



Fifteenth Opinion, of 30 April 2021, of the Ibero-American Commission on Judicial Ethics on the ethical implications of judges' relationships with the State's most senior politicians when judging cases in which they are involved

I. Introduction

1. On 20 April 2021, Commissioner Fernández Mendía sent a query to the Executive Secretariat of the Ibero-American Commission on Judicial Ethics about whether, in light of the Ibero-American Code of Judicial Ethics, there were ethical implications for the conduct of senior criminal court judges based in a capital city who meet socially with the Head of State on repeated occasions while their courts are conducting proceedings in which senior government officials' performance of their duties is under investigation, irrespective of their political allegiance, without recusing themselves and refusing to consider such a possibility.
2. In his query, the commissioner explains that this issue was raised by means of a memo sent by a senior judge from the Argentinian Federal Court of Criminal Appeals, with respect to the conduct of senior criminal court judges. According to this document, the situation involved repeated social visits by such judges to the President of the Republic at different official locations during his term of office, while their respective courts were conducting proceedings in which senior political leaders' performance of their duties was under investigation, without establishing their recusal, in accordance with the principles of independence, transparency and impartiality.
3. In its response, the Ibero-American Commission on Judicial Ethics must firstly establish its competence and the scope of this opinion; secondly, it must determine the constitutional and jurisdictional principles governing how a judge or senior judge of a court acts in relation to political leaders who are or who may potentially find themselves subject to investigation and prosecution or whose actions may affect other politicians; thirdly, the Commission must set out the ethical aspects of these relationships from the perspective of the Ibero-American Code of Judicial Ethics; and finally, the Commission will conclude with some general assessments in this respect.

II. The Commission's competence and the limits of ethical judgements

4. As a preliminary, it is necessary to determine the competence of the Ibero-American Commission on Judicial Ethics and the limits of its judgements, since the advisory role which it has been assigned prevents it from acting as a court or as an arbitrator of the conduct of third parties.



5. On the one hand, Article 83(a) of the Ibero-American Code of Judicial Ethics assigns the Commission the power to settle ‘the queries made by Commissioners or Delegates with respect to whether the conduct of public servants within judicial bodies adheres to judicial ethics, as well as when an internal judicial ethics body from one of the States has issued a decision on issues of this nature and requests an opinion from the Ibero-American Commission’.
6. This power was assigned by the Ibero-American Judicial Summit by virtue of the amendments to the Ibero-American Code of Judicial Ethics introduced at the General Assembly in Santiago, Chile in 2014, whose aim was to foster more extensive and effective involvement on the part of the Commission.
7. Nevertheless, the Commission has no competence to resolve individual issues, nor to interfere in political debate or the proceedings of the disciplinary or ethical bodies of the members of the Ibero-American Judicial Summit.
8. It should be noted, however, that Article 45 of the Code justifies judges themselves taking action in the fulfilment of ethical obligations, stipulating: ‘Judges should report any serious breaches by their colleagues to the appropriate authority’. Such queries, therefore, would be justified under the terms determined by the Code, and these have been met in this case.
9. On the other hand, the Commission cannot act as a court with respect to the conduct of third parties because it has not heard both parties to this effect, nor does it possess all the details of the specific case from which the query arose. Consequently, while it stems from very specific circumstances, the Commission will issue this opinion in an attempt to determine how the principles enshrined in the Code apply to similar circumstances that might arise within the Ibero-American judicial sphere.
10. The Commission will therefore address the ethical implications that might arise in similar cases, based on pertinent generalisations drawn from specific circumstances. In this way, the Commission can help promote a culture of integrity among Ibero-American judges, enabling a strengthening of the principles and virtues that form the framework of ethical requirements for the profession of judge in today’s society.
11. In this respect, Article 95 of the Code is completely clear: ‘The opinions, recommendations, advice or any decision issued by the Ibero-American Commission will in no case be binding on Judiciaries, Councils of the Judiciary or the Judicial Summit itself’. The Commission is therefore responding to this query in order to shed light on the most appropriate behaviour from an ethical standpoint, without seeking to resolve a specific case nor, of course, rule on its prior or subsequent legal vicissitudes.



12. It is precisely in this spirit that the Commission approaches the general examination of a situation that could occur in any of the countries within the Ibero-American community where judges are frequent visitors of the most prominent political leaders, with special regard to members of a State's highest courts, when cases involving current or past members are being investigated or tried.

III. Relationships between judges and political leaders: separation of powers, appearances and public trust

13. The manner in which a judge or court acts in relation to political representatives who are or who may eventually become the subject of judicial investigation and prosecution should be no different from the behaviour required of them with respect to any other defendant or litigant. Nevertheless, prudence dictates that judges should exercise caution under these circumstances, since appearances are, if possible, yet more important in these cases.
14. Indeed, the most recent jurisprudence of supranational courts, both in the Americas and in Europe, has underlined the growing importance of the rule of law and the separation of powers in the exercise of the judicial function¹.
15. As an example, the Court of Justice of the European Union reiterates in the *Repubblika judgement* (2021): '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'².
16. In the same vein, the Inter-American Court of Human Rights, based in San José, Costa Rica, uses similar language. Thus, the Inter-American Court states: 'the State must guarantee the autonomous exercise of the judicial function as regards both its institutional aspect, that is, in relation to the Judiciary as a system, as well as its individual aspect, that is, in relation to the specific judge. The Court deems it appropriate to clarify that the institutional dimension relates to aspects that are essential to the rule of law, such as the principle of the separation of powers and the important role of the judicial function in a democracy. Consequently, this

¹ Romero, María Luisa, María Judith Arocha and Vanessa Coria (2019): *Compendio de Estándares Internacionales para la Protección de la Independencia Judicial* [Compendium of International Standards for the Protection of Judicial Independence], Centro por la Justicia y el Derecho Internacional (CEJIL), San José, Costa Rica.

² CJEU, Judgment of the Court (Grand Chamber) of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311.

institutional dimension goes beyond the figure of the judge and has a cumulative impact on society as a whole³.

17. The Inter-American Court also reiterates: ‘one of the main objectives of the separation of public powers is the guarantee of judicial independence. The State must guarantee this autonomous exercise of its duty both in its institutional aspect, that is, in relation to the Judiciary as a system, as well as in its individual aspect, that is, in relation to the specific judge. The purpose of judicial protection lies in preventing the judicial system in general and its members in particular from finding themselves potentially subject to undue restrictions in the exercise of their duty imposed by bodies outside the Judiciary or those responsible for review or appeal proceedings’⁴.
18. These current and repeated considerations in the Americas and in Europe are anchored in the application of the fundamental right to a fair trial (Article 6 of the European Convention on Human Rights), effective legal protection (Article 47 of the Charter of Fundamental Rights of the European Union) and judicial guarantees and protection (Articles 8 and 25 of the American Convention on Human Rights).
19. Nevertheless, both the European Court of Human Rights and the Court of Justice of the European Union argue that neither Article 6 of the European Convention on Human Rights, which enshrines the right to a fair trial, nor Article 47 of the Charter of Fundamental Rights of the European Union, which proclaims the right to effective judicial protection, requires States to adopt a particular constitutional model governing in one way or another the relationship and interaction between the various branches of the State, nor requires those States to comply with any theoretical constitutional concepts regarding the permissible limits of such interaction⁵.
20. Nevertheless, the Strasbourg Court recognises that: ‘a certain interaction between the three branches of government is not only inevitable, but also necessary, to the extent that the respective powers do not unduly encroach upon one another’s

³ Inter-American Court, *López Lone et al. v. Honduras*, Preliminary Motions, Merits, Reparations and Costs. Judgment of 5 October 2015. Series C No. 302, § 194.

⁴ Inter-American Court, *Rico vs. Argentina*, Preliminary Motions and Merits. Judgment of 2 September 2019. Series C No. 383, § 53.

⁵ ECtHR (Grand Chamber), Judgment of 6 November 2018, *Ramos Nunes de Carvalho e Sá v. Portugal*, EC:ECHR:2018:1106JUD005539113, § 144. CJEU, Judgment of the Court (Grand Chamber) of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, EU:C:2019:982, § 130.

functions and competences. The question is, once again, whether in a given case the requirements of the Convention are met⁶.

21. In short, the supranational courts in the Americas and in Europe have developed a body of jurisprudence which reinforces the two dimensions of judges' independence: external, corresponding to independence; and internal, corresponding to impartiality. As the Court of Justice of the European Union points out in Section 53 of the abovementioned *Repubblika judgement* (2021): 'the guarantees of independence and impartiality required under EU law presuppose rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, that are such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it'.
22. The *raison d'être* of this jurisprudence is always the same: the public's trust in justice. Thus, the Strasbourg Court, in established jurisprudence, such as that which stems from the *Micallef v. Malta* (2009) judgement, affirms that what is at stake is 'the confidence which the courts in a democratic society must inspire in the public⁷'. Moreover, according to the *Baka v. Hungary* (2016) judgement: 'The Court has on many occasions emphasised the special role in society of the judiciary, which, as the guarantor of justice, a fundamental value in a law-governed State, must enjoy public confidence if it is to be successful in carrying out its duties. It is for this reason that judicial authorities, in so far as concerns the exercise of their adjudicatory function, are required to exercise maximum discretion with regard to the cases with which they deal in order to preserve their image as impartial judges⁸'.
23. Similarly, according to the Court of Justice of the European Union, as can be seen in Section 72 of the *Repubblika judgement* (2021), it is a question of ensuring that national provisions relating to judicial appointments do not 'give rise to legitimate doubts, in the minds of individuals, as to the imperviousness of appointed members of the judiciary to external factors – in particular, to direct or indirect influence from the legislature or the executive – and as to their neutrality vis-à-vis the interests before them, and thus lead to those members of the judiciary not being regarded as independent or impartial, the consequence of which would be to undermine the trust which justice in a democratic society governed by the rule of law must inspire in individuals'.

⁶ ECtHR, Judgment of the Court (Grand Chamber) of 1 December 2020, *Guðmundur Andri Ástráðsson v. Iceland*, Application No. 26374/18, EC:ECHR:2020:1201JUD002637418, § 215.

⁷ ECtHR, Judgment of the Court (Grand Chamber), of 15 October 2009, *Micallef v. Malta*, Application No. 17056/06, EC:ECHR:2009:1015JUD001705606, § 99.

⁸ ECtHR, Judgment of the Court (Grand Chamber) of 23 June 2016, *Baka v. Hungary*, Application No. 20261/12, EC:ECHR:2016:0623JUD002026112, § 164.

24. In short, judges' independence and impartiality should raise neither doubts nor fears in defendants appearing before the courts, nor generate distrust among the general public.
25. This, then, is the reason why some countries have established their own constitutional or legal rules prohibiting judges' involvement in party politics. Furthermore, some national legislation includes a judges' charter which establishes disciplinary measures representing a strong deterrent to judges' involvement in politics.
26. For illustrative purposes, it should be noted that in Spain, Article 127 of the 1978 Constitution prohibits working judges' membership of both political parties and trade unions. In accordance with the constitutional mandate, Article 395 of the 1985 Organic Law on the Judiciary establishes the following prohibition: 'Neither judges nor senior judges may belong to political parties or trade unions or be employed in their service'. Consequently, Spanish judges are prohibited from: 'praising or criticising the public powers, authorities, officials or official bodies with respect to their actions, **as well as attending, in their capacity as members of the Judiciary, any public events or meetings that are not judicial in nature, except for those intended to pay respect to the monarch or those to which they have been summoned or authorised to attend by the General Council of the Judiciary**'. In specific terms, Article 418.3 of the Organic Law on the Judiciary classifies as serious misconduct: 'praising or criticising the public powers, authorities, officials or official bodies with respect to their actions, citing their status as a judge, or taking advantage of this status'.
27. In similar terms, subparagraphs 4 and 6 of Article 9 of Costa Rica's Organic Law on the Judiciary (1997) prohibit any official or employee of the Judiciary from: 'praising or criticising officials and official bodies with respect to public actions, except on matters in which they are involved in defence of legitimate interests and subjective rights and in cases where the law permits' (subparagraph 4) and 'taking an active part in meetings, demonstrations and other acts of a political, electoral or party-political nature, even though this is permitted for other citizens'. Article 35 of the Regulation for the Prevention, Identification and Correct Management of Conflicts of Interest in the Judiciary of Costa Rica refers to political participation and misuse of status for the benefit of political groups, stipulating: 'No person in the service of the Judiciary may participate in political or electoral procedures or activities - attending associations, meetings, demonstrations, voting in the internal elections of political groups or any other political or party-related action - nor express opinions or comments that can be explicitly interpreted as a statement of membership of a particular party or political affiliation, including those issued using any information media, social network or the Internet, with the sole exception of

casting their vote in national elections’. The Costa Rican Regulation also establishes that: ‘Persons in the service of the Judiciary and judicial officials will avoid participating in events of an unofficial nature where political figures are in attendance when this might compromise trust in the independence of the Judiciary’.

28. In short, meetings between judges and senior politicians may impinge on the separation of powers as a basic principle of the rule of law. Consequently, as has been shown, some constitutional and legal rules in Ibero-America prohibit such actions or submit them to authorisation and may establish disciplinary consequences for those who fail to comply with such rules.

IV. The ethical regulation of judges’ meetings with government policy-makers: independence, impartiality and ethical virtues

29. The Ibero-American Code of Judicial Ethics includes three types of specific provisions applicable to the circumstances under examination by this Commission, which are also linked to the principles of judges’ independence and impartiality and judicial virtues.
30. It is important to bear in mind that the specific case at the centre of the original query involved several Supreme Court judges who visited the offices of the President of the Republic while, at the same time, this Court was bringing criminal cases against members of the Executive branch.
31. Based on these facts, the most salient point is that the courts involved are of the highest level. It is not hard to share the view, as this Commission has already stated, that ‘the greatest dangers to and attacks on the independence of judges appear in the highest spheres of the judicial structure, where disputes of the greatest national significance are finally resolved’⁹. For the same reason, ethical duty and public exemplariness are all the more necessary in these circumstances.
32. Firstly, with respect to independence, Article 4 of the Code establishes specifically that: ‘Judicial independence means that, ethically, judges are prohibited from participating in party political activity in any form’.
33. This provision, with the scope of an ethical principle, is independent of the constitutional and legal model of the Judiciary that is in force at a given place and time. It follows from this principle that judges should, at all times and under all circumstances and in the exercise of their functions, maintain a distance from ‘party political activity’.

⁹ Castro Caballero, Fernando A. (ed.), *Annotated Ibero-American Code of Judicial Ethics*, Ibero-American Commission on Judicial Ethics, Judicial Branch, Superior Council of the Judiciary, Bogotá, 2019, p. 44.

34. This means that they cannot participate in party activities, whether in public or in private¹⁰. It may seem obvious to add that judges should not take part in any form in legitimate debate between political parties.
35. The need to maintain the separation of powers, in particular between the Executive and the Judicial branches, suggests that judges should exercise particular caution in all kinds of gatherings or meetings, whether in public or in private, between judges and members of the Executive branch of the Government. Only public meetings and those required by protocol, devoid of any party-political significance, would be ethically admissible, whereas any type of meeting between judges and politicians, whether public or private, would be thoroughly inadvisable.
36. Furthermore, and with greater reason, any meetings with members of the Executive, including the Head of State or the President of the Republic, with a view to reaching agreements or making arrangements related to the exercise of the jurisdictional function would be proscribed by a proper understanding of judicial ethics.
37. Secondly, with respect to the impartiality of the Judiciary, Article 11 of the Code stipulates: ‘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’. There are other articles in the Code which also refer to impartiality, such as Article 13, requiring judges to ‘avoid any appearance of preferential or special treatment toward lawyers and defendants or litigants’ and Article 10, requiring judges to maintain ‘an equal distance from the parties and their lawyers’ and to avoid ‘any conduct which might reflect favouritism, predisposition or prejudice’. Article 15 of the Code, meanwhile, clearly discourages meetings with defendants and litigants in the following terms: ‘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 might reasonably consider unwarranted’¹¹.
38. In circumstances where impartiality may be compromised, judges have a legal and ethical obligation to recuse themselves or admit the challenge made by the parties. In this scenario, there is no doubt that contact with one of the parties involved in the procedure - whether before or, with greater reason, while it is ongoing - would

¹⁰ The Commission has stated its position on the consequences of Article 11 of the Code in several of its opinions. These include the Fourteenth Opinion, of 12 March 2021, on inappropriate relations that may occur between justice and politics or between justice and the independent practice of the legal profession: ethical proposals in the face of ‘revolving doors’ (Reporting judges: Commissioners Hernán A. de León Batista and Fernando A. Castro Caballero) and the Twelfth Opinion, of 16 October 2020, on judges’ ethics and freedom of expression (Reporting judge: Commissioner Elena Martínez Rosso).

¹¹ 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.

legally and ethically disqualify the judge from continuing to hear the case. It should be noted that in some procedural systems, such as in Uruguay, there is an alternative to recusal when a judge feels that their relationship with the parties does not justify their withdrawal from the case but does require an explanation of its nature. In this case, they are required to do so at the earliest possible opportunity, in order that the parties may make any challenge they deem necessary. In these cases, judges participating in any type of meeting where issues pertaining to the case before their court have been addressed must recuse themselves.

39. Thirdly, with respect to the judicial virtues entailed in conduct of this nature, involving visits or meetings between judges and senior politicians, it is essential to take into account the need to cultivate judicial virtues such as discretion and prudence.
40. With respect to discretion, it is important to note the provisions of Article 60 of the Code, in accordance with which: ‘Judges should avoid conduct or attitudes that might be considered an unjustified or excessive pursuit of social recognition’. In this case, even if the judges’ meetings were only for cultural or sporting purposes and involved no discussion of matters relating to the case before the Court, they should either have been avoided or, at least, have been kept to the minimum required by protocol or duty to the State’s most senior politicians.
41. With respect to prudence, as applied to meetings between judges and political leaders, Article 69 of the Code advises: ‘A prudent judge seeks to ensure that their conduct, attitudes and decisions are the result of rationally justified judgements, formed after having considered and evaluated the available arguments and counter-arguments, within the framework of the applicable law’. In the factual case that gave rise to the query, prudent judgement would have anticipated the potential for suspicion of bias generated by repeated visits to the offices of the nation’s President.
42. The application of the ethical principles of judges’ independence and impartiality and the virtues inherent to the exercise of the judicial function must reflect on the judicial process in such a way that they should be determining factors in the behaviour of judges involved in such meetings with respect to the reasons for recusal and in the evaluation of grounds for recusal.
43. Furthermore, these considerations apply to all levels of the judicial hierarchy. Above all, however, it is the judges of the Superior and Supreme Courts who are especially obligated by their duty to set an example which radiates outward to reach even the humblest of judicial officials.

V. Conclusion

44. The Ibero-American Commission on Judicial Ethics wishes to reiterate that the exercise of the judicial function is based on the public's confidence in its judges. The real and effective separation of powers is essential; at the same time, it is also essential to avoid conveying an impression of the blurring of powers, since appearances are of paramount importance in this regard.
45. The case at the centre of the query concerns repeated social meetings by several Supreme Court judges at a time when proceedings were already in progress or when it was foreseeable that prosecutions of political leaders would be instituted.
46. In this case, there is an appreciable repercussion on the principle of separation of powers and the judges should be considered to have violated the ethical principle of independence.
47. At the same time, the principle of impartiality has also been compromised, inasmuch as the special treatment of one of the parties might inspire fear in the other defendants. The fact that the matter involves senior figures in the State's highest institutions has extraordinary significance for other judges and public officials.
48. Finally, from the point of view of judges' behaviour, to paraphrase the European jurisprudence referred to above, any judges who have legitimate concerns about their lack of impartiality should recuse themselves.
49. In conclusion, the necessary harmonious cooperation between the organs of the State does not, of course, preclude judges attending public meetings with the State's most senior politicians in an institutional capacity and as a matter of courtesy. Nevertheless, familiarity, regular interaction and the presence of judges in government agencies are strongly discouraged. Under these conditions, the necessary provisions must be taken to ensure transparency and public disclosure with respect to such meetings and to ensure that no private meetings are held which might give rise to any form of suspicion.
50. Thus, without prejudice to courtesy and the fostering of good institutional relations between judges and other powers of the State, in particular the Executive branch, it is not acceptable in this day and age for a judge to form part of the government's entourage, and any indications of obsequiousness or indulgence shown by judges with respect to other powers of the State can only have a detrimental effect.