other argumentation is necessary to justify the rejection of the request for the reservation of the position...*" (Resolution No. 101/2017, of 14/8/2017).

29. Beyond the legal issue involved, there would be important ethical questions about *revolving doors* between the judiciary and any political office. In Uruguay, this idea, steeped in values, forms part of the moral foundations on which judicial independence, fundamental to the rule of law and the Republic's health, is based, and most of its citizens understand it to be so. The Uruguayan people would interpret any other action as a breach of the independence principle, which would undermine the current republican-democratic government system's ethical foundations.

30. The Ibero-American Judicial Ethics Code states categorically in its Article 4 that: "*Judicial independence implies that judges are ethically forbidden to participate in partisan political activity in any way.*"

31. To comply with this ethical guideline would mean legislating on the *revolving doors* phenomenon. As it is more widespread in some countries than in others, regulating it could provide greater legal and social peace of mind.

32. In this regard, to preserve citizens' credibility and trust in the judicial system, particularly in the face of possible political interference, it is appropriate and advisable for all judges to refrain from intervening in matters in which their impartiality could seem to be compromised (whether this is real or apparent) as covered by Article 11 of the Ibero-American Judicial Ethics Code. Such would be the case if a judge with a political background were called upon to decide a dispute in which the political group of which he or she was formerly a member or some of its members were a party or had an interest. However, although this circumstance is not explicitly established in the law as grounds for impediment, any reasonable observer would have grounds to doubt the judge's impartiality.

33. Alternating between political and judicial activity can give rise to multiple conflicts of interest that ethically impede the normal performance of the judge's own functions. What is important here is that the judicial officer should have the professional honesty to disclose the conflict and to try to distance himself from the case, either by declaring a legal impediment, if the reason is covered by law, or by announcing his withdrawal for ethical reasons, by way of conscientious objection on a constitutional basis, provided that the country's political charter guarantees citizens the right not to be forced to act against their personal convictions and moral principles.

34. The problem is that most Ibero-American nations accept as dogma that the grounds for impediment and withdrawal in judicial matters are exhaustive and must be expressly laid down by law, making it impossible to extend them by analogy to other situations not covered by law. Consequently, judges' abstentions for ethical reasons can only be accepted when the reason for the abstention is clearly covered by one of the grounds for impediment provided for in the country's legislation. This is because there is a certain

predisposition to see this type of abstention as a manoeuvre to avoid responsibility, especially when dealing with sensitive or complex cases. So they are usually rejected with the argument that, if there is no legal impediment, the fulfilment of the judge's functional duty must obligatorily be given precedence.

35. Of course, it cannot be acceptable to oblige a judge to intervene in cases where, whatever the cause, he or she truly feels unable to act with due objectivity and impartiality. Therefore, it would be desirable that the domestic legislation of Ibero-American countries establish, as a generic reason for impediment, a formal statement about it by the judge and that this be sufficient to abstain from hearing the case. If the judge's sincerity cannot be trusted, the problem is of another order. Then it would be necessary to review the methods for choosing or selecting those entrusted with the delicate mission of imparting justice.

36. No less delicate is the situation that arises when legal professionals who have historically worked defending private interests reach the most senior levels of the judiciary. They may reach positions at the top of the judiciary while their law firms continue operating in the hands of partners or junior lawyers who continue to handle their litigation and advisory services, with the advantage of having the veiled support of a supreme court judge. It is desirable for a prominent professional to put his or her skills and experience at the service of the justice system, but not when public influence is used to promote private interests.

37. Equally problematic may be when a very senior judge moves into private practice. Ideally, the office of senior judge should be the last rung on a lawyer's career ladder, and having held this most senior position, they should abstain from carrying out any other professional work except teaching law. This would prevent them from being persuaded to influence their former colleagues and subordinates to obtain favourable decisions or to use the privileged information and expertise they gained as members of the Court for the benefit of others.

38. Nevertheless, for senior judges to give up the practice of law once they leave office requires at least two conditions to be fulfilled at government expense: The first is to grant them a retirement pension sufficient to live with dignity without the need to seek additional income. The second is that the Constitution or the law should prohibit those who have served as high court judges from practising as independent professionals. This would undoubtedly strengthen the dignity of the judiciary, which is at present so threatened and diminished. Citizens cannot but frown on a senior judge who overnight switches to defending private interests. Doing such work ends up contradicting the very positions or opinions that he or she advocated as a member of the Court.

39. Vocational training for judges should aim to prevent this type of conflict, strengthening their convictions about the difficulties caused by switching professions between politics and the judiciary and between the judiciary and independent law practice. This strengthens the judges' sense of belonging and keeps them away from grand political and economic ambitions.

40. On the other hand, where the justice system lacks financial independence, other branches of government can interfere in and control its work. One way to ensure the judicial branch's independence is to allocate a fixed percentage of the national budget for its work. This would prevent the government and legislature from putting pressure on the judiciary by threatening to withhold the resources it needs to carry out its sensitive responsibilities.

41. One of the necessary features of a social and democratic state governed by the rule of law must be respect for principles aimed at ensuring an efficient civil service. The judiciary is a fundamental part of the civil service. It must exercise its functions with the utmost transparency to optimise the use of resources and enhance human dignity in a context of recognition, promotion, and defence of essential values such as freedom, equality, solidarity, and coexistence in a social environment of peace, order, and legality. This requires a judiciary in which judges and magistrates with experience,

knowledge of the subject matter, and the functional skills the position requires, who have held positions within the judiciary efficiently and responsibly, are guaranteed job security, in accordance with the nature and quality of the tasks entrusted to them.

Conclusions

42. From both a constitutional and legal point of view, effective mechanisms must be established to help prevent or discourage judges from entering the political or private spheres, prevent them from returning from politics or litigation to judicial office, and carefully regulate any conflicts of interest that arise.

43. From an ethical perspective, effectively separating the judiciary from politics is especially important. However, this essential ethical obligation, which is the clearest manifestation of the principle of judicial independence, is greatly limited by legislation that generally facilitates the move from politics to the judiciary and vice versa.

44. Because of this, efforts must be made to establish regulations that allow for a judiciary capable of meeting the constitutional expectations of being the guarantor of fundamental rights, primarily human dignity, peace, and a just social order. To achieve this, national government public servants must act with a democratic vocation, autonomy, institutional and legal loyalty so that they have the powers, skill, ability, attitude, and aptitude to identify and synthesise relevant factual situations. Likewise, they must have a deep respect for the human condition, observe due prudence, promptly process, and decide on cases assigned to them in a context of neutrality, objectivity, and punctual application of legal regulations, without allowing interference by interests other than that of implementing justice equitably.

45. Revolving doors in the justice system should not be seen as isolated phenomena but as the product of structural flaws in the constitutional architecture that make them possible. Therefore, without ignoring the fact that adequate ethical training for judges is

the best defence against this type of mobility that so damages judicial integrity, and given that it is not possible to guarantee this high ethical standard in all those who aspire to be or are already officers of justice, the most advisable strategy is to set reasonable and effective limits on the movement back and forth between politics, litigation and the judiciary in the legal system itself.

46. Thus, given that Article 4 of the Ibero-American Judicial Ethics Code states that "*Judicial independence implies that judges are ethically forbidden to participate in partisan political activity in any way*," beyond the ethical and strictly regulatory sphere, there are other cases of express legal authorisation where there is no such prohibition. In the Commission's view, regulatory silence should not be interpreted positively ("everything which is not forbidden is allowed"), as it must be integrated into an ethical mandate that adequately satisfies the expectation of independence and the principle of the division of powers. This implies that one should:

    – always be as strict as possible in interpreting and applying legislation where it permits "double bind" situations, whereby a judge may alternatively serve on partisan political bodies while reserving his or her judicial seat.

    – Reciprocally, in cases where legislation prohibits such a situation, one must also be very rigorous to avoid allowing exceptions or permissions that distort the ethical, and –in those cases also legal– impediment.

47. Similarly, it is worth linking the deontological mandate of Article 4 with the more specific mandate of Article 11, both in the Ibero-American Judicial Ethics Code, whose purpose is to preserve not only impartiality but also the appearance of impartiality, by providing that "*judges must refrain from intervening in cases in which their impartiality could seem to be compromised or in which a reasonable observer might believe that there is reason to think so*." For this reason, judges must act with the utmost sensitivity when faced with genuinely disqualifying situations or situations that may give rise to

well-founded suspicions about their independence and impartiality and promptly inform their colleagues and the parties to the proceedings about such situations. Likewise, the judges assigned to rule on a case must be concerned above all with preserving the judiciary's legitimacy and trust. In this regard, they should be inclined to accept a colleague's abstention or impediment unless there is no factual and legal basis for it.

48. The prohibition in Article 4 of the Ibero-American Judicial Ethics Code against judges participating in any way in partisan political activities is intended to protect judicial independence by preventing political bias in their judgement and decisions. Similarly, it prevents the spread of explicit or implicit conflicts of interest or constraints arising from *revolving doors* situations. To a large extent, Article 4 was not conceived *in the abstract*, but precisely in the knowledge that in the Ibero-American context, there was and still is a frequent and repeated role-switching that has to be controlled in the interest of the transparency and objectivity that should distinguish judicial activity. These virtues presuppose the judge's independence, something that does not come about magically and prodigiously simply by being sworn in to a new office. The reality of this will inexorably dominate the perception by the *reasonable observer* mentioned in Article 11 of the Ibero-American Judicial Ethics Code.