



Sixth opinion, of 5 April 2019, of the Ibero-American Committee for Judicial Ethics on remunerated activity undertaken by judges outside judicial office and its compatibility with ethics. Rapporteur: Elena MARTÍNEZ ROSSO

I. Introduction

1. The framework of action for judges within different legal systems, their incompatibilities, prohibitions or limitations, of either constitutional or legal origin, is usually established by clear and precise provisions.
2. According to basic interpretative guidelines, both prohibitions and limitations on the activity of people, insofar as they affect their freedom, are strictly intellectual, such that analogy and broad interpretation are not admissible as valid methods to determine the scope of such rules.
3. In this matter it can be argued from a strictly legal point of view that that which is not prohibited is allowed, a principle that emerges from the text embodied in Article 10 of the Uruguayan Constitution.
4. The aim of this opinion is to determine whether certain conducts or activities on the part of judges, beyond strict conformity to legal rules under which they would be permitted, transgress the ethical rules that prevail in the community in which they serve.
5. It is expedient to start from the premise that judges enjoy the same constitutional rights and guarantees as other citizens. It is particularly pertinent to highlight the rights to freedom of work and industry; of expression of thought and of privacy.
6. But, at the same time, the office which they freely entered imposes certain restrictions on the exercise of those same rights.

7. In reference to this point, it is pertinent to cite the provisions of section 4.2 of the Bangalore Principles of judicial conduct of 2002:

“As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. In particular, a judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office”.
8. The commentary on the cited principle reads: *“A judge must expect to be the subject of constant public scrutiny and comment, and must therefore accept restrictions on his or her activities that might be viewed as burdensome by the ordinary citizen. The judge should do so freely and willingly even when these activities would not be viewed negatively if carried out by other members of the community or of the profession. This applies to both the professional and the personal conduct of a judge. The legality of a judge’s conduct, although relevant, is not the full measure of its propriety”¹.*
9. In other words, some lawful activities may be regarded as contrary to the ethics that should govern the conduct of a judge, from the perspective of a reasonable observer.
10. Likewise, the Ibero-American Code of Judicial Ethics sets out in Article 55, in the chapter referring to the integrity of judges, that: *“A judge should be aware that appointment to judicial office presupposes requirements that do not apply to other citizens”.*
11. Proper conduct goes beyond the specific domain of the office, in accordance with the provisions of Article 53 of the aforementioned Code, and it should be assessed from the perspective of a reasonable observer (Article 54).
12. As such, tension will always exist for judges between the exercise of their individual rights and the legal and ethical restrictions imposed on them by the performance of their duties.

¹ *“Commentary on The Bangalore Principles of Judicial Conduct”*, United Nations Office on Drugs and Crime, New York, 2013, document available at: https://www.unodc.org/documents/corruption/publications_unodc_commentary-e.pdf

13. Finally, legal rules regarding incompatibilities are comprised of piecemeal provisions that, notwithstanding, leave unresolved areas that create ethical dilemmas.
14. As such, all the cases that will be addressed in this opinion refer to points that in general terms are not included in specific legal rules, but which may compromise the public service ethics of judges.
15. Specifically, we shall address issues relating to the possibility of judges engaging in ethically reprehensible conduct by performing remunerated private activities that are not expressly prohibited by any legal rule.

II. General guidelines for the resolution of cases from an ethical perspective

16. The resolution of ethical problems is always a complex task, since it propels us into an area where there are no absolute rules that might apply regardless of time, place and ethical conscience or the moral values prevailing in a particular environment.
17. As indicated above, not all remunerated activities that judges may perform are prohibited by law. However, once we reach the conclusion that the issue is not covered by any legal rule of prohibition, we may be faced with an ethical problem that affects the discharge of judicial duties.
18. In such cases, some general guidelines exist which may clarify the ethical dilemmas that normally arise.
19. Firstly, there must be an ethical adjustment concerning the conduct or activity to be performed by the public servant as regards its very nature or purpose.
20. It is clear that any individual - including judges - may perform lawful tasks that are nevertheless seen as morally questionable by the society in which they discharge their judicial duties. In this regard, it should be particularly taken into account that higher ethical conduct is required of judges than of other citizens, a circumstance that will raise the standard against which the ethical assessment of such an activity should be made.

21. Secondly, a judge's time is an issue of fundamental importance, but it is difficult to embody in a guideline drawn up a priori.
22. As a rule, judges who adapt their conduct to ethical standards spend most of their time discharging their judicial duties in full and that is what the community in which they operate expects from them.
23. This naturally depends, to a considerable extent, on the quantity and quality of the cases that they must hear, a highly dynamic factor that varies significantly according to the courts in which judges sit during their judicial career.
24. Any other remunerated activity, including one that is expressly permitted, such as a teaching in accordance with Uruguayan law, for example, must be ancillary and subordinate to the total commitment of both time and effort required to perform the duties of a judge.
25. This is how a reasonable observer should be able to perceive it.
26. The office of a judge frequently requires meditation and analysis that occupies a great deal of time, at times many hours and on occasions days, in order to appreciate the question from all possible angles or perspectives, weigh up arguments and find the fairest solution according to what is considered the correct interpretation of applicable law.
27. The judge's mind must be fully concentrated on the search for the solution that is considered correct to resolve the conflict in hand. In such cases, which are not infrequent, judges require all the time available to properly discharge their duties.
28. A task of such relevance and complexity is often incompatible with any other activity, albeit pro bono.
29. The members of the community in which judges operate expect total dedication and commitment from said public servants, proportional to the magnitude of decisions by which a person may be convicted or acquitted, their money appropriated or the fate of their children decided.

30. A judge's image would be ethically compromised if their "other tasks", albeit unpaid, denied them the time they needed to decide in a considered and duly justified manner on all the cases which they must hear.
31. This should not lead us to argue that judges should only engage in the administration of justice. Contact with the society in which they discharge their duties is indeed desirable as they should understand its characteristics, principles and values, in addition to strict reasons of mental health and the need to relax that is common to us all.
32. In any event, time should always be made to continue training, because the career-long professional development that is mandatory in Uruguay in certain areas of law constitutes an ethical duty.
33. Thirdly, it seems clear that judges should avoid engendering potential conflicts of interest by engaging in certain activities, even if they are permitted by law.
34. A judge's dissociation as regards the interests of the parties is what guarantees their impartiality in the eyes of a reasonable observer.
35. This is the basis on which Article 27 of the Uruguayan Commercial Code prevents judges from engaging in business within their jurisdiction.
36. At this point it is necessary to clarify that engaging in business, even outside a certain judge's territorial jurisdiction, may also clash with ethics.
37. This is because a conflict of interests may also arise in such a case in a country of the size and with the political structure of Uruguay.
38. Moreover, the time occupied by the business activity may be incompatible with the commitment that the judicial activity requires.
39. In addition, the nature of the business activity is such that it may have a significant effect on the frame of mind that judges require to perform their duties.

40. This line of reasoning leads us to a final general guideline to be taken into account for resolving the ethical questions involved in the business activities of a judge.
41. This type of activity, haphazard and totally unpredictable as regards results, is a disruptive element that can affect the serenity, equanimity, reflection and moderation necessary for judges to perform their duties without emotional upheavals, beyond those that are inherent to human life.
42. It exposes judges vis-à-vis others to potential economic difficulties that could lead them to default or even file for bankruptcy, which means potentially being in debt to those whom they may have to judge.
43. Merely raising the question makes it unnecessary to reiterate that in such a case they would not have the moral authority necessary to judge their fellow citizens.
44. In short, judges should avoid engaging in inappropriate behaviour and try not to disrupt "normality" as regards the environment in which they operate. They should always bear in mind that they are an ethical point of reference for other members of society.

III. The case of Uruguay: an express prohibition against performing any remunerated private activities

45. In Uruguay, the rules that establish full commitment for judges and include a provision for a specific salary item for such a purpose determine incompatibility with any private remunerated activity.

46. As such, Article 330 of Law 13,640, of 26 December 1967, sets out:

"It is hereby declared that the posts of Judges in the Judiciary are subject to full commitment and consequently they are governed by the rules outlined in subparagraph 2 of Article 158 of Law no.12,803 of 30 November 1960 and concordant articles, as of the effective date of this law".

47. Likewise, Article 158 of Law 12,803 establishes:

*"The rules governing full commitment shall be subject to the following conditions:
(...)*

b) total dedication to the duties of the post, excluding any other remunerated activity, whether it be public or private (...)”.

48. In accordance with the aforementioned regulations, the rules governing full commitment entail total dedication to the duties of the post and exclude any other remunerated activity, except for teaching on legal matters in public higher education, which is expressly envisaged in Article 251 of the national Constitution.
49. As it is a rule of prohibition, there is no possible alternative to a strict interpretation of its scope.
50. The concept of remunerated activity appears quite broad and, in the opinion of this Committee, should be interpreted as any work or service performed by a judge for which they receive payment, whether in cash or in kind. However, in addition, the price and activity must be agreed as bilateral considerations. As such, the result of the sale of goods or products generated by the judge’s work could be excluded, the elaboration of which was not previously agreed, nor was the price determined (legal texts, works of art, etc).
51. Long before the rules establishing “full commitment” for judges, there was an express prohibition in Uruguayan law against engaging in business: “in the territory where [judges] exercise their authority and jurisdiction with permanent tenure”, outlined in Article 27 of the Commercial Code.
52. The possibility of engaging in business outside their territorial jurisdiction would be excluded in the Uruguayan national system by the aforementioned provisions governing full commitment, so long as it was carried out in a personal capacity. However, there may still be some doubt as regards engaging in business outside Uruguayan territory and via commercial companies, since it may be considered that such cases are not covered by the rules governing full commitment or that holding shares in a commercial company is not, in itself, a business act.

IV) Some cases requiring special consideration

1) Work under a relationship of subordination in private activity

53. This is a situation that is clearly excluded in the Uruguayan case, by virtue of the regulations cited above.
54. The Uruguayan legislation that enshrines the rules governing full commitment for civil servants is based on the need to dedicate most of the time available to the tasks of judicial office. As such, it shall be unlawful to engage in work under a relationship of subordination under any legal order that establishes the full commitment system, as in the case of Uruguay.
55. However, if a country's legal order does not establish the full commitment system as a means of excluding any private activity, we may be faced with the breach of an ethical duty.
56. To analyse the conduct from this perspective, the following guidelines should be taken into consideration in accordance with the general assessment guidelines suggested in section II of this opinion: 1) moral adjustment of the nature of the activity that the judge should perform; 2) the degree of time commitment that the private activity entails for the public servant, an aspect that should be regulated using objective criteria (number of hours, weekly frequency, etc.) and 3) the potential creation of conflicts of interest that may compromise both the independence and the impartiality of the judge.

2) Administration of personal or family assets

57. Uruguay does not have an explicit rule governing this situation, unlike other legal systems in which it is established as an activity that is compatible with the judge's office². Notwithstanding this, it is necessary to analyse such a hypothesis in the light of the provisions that regulate the matter and, above all, on the basis of the ethical guidelines that were initially proposed.
58. In accordance with the Committee's criterion, the administration of personal or family assets shall be compatible or incompatible with judicial office depending, firstly, on the legality of the objects or property to be administered and, secondly,

² By way of example, Article 19(a) of Spanish Law 53/1984 of 26 December on Incompatibilities for Personnel in the Service of Public Administrations, excludes activities arising from the administration of personal or family assets from the rules governing incompatibilities.

on the degree of activity and the time it may occupy without compromising the full performance of judicial duties.

59. It should be noted that the rules governing incompatibilities aim to ensure that judges' time is dedicated principally to their duties and they are not distracted by other tasks to the detriment thereof.
60. However, no guidelines can be established a priori regarding the degree of commitment needed for administrative tasks. As such, if the administration of personal assets requires judges to devote a significant amount of time or effort, they may be engaging in ethical misconduct if to some extent they neglect the absolute priority of discharging their judicial duties fully, properly and in a timely manner.
61. Secondly, there could be ethical misconduct on the part of judges as regards the origin of the income that makes up their personal assets (for example, activities that are unlawful or contrary to prevailing public morality).
62. Finally, the very concept of administration is ambiguous.
63. According to the third definition of the word "administrar" [administer] in the *Diccionario de la Lengua Española* [Dictionary of the Spanish Language], the concept of administering consists of: "*Ordenar, disponer, organizar, en especial la hacienda o los bienes* [order, arrange, organise, especially property or assets]"³.
64. On the basis of this concept, the question may arise as to whether administration refers only to preservation of assets, or if, on the contrary, it also includes augmenting them via investment or putting them into products or services that enable them to increase.
65. In the Committee's opinion, administration includes any activity that helps to preserve or increase assets and the moral adjustment entailed therein should be analysed in accordance with the proposed guidelines.

3) Commercial activity that is not expressly prohibited by rules

66. As indicated above, Article 27 of the Uruguayan Commercial Code sets out an express prohibition against engaging in business within the judge's territorial

³ *Diccionario de la lengua española*, twenty-third edition, 2016, online version: <<https://dle.rae.es/?id=0mFISCm>>

jurisdiction. Until 1967, this provision allowed for the interpretation that the possibility existed that judges could engage in business activity in territories other than those under their jurisdiction⁴. After 1967 the total commitment system was established which, it could be argued, eliminates any doubt regarding interpretation. Engaging in business in a personal capacity is a remunerated private activity and, as such, it is expressly prohibited by the provisions cited previously.

67. However, potentially engaging in business persists as an ethical dilemma in the following cases: a) legal systems in which private remunerated activity is not prohibited; b) participation in commercial companies, if it is understood that this entails commercial transactions; and c) engaging in business activity outside the national territory of the State that the Judge serves.
68. The general guidelines outlined in section II of this work shall inform the search for the ethical solution to each of these dilemmas.
69. Of particular interest is the case analysed by the Spanish Supreme Court in the judgment handed down by the Third Chamber for Contentious Administrative Proceedings, Section 7 of 27 November 2013, Appeal 341/2012, ES:TS:2013:6124, reporting judge: Pico Lorenzo, dissenting vote: Conde Martín de Hijas.
70. In said judgment, the Court declared lawful the ruling of the General Council of the Judiciary that found that the status of Judge is incompatible with that of partner with a 50% stake in a commercial company engaged, inter alia, in the activity of providing legal services (the other 50% corresponded to the judge's spouse who was a lawyer).
71. The Court analyses what is meant by "commercial activity" performed by a judge in the current social situation, establishing that the possibility of exerting control over the operation of the business (note that the judge owned half of the shares) should be considered equivalent to engaging in business activity through a third party.

⁴ Reference is made exclusively to the case of judges whose jurisdiction is limited territorially to areas other than that of the national territory as a whole. Clearly, judges with national territorial jurisdiction would be fully subject to the prohibition.

72. It should also be noted that this judgment of the Spanish Court expressly cites Article 55 of the Ibero-American Code of Judicial Ethics in its grounds, as well as other ethical rules, both European (in particular, the *Magna Carta* of Judges, Fundamental Principles, adopted in 2010 by the Consultative Council of European Judges) and international (Bangalore Principles of judicial conduct).
73. In short, and in the opinion of the Spanish Court, in reference to the management of the company by the judge, it is such a strong economic and legal link that "it may affect the appearance of objective impartiality for the performance of judicial duties". However, the Supreme Court emphasises, "Neutrality and the appearance thereof is absolutely necessary with regard to a judge in a transparent and democratic society, especially if we interpret it in accordance with international ethical criteria regarding the conduct of judges". This leads the Supreme Court to reject the Spanish judge's claim to continue as a partner in the company she owned with her husband, insofar as "mere possession of half of the shares implies engagement in the activity of the company". This did not prevent one of the seven magistrate judges from dissenting from the ruling, stating: "I believe that our judgment, borne of an excessive preoccupation to safeguard the appearance of impartiality, is in reality vitiated by a highly superficial discourse in legal terms".
74. Such concepts are fully transferable to any legal system that has a prohibition against judges engaging in business, in a personal capacity, within their territorial jurisdiction.
75. Consequently, ethical problems arise in cases of minority holdings in commercial companies that do not permit any form of control over the operation of the business, or in those cases in which the company operates outside the territorial jurisdiction of the judge.

76. In such cases, ownership of shares is passive, not active, conduct, such that it cannot be included in the concept of remunerated activity.

77. In any event, such activity should be analysed ethically by applying the guidelines proposed in section II of this opinion.

4) Provision of religious, mystical or esoteric services (fortune telling, healing, clairvoyance, tarot, etc)

78. Such activities should be considered to be expressly excluded by specific rules, as occurs in the Uruguayan case, provided they are remunerated activities.

79. For legal systems that do not have a broad prohibition against remunerated private activity, as in the case in Uruguay, engaging in services of this type may entail an infringement of legal prohibitions or ethical duties.

80. Indeed, activities of this type have some of the characteristics of business activity and may be subject to the same questions that were raised when such activity was analysed. However, on the other hand, the performance thereof may be considered an outward manifestation of the judge's participation in a certain group of people, placing them in a position that any reasonable observer might call into question from the perspective of the independence and impartiality that a judge should possess.

5) Production of legal texts

81. The production of legal texts by judges and the compatibility thereof with ethics requires a series of clarifications and elaborations before it is addressed in this opinion.

82. There are countries in which all remunerated activity, except teaching in most cases, contravenes the rules under which a judge's salary is comprised of a specific item called "total incompatibility", an expression that includes any other remunerated service or work.

83. The publication of legal works, insofar as it facilitates obtaining earnings arising from such an activity, would in such cases contravene the current rules and, consequently, the ethics of a judge.
84. In legal systems in which no such limitation exists, no ethical dilemma is observed in the performance of such an activity in return for compensation, except in the case in which the burden of the judge's work or the time required to discharge their duties properly and in a timely manner, without diminishing their performance and the quality of the final outcome of their work, are affected by the task of producing legal texts.
85. In such a case, even judges who published legal texts or works of any other kind free of charge would be in breach of their ethical duties, as indicated in section II of this work.

6) Performance of remunerated tasks for foreign States (consultancy) or discharge of duties in international organisations

86. In this case, at least in Uruguayan law, we are again faced with a situation that cannot be considered to be prohibited by legal rules. As such, to rule on the ethical propriety of the conduct of a judge who provides services for a foreign State (as a legal advisor for legislative reform, for example) or for an international organisation in return for remuneration, it is necessary to follow the interpretative guidelines outlined above.
87. It is especially important to analyse the ethical adjustment of the activity undertaken (for example, it could not refer to legal reform that transgresses our society's moral principles), as well as the degree of intellectual and time commitment required for the task.

IV) Final reflections

88. Judges are required to make greater sacrifices than other citizens in light of the importance and complexity of the sacrosanct duties they must discharge.
89. Ethical problems that eschew the regulatory legal framework for the activity of judges are always difficult to clarify, but the existence of clear guidelines for the analysis of the cases that may arise is of fundamental value and that has been the

main purpose of this opinion, which is no more than an approximation and an invitation to reflect on a topic of such importance for judges and for all legal operators.

