Global Network
on Electoral Justice

Judicial Independence:
Main Threats and Available Solutions

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I. INTRODUCTION

This document seeks to analyze and identify, with an international and comparative approach, the main threats impacting judicial independence, as well as the available solutions arising mainly from the jurisprudence of regional courts for the protection of human rights and from international standards established by hard and soft law sources.

Judicial independence, together with due process, is a key attribute for providing effective and efficient delivery of justice to citizens and thus protecting their fundamental rights. Therefore, judicial independence represents a core aspect of electoral justice because it guarantees political and electoral rights, which are fundamental rights of citizens. Along with the principle of due process, the principle of judicial independence distinguishes the constitutional function of jurisdiction in the framework of constitutional democracy, these principles being essential to guarantee both the rule of law and fundamental rights and freedoms.

This is a classic principle of constitutionalism, already confirmed since the end of the 18th century by jurists such as Montesquieu, who stated that "... there is no liberty ... when the judicial branch is not separated from the legislative and executive branches. Being united to the first, the rule over the life and liberty of citizens would be arbitrary, since the judge and legislator would be one and the same. Being united to the second would be tyrannical, for the judge would enjoy the same strength as an aggressor" (Montesquieu, 1748); or like Hamilton, who would say that "the judicial department is, without comparison, the weakest of the three departments of power; that it can never successfully attack either of the other two, and that all sorts of precautions are necessary to enable it to defend itself against the attacks of the other two" (Hamilton, 1788).

The development of contemporary constitutionalism has enriched the principle of judicial independence, distinguishing, for example, an external and objective dimension and an internal and subjective dimension, and stressing the importance of the judiciary not only being independent, but also appearing as such.

In the specific area of electoral justice, judicial independence generates public confidence in the judiciary and in the electoral process as a whole. Judicial independence implies that the judiciary operates in accordance with standards of fairness and impartiality and is immune to external or internal improper influences. Judicial independence can, therefore, create the conditions for members of society and participants in electoral processes to be treated fairly and equitably in accordance with the law and to increase their incentives to respect the outcomes of court rulings. This guarantees a fair electoral process, a

necessary condition for the proper functioning of representative democracy and the rights of political participation.

In order to achieve the objective of this document, we intend to develop the previous deliverables of the Observatory on Judicial Independence of the Global Network on Electoral Justice ("Judicial Independence, Due Process, Relationship between the Powers of the State and International Standards" - Deliverable 2021; and "Judicial Independence and Due Process in Electoral Justice. Analysis of International Principles and Rules and Their Comparative Applications" - Deliverable 2022). Based on these two documents, this deliverable focuses more deeply on the issue of judicial independence and deals particularly with describing some of the main threats to this principle and possible solutions to these threats.

The document opens with an introduction dedicated to the regulatory framework on judicial independence, which today is made up of texts of a very heterogeneous nature, including both hard and soft law regulatory texts, as well as good practice codes or codes of self-discipline, which are of utmost importance in this regard.

It continues with an articulation of the different points of interest individualized with reference to judicial independence, and which underline the existence of both internal and external threats to this principle: political interference in the mandates of judges; budget cuts; interference with judicial councils; revolving doors. Each point of interest includes references to specific cases and possible solutions derived from international and comparative standards on judicial independence.

The principle of judicial independence is based on a very complex regulatory framework, both at the national and supranational levels. At the national level, the vast majority of the constitutions in force contain specific references to the principle of judicial independence, which are quite detailed, leaving to the law the definition of the particular tools required to develop this principle. At the international level, the principle is established in human rights charters or declarations at both the universal and regional levels; moreover, the principle is developed in different documents such as opinions, commentaries and/or self-discipline codes elaborated by governmental or non-governmental organizations, scientific institutes, independent bodies and judges' associations.

This set of norms, rules and standards seeks to establish, in general, the issue of judicial independence as a fundamental tool for the protection and development of the rule of law and fundamental freedoms; and also deepen specific issues, problems and challenges that concern judicial independence. This first part includes a compilation of the most

general principles, while the more specific aspects will be used in the following pages as references to possible solutions to the threats affecting judicial independence today.

At the global level, the foundation of judicial independence is in the Universal Declaration of Human Rights adopted by the UN in 1948 (United Nations, 1948). These principles were normalized by the International Covenant on Civil and Political Rights of 1966 (United Nations, 1966). The first document states that: «Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations or of any criminal charge against them»; and, similarly, the second document states that: «Everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of any criminal charge against them or of their rights and obligations under civil law».

This last article, like the others in the Covenant, was the subject of a General Comment adopted by the Human Rights Committee, No. 13 of 1984 (United Nations, 1984), replaced by No. 32 of 2007 (United Nations, 2007). In the latter document it was generally stressed that: «The right to equality before courts and tribunals and to a fair trial is a fundamental element of human rights protection and serves as a procedural means of safeguarding the rule of law»; and, among others, it adds that: «The requirement of the competence, independence and impartiality of a court within the meaning of article 14, paragraph 1, is an absolute right from which no exception may be made. The requirement of independence refers, particularly, to the procedure and qualifications for the appointment of judges and guarantees in relation to their security of their tenure until the mandatory retirement age or the expiration of their term of office, where it exists, the conditions governing promotions, transfers, suspension and termination of their functions, and the effective independence of the judiciary from political interference by the executive and legislative branches. »

More specific documents on the role of judges have been adopted in the Universal Human Rights System in recent decades, including the Basic Principles on the Independence of the Judiciary of 1985 (United Nations, 1985) and the Bangalore Principles on Judicial Conduct of 2006 (United Nations, 2006). The first reads, among other things, that: «The independence of the judiciary shall be guaranteed by the State and proclaimed by the Constitution or the legislation of the country. All governmental and other institutions shall respect and abide by the independence of the judiciary. Judges shall be impartial in deciding the matters before them, on the basis of the facts and in accordance with the law, without any restriction and without undue influence, inducement, pressure, threats or interference, whether direct or indirect, from any quarter or for any reason whatsoever. Undue or unjustified interference in the judicial process shall not be made, nor shall judicial decisions of the courts be subject to review. This principle shall apply without prejudice to

judicial review or to the mitigation or commutation of rulings imposed by the judiciary and carried out by the administrative authorities in accordance with the provisions of the law». The second states that: «Judicial independence is a prerequisite of the principle of legality and a fundamental guarantee of the existence of a fair trial. Thus, a judge must uphold and exemplify judicial independence in both its individual and institutional aspects».

The principle of judicial independence is also clearly established in the main regional conventions for the protection of human rights, as a fundamental part of the individual right to due process. At the European level, Article 6 of the European Convention on Human Rights states that: «Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, which shall decide disputes concerning their rights and obligations in a suit at law or concerning the merits of any criminal charge against them» (Council of Europe, 1950); and, similarly, Article 47 of the Charter of Fundamental Rights of the European Union states that: «Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law» (European Union, 2000). Article 8 of the American Convention on Human Rights states that: «Everyone is entitled to a fair and prompt hearing, within a reasonable time, by a competent, independent and impartial tribunal, previously established by law, in the determination of any criminal charge against them, or of their rights and obligations of a civil, labor, fiscal or any other nature» (Organization of American States, 1969); finally, according to Article 26 of the African Charter on Human and Peoples' Rights, «States signatory to the present Charter shall have the duty to guarantee the independence of the courts of law» (African Union, 1981).

It is interesting to note, how the principle of judicial independence is also the subject of more specific documents, often drafted by specialized organizations and in relation to specific problems and particular situations. Some examples include the work of the Special Rapporteur on the independence of justices and attorneys, who prepares and submits thematic reports to the UN Human Rights Committee; also noteworthy are the reports of the Venice Commission, which has published a Report on the independence of the judiciary and several reports on the reforms of judicial systems adopted in various countries, particularly in democracies that are not fully consolidated.

Finally, we note the presence of significant documents drafted by judges' associations, which are important to complete the framework of reference on judicial independence. For example, reference can be made to the Universal Statute of the Judge approved by the International Union of Justices in 1999, which states that: «The independence of the judge is indispensable for impartial justice under the law. It is indivisible. It is not a prerogative or a privilege granted for the personal interest of judges, but is granted the rule of law and

the interest of any person who asks for and expects impartial justice» (International Union of Justices, 1999); to the Magna Carta of Judges, approved by the European Judges' Advisory Council, which reads that: «The independence and impartiality of the judge are indispensable prerequisites for the functioning of justice» (Advisory Council of European Judges, 2010).

II. THE MANDATE IN THE JUDICIARY: IMMOBILITY AND EARLY TERMINATION

The principle of judicial independence is born from and develops together with one of the fundamental principles of constitutionalism, that is, the separation of powers. Since the judiciary is "the weakest" of the three branches of government, it is essential to prevent interference by the other branches of government in the administration of justice. Therefore, it is advisable that the electoral jurisdictional authorities have guarantees for the observance of the separation of powers, among which the integrity of the judicial mandate and the irremovability of judges stand out.

For a clear understanding of the importance of these principles, the possible threats that impact them and the available solutions, it is necessary to reflect, first of all, on the length of judicial office. This is a fundamental aspect of judicial independence, especially with regard to supreme, constitutional or supranational courts, for which the relevant regulations often provide rules that differ from those governing the judicial career in general.

There are two possible regulatory designs to regulate this aspect. On the one hand, systems that provide for a fixed term of judicial office, which may be renewable or non-renewable and is normally longer than political-electoral offices, which seeks to ensure the separation between popular legitimization of politics and technical legitimization of magistrates. On the other hand, there are systems that do not provide for a fixed duration of the judicial office; in the most extreme cases, the judicial office is considered for life and may end before the death of the judge only if the latter does not maintain good behavior; in the other cases, the office ends with the retirement of the judge. The first design allows for stronger accountability on the part of judges and an adaptation of the composition of the courts as the country's social and cultural conditions change. The second ensures a stronger form of judicial independence, being the position completely independent of the political powers, even in cases in which they are the ones who appoint the judges.

In both systems, the principle of the irremovability of judges is considered as fundamental to guarantee their independence. Consequently, irremovability is generally affirmed and regulated in the instruments of international law that make up the normative framework in this area, as well as in democratic constitutions.

In the General Comment to Article 14 of the International Covenant on Civil and Political Rights, No. 32 of 2007, adopted by the Human Rights Committee, after stating that «the requirement of independence refers, in particular, to the … guarantees in relation to their security of tenure until the mandatory retirement age or expiry of their term of office» and that «the law shall guarantee the legal status of judges, including their tenure in office», it is further stated that «judges may be removed only for serious reasons of misconduct or incompetence, in accordance with fair procedures guaranteeing objectivity and impartiality established in the Constitution or in the law. The removal of judges by the executive branch, for example, before the expiration of the term for which they were appointed, without being given any specific reason and without effective judicial protection to challenge the removal, is incompatible with the independence of the judiciary. This also applies, for example, to the removal of allegedly corrupt judges by the executive branch without following any of the procedures established by law" (United Nations, 2007).

The irremovability of judges is also the subject of a specific section of the 1985 Basic Principles on the Independence of the Judiciary, which states, among other things, that "The law shall guarantee the tenure of judges for the terms established [...]. The irremovability of judges, both those appointed by administrative decision and those elected, shall be guaranteed until they either reach the age of mandatory retirement or the term for which they were appointed or elected expires, where such rules exist» (United Nations, 1985).

The Universal Charter of the Judge adopted by the International Union of Judges in 1999, in addressing this aspect, refers to the two aforementioned normative models, stating that «Judges – once appointed or elected – enjoy tenure until the mandatory retirement age or the end of their term of office. A judge must be appointed without any time limitation. If a legal system provides an appointment for a limited period of time, this could only occur under pre-determined conditions, provided that judicial independence is not endangered” (International Union of Magistrates, 1999).

Despite the preference, in terms of independence, for the appointment system until mandatory retirement, several threats to the principle of judges' irremovability have occurred in systems that recognize this rule. In the context of the so-called constitutional or democratic regression processes that have taken place in several countries throughout the world in the last decade, one of the strategies of illiberal systems has been the control of the judiciary, even thanks to the control over the composition of the courts. Poland and Hungary have been among the most affected countries by these processes; in both cases, the apical courts have been subject to attacks on their independence, through measures

such as the sudden and retroactive lowering of the retirement age, which has allowed for a de facto removal and replacement of several judges.

In Hungary, between 2011 and 2012, by adopting a new constitution and amending the legislative framework on the organization of the judiciary, it was provided, among other measures, to lower the retirement age of judges. The combined provisions of Law CLXII of 2011 On the Legal Status and Remuneration of Judges, Article 12 of the Transitory Provisions of the new constitution and Article 26 of the constitution itself reduced the retirement age from 70 to 62 years of age. This reform also applied to judges who reached retirement age before or during the passage of the law.

The Hungarian Ombudsman appealed to the Constitutional Court against the retroactive lowering of the retirement age of judges. In its judgment of 16 July 2012, the Constitutional Court declared unconstitutional and consequently annulled the provisions on the mandatory retirement age of judges (Constitutional Court of Hungary, 2012). The Constitutional Court upheld that the new regulation violated the constitutional requirements of judicial independence on both “formal” and “substantive” grounds. From a formal point of view, in order to guarantee the irremovability of judges, a cardinal law, and not an ordinary one, should determine the duration of judicial office and the retirement age. From the substantive point of view, the new regulation resulted in the removal of judges within a period of three months; despite the relative freedom of the legislator to determine the maximum age of serving judges, and the fact that no specific age can be deduced from the Basic Law, the Constitutional Court held that the introduction of a lower retirement age for judges had to be done gradually, with an adequate transition period and without violating the principle of irremovability of judges. Following the ruling of the Constitutional Court on July 16, 2012, Parliament approved Law XX of 2013, which modified the mandatory retirement age to 65 years and postponed the validity of the new regulations until 2023.

The Court of Justice of the European Union also ruled on the case, after an action initiated by the European Commission, which replied to Hungary that obliging judges to cease their professional activity entailed a difference in treatment on grounds of age that is not justified by legitimate objectives and, in any case, is not necessary and adequate in relation to the objectives pursued. The Court of Justice of the European Union declared that Hungary failed to comply with its obligations under European Union law, due to the fact that by adopting a national regime requiring judges who have reached the age of 62 to cease their professional activity, it results in a difference in treatment on grounds of age that lacks proportionality with the objectives pursued (Court of Justice of the European Union, 2012).

The same policies and legislation adopted by Hungary have also been the subject of the jurisprudence of the European Court of Human Rights. The most controversial case concerns the president of the Supreme Court who was *de facto* removed due to his criticism of the aforementioned reforms. In fact, the judge, elected president of the Supreme Court in 2009, should have ended his term in 2015; however, between the reforms of 2011-2012, some modifications to the organization and functioning of the Supreme Court were approved, along with the change of the name of the body to Curia; these reforms were considered by their proponents as sufficient reasons to argue that it was a new body and, therefore, to decide the early termination of the office of the presidency.

In an opinion of the Venice Commission on this matter, it is stated that «Since the provision of the Basic Law regarding the eligibility to be president of the Curia could be understood as an attempt to get rid of a particular person, the law may operate as a kind of sanction to the former president of the Supreme Court. Even if this were not the case, the impression that it might be the case carries the risk of causing a chilling effect, thus threatening the independence of the judiciary» (Venice Commission, 2012). The European Court of Human Rights, in agreement with this imposition, states that «a State Party cannot legitimately invoke the independence of the judiciary to justify a measure such as the premature termination of the mandate of a presiding judge for reasons that had not been established by law and that do not relate to any grounds of incompetence or professional misconduct. The Court considers that this measure could not serve the objective of increasing the independence of the judiciary, as it was simultaneously … a consequence of the previous exercise of the right to freedom of expression of the plaintiff, who held the highest office in the judiciary [and] was also a measure that interfered with their right to serve his full six-year term as President of the Supreme Court ” (European Court of Human Rights, 2016).

Similar problems with reference to modifications of the retirement age of judges as a tool to interfere in the judiciary have arisen in Poland. Here, the controversial changes consisted in lowering the retirement age for judges from 70 to 65 years, allowing those concerned to submit, before reaching this age, a declaration indicating their desire to continue to perform their duties; the extension, of three years renewable once, was decided by the President of the Republic. This modification was the subject of several interventions by international organizations.

According to the Venice Commission, “the early retirement of sitting judges affects both their security of tenure and the independence of the Supreme Court in general. Regarding the first point – related to the individual rights of the judges in question – the Venice Commission has previously determined that a very similar reform in Hungary affected “the

independence, status and irremovability of judges" [...] Early retirement does not only affect the individual rights of judges; it may also "affect the operational capacity of the courts and legal continuity and certainty and could also open the way for undue influence on the composition of the judiciary"» (Venice Commission, 2017).

The Court of Justice of the European Union intervened twice, in 2019, in relation to the regulations governing the retirement of judges, finding them contrary to the principle of judicial independence established by the Charter of Fundamental Rights of the European Union. In a first case, it stated that «the principle of irremovability requires, in particular, that judges may remain in the exercise of their duties until they have reached the age of mandatory retirement or until their term of office expires whenever it has a fixed duration. Although it is not absolute, this principle can only be subject to exceptions when there are legitimate and compelling reasons that justify it and provided that the principle of proportionality is respected. Thus, it is generally accepted that judges may be dismissed if they do not meet the conditions of aptitude to continue in the exercise of their functions due to incapacity or serious misconduct, observing the procedures established for this purpose. In the present case, it should be noted that the reform at issue, which provides for the application of the measure reducing the retirement age of judges of the Sąd Najwyższy (Supreme Court) to those judges who are active in that Court, entails an early termination of the exercise of the judicial function of those judges and that, as a result, it may give rise to legitimate concerns as to the respect of the principle of irremovability of the judge" (Court of Justice of the European Union, 2019a). In a second case the Court reiterated its case law stating that while the decision on the retirement of judges and other reforms «certainly cannot, on their own and considered in isolation, lead to [judicial] independence being called into question, something different could be said, on the other hand, if they are considered together» (Court of Justice of the European Union, 2019b).

In Poland too, in fact, the reforms to the judicial system have been many and overlapping; among these, the one that modifies the self-governing body of the judiciary is also noted in this case, which, although it is not a judicial body, is important to guarantee the independence of the judiciary. Along with the reform of the body, the immediate renewal of its composition and the removal of its members was established, a practice that has been declared illegitimate by the European Court of Human Rights, which has ruled as follows: «the Court observes that the entire sequence of events in Poland clearly demonstrates that successive judicial reforms were aimed at weakening judicial independence [...] As a result of successive reforms, the judiciary – an autonomous branch of state power – has been exposed to interference from the executive and legislative branches and thus substantially weakened. The applicant's case is an example of this general trend» (European Court of Human Rights, 2022).

There are also different cases of dismissal of judges that refers to Ecuador. On November 23, 2004, the President of the Republic announced the government's intention to promote in Congress the reorganization of the Constitutional Court, the Supreme Electoral Court, as well as the Supreme Court of Justice. The President and the Congress proceeded with the dismissals of the members of Ecuador's highest courts between November and December 2004 and were carried out in a temporary 14-day period in a situation of political instability.

The case was brought before the Inter-American Court of Human Rights, which issued three separate judgments upholding important principles of judicial independence. Particularly, the Court affirmed that the following guarantees are derived from judicial independence regarding the role of judicial authorities: (i) to an adequate appointment process; (ii) to stability and security of tenure; and (iii) to be protected against external pressures. Regarding the guarantee of stability and irremovability in the position of such authorities, the Court pointed out that it implies, in turn, the following: (i) that removal from office must be based exclusively on permissible grounds, either through a process that complies with judicial guarantees or because the term or period of office has expired; (ii) that judges may only be removed from office for serious breaches of discipline or incompetence; and (iii) that all proceedings against judges must be resolved in accordance with established standards of judicial conduct and through fair, objective and impartial procedures, in accordance with the Constitution or the law. (Inter-American Court of Human Rights, 2013a; Inter-American Court of Human Rights, 2013b; Inter-American Court of Human Rights, 2023).

The last of these rulings is extremely important in this report because it concerns electoral judges. The Court, in this regard, states that while the TSE performed administrative functions and the organization and management of the electoral processes, as is evident from the electoral regulations in force at the time of the facts, and from the evidence submitted to the Court, among its functions was also to hear and resolve matters pertaining to electoral justice. Consequently, the Court concluded that the TSE fulfilled materially jurisdictional functions in the electoral sphere, and, therefore, its members enjoyed the same guarantees of judicial independence as judges in general due to the materially jurisdictional nature of the functions they performed (Inter-American Court of Human Rights, 2023).

In the same context, a controversial case took place in Honduras in 2009 as a result of the 2009 coup d'état. After the coup d'état, several judges carried out different actions in favor of democracy and the Rule of Law. As a result of these actions, disciplinary proceedings were initiated against them. In addition, all the victims were members of the Association of Judges for Democracy (AJD), which also spoke out against the coup d'état

and in favor of the restitution of the Rule of Law. In 2015, the Inter-American Court of Human Rights issued a Judgment by which it unanimously declared that the State of Honduras was responsible for the violation of freedom of expression, right of assembly, political rights, right of association, judicial guarantees, judicial protection, right to remain in office under conditions of equality and the principle of legality, in the framework of the aforementioned disciplinary proceedings, by which four judges were dismissed and, three of them, were separated from the Judiciary.

The Court had the opportunity to point out some fundamental aspects connected with the principle of irremovability of judges. These, according to the Court, have specific guarantees due to the necessary independence of the Judiciary. In this regard, the Court stated that: i) respect for judicial guarantees implies respect for judicial independence; ii) the dimensions of judicial independence translate into the subjective right of the judge to be removed from office only on the permitted grounds, either through a process that complies with judicial guarantees or because the term or period of his or her mandate has expired, and iii) when the permanence of judges in office is arbitrarily affected, the right to judicial independence enshrined in Article 8.1 is violated. 1 of the American Convention, in conjunction with the right of access and tenure under general conditions of equality in public office, established in Article 23(1)(c) of the Convention. By the same token, the Court indicated that the guarantee of stability and irremovability of judges, in addition to guaranteeing that a judge may only be removed from his or her position through a process with due guarantees or because the term of his or her mandate has ended, implies that: (i) judges can only be dismissed for serious lack of discipline or incompetence, and (iii) any disciplinary process of judges must be resolved in accordance with the established rules of judicial behavior in fair procedures that ensure objectivity and impartiality according to the Constitution or the law (Inter-American Court of Human Rights, 2015).

In 2021, the newly constituted Legislative Assembly of El Salvador dismissed all members of the Constitutional Chamber of the Supreme Court of Justice - five permanent justices and their alternates - alleging that they had acted unconstitutionally in ruling against acts and decisions taken by the Ministry of Health in relation to the COVID-19 pandemic. In a vote, carried out in the first ordinary plenary session on May 1, the Salvadoran Legislative Power approved the decree of dismissal of the plenary of proprietary and alternate justices of the Constitutional Chamber of the Supreme Court of Justice. Such a decision was adopted with dispensation of procedure and through the approval of 64 of 84 parliamentarians.

The Inter-American Commission on Human Rights politically condemned the decision of the Legislative Assembly of El Salvador, for failing to comply with the constitutional norms that regulate the procedure and inter-American standards for the removal of justice

operators, such as due foundation, the right to defense and due process. In this regard, the IACHR notes with extreme concern in the expeditious dismissals decreed by the National Assembly, the absence of due process guarantees, as well as the absence of specific causes, as provided for in the Constitution, elements that constitute a serious attack on the principle of separation and independence of powers and the democratic rule of law. In turn, the Constitutional Chamber, in its original composition, issued the Writ of Unconstitutionality No. 1-2021 declaring the unconstitutionality of the decision to dismiss the judges (Sala de lo Constitucional de la Corte Suprema de Justicia de El Salvador, 2021).

The same country had been the subject of a ruling by the Inter-American Court of Human Rights referring to an illegitimate dismissal of a judge. In 2019, the Court issued a Judgment declaring El Salvador internationally responsible for the violation of the rights to judicial guarantees, judicial protection, the right to remain in office under conditions of equality, the obligations to respect and guarantee rights and the obligation to adopt domestic law provisions of an electoral judge.

These violations arose due to the arbitrary dismissal of a judge from his position as a justice of the Supreme Electoral Court, having been removed by an incompetent body, and without there being a procedure previously established in the Law. In addition, the judge also did not have access to an effective remedy to guarantee his judicial protection (Inter-American Court of Human Rights, 2019).

III. THE BUDGET OF THE JUDICIARY: SUFFICIENT RESOURCES AND BUDGET CUTS

The independence, not only of the judiciary, but of anybody or subject, passes through its financial autonomy, or at least through the security of having sufficient and stable resources. In the case of the judiciary, the relationship between resources and independence develops in two directions.

On the one hand, at the subjective and individual level, judicial independence includes adequate and sufficient remuneration of judges. This principle is recognized in several international instruments and is fundamental to guarantee the judge's position in the face of external pressures and to avoid economic dependence. Both the General Comment on Article 14 of the International Covenant on Civil and Political Rights, No. 32 of 2007 (United Nations, 2007), and the Basic Principles on the Independence of the Judiciary of

1985 (United Nations, 1985) state that in order to safeguard judicial independence, the law must guarantee the legal status of judges, including adequate remuneration. The Venice Commission devotes a specific section of its Report on the Independence of the Judiciary to the issue of judges' remuneration, stating that the "law should guarantee judges a level of remuneration that is commensurate with the dignity of their office and the scope of their functions" (Venice Commission, 2010). Finally, the Universal Charter of the Judge approved by the International Union of Judges in 1999 specifies that «the judge must receive sufficient remuneration to ensure true economic independence and, therefore, his dignity, impartiality and independence. Remuneration should not depend on the results of the judge's work or actions and should not be reduced during his judicial service. The rules on remuneration must be enshrined in legislative texts at the highest possible level» (International Union of Judges, 1999).

On the other hand, at the objective and institutional level, judicial independence includes the attribution to the judiciary of sufficient resources to ensure its functioning. In this regard, among the 1985 Basic Principles on the Independence of the Judiciary is that «Each Member State shall provide adequate resources to enable the judiciary to carry out its functions properly». Differently from other constitutional bodies, the judiciary is not normally recognized as having real financial autonomy (United Nations, 1985).

In Opinion No. 2 of the Consultative Council of European Judges on the administration of financial resources of the courts in relation to the efficiency of the judiciary and with respect to the provisions of Article 6 of the European Convention on Human Rights of 2001, recognizing that «the financing of the courts is closely related to the independence of judges, as it determines the conditions under which the Courts perform their functions», it is stated in this regard that «although the financing of the courts is an element of the budget presented to Parliament by the Ministry of Finance, this financing shall not be subject to political fluctuations. The importance of the resources that a country can devote to its courts depends on a political decision; but in a system based on the separation of powers, it is always necessary to ensure that neither the executive nor the legislative branch exerts any pressure on justice when setting its budget. Decisions on the allocation of financial resources to the courts must be taken with the utmost respect for the independence of judges» (Advisory Council of European Judges, 2001).

In order to achieve this result, the same document underlines the importance of «the provisions on the adoption of the budget for justice by Parliament include a procedure that takes into account the opinion of the judiciary». This need is contained in other documents. According to the Universal Charter of the Judge approved by the International Union of Judges in 1999, «the other powers of the State must provide the judiciary with the necessary means to adequately equip itself to carry out its function. The judiciary must

have the opportunity to participate or be heard in the decisions taken regarding budgetary matters of the judiciary and the material and human resources allocated to the courts» (Consultative Council of European Judges, 2001). The Venice Commission, in its report on the independence of the judicial system, states that «the financing of the courts must not be based on discretionary decisions of public bodies, but on objective and transparent criteria that guarantee their stability», and that «decisions concerning the allocation of funds to the courts must be taken in the strictest respect for the principle of judicial independence; the judiciary shall have the opportunity to give its opinion on the budget proposal submitted to Parliament, possibly through the Judicial council» (Venice Commission, 2010).

The Opinion of the Consultative Council of European Judges contains a comparative representation of these procedures, from which we learn that «in most countries, the Ministry of Justice has to submit the budget of the courts to the Ministry of Finance in order to negotiate the budget with it [...]. Nevertheless, it may happen that the courts submit budget proposals directly to the Ministry of Finance... However, other countries do not have any formal procedure regarding a jurisdictional participation in the elaboration of the budget that the Minister of Justice, or its equivalent, negotiates to finance the expenses exposed by the courts; and the influence there might be is informal».

As a matter of fact, the possibility for the political power to determine the budget of the judiciary has been used several times to affect the independence of the judiciary, as a response to judicial decisions or practices. In recent years, a controversial case took place in Alaska, in the United States, in relation to the jurisprudence of the Supreme Court in matters of voluntary termination of pregnancy. In 1998, the Alaska Department of Health and Human Services restricted state coverage of abortion expenses to extreme cases only.

In 2001, the Alaska Supreme Court rejected that regulation, arguing that it violated women’s constitutional right to equal protection by discriminating between women who chose to interrupt their pregnancies and those who chose to carry their pregnancies to term. Two laws passed in 2013 and 2014 tried to restrict funding to cover abortion expenses to “medically necessary” cases but were also rejected by the Supreme Court. In 2019, the Governor of Alaska decided to cut the Supreme Court's budget of $335,000. The relationship between this cut and the Supreme Court's decisions on abortion is clear, as evidenced by the Governor's own words, which expressly emphasized that the amount of the cut is equal to the annual state-funded expenditures for abortions, specifying that «The Legislative and Executive branches oppose state-funded elective abortions; the only branch of government that insists on state-funded elective abortions is the Supreme Court; the annual cost of elective abortions is reflected in this reduction».

At the national level, some constitutional courts have sought to strengthen the principle of the need for adequate resources by stating that judicial independence includes the financial autonomy of the judiciary.

A very important example of this imposition is found in Lithuania. In a 1999 decision on the law on the judiciary «the Constitutional Court notes that the principle of independence of the courts also includes that the financing of the courts be independent of the executive. This principle can be ensured by providing in laws that the state budget must indicate how many resources must be allocated to each court so that proper conditions for the administration of justice can be created». And it states that «the material basis of the organizational independence of the courts is their financial independence from any decision of the executive. It should be noted that the financial independence of the courts is guaranteed … when funds for the court system and for each court are allocated in the state budget approved by law. Guaranteeing the organizational independence of the courts is one of the essential conditions for guaranteeing human rights» (Constitutional Court of Lithuania, 1999).

The Constitutional Court, on this basis, pronounces contrary to the Constitution the provision of the law that provides among the powers of the Minister of Justice «to arrange the financial and material-technical supply of local and regional courts and the Court of Appeal», arguing as follows: «it shall be noted that the concept of “arranging the financial and material-technical supply of the courts” is legally indeterminate and can be interpreted in various ways. It can be understood not only as a reflection of the powers of the Minister of Justice to determine how much money is needed for the activity of the courts and not only as his duty to ensure that these funds are included in the state budget, and not only as a reflection of the duty of the Minister of Justice to be present in Parliament when the issues of the allocations provided for the courts in the draft state budget are debated. The concept used in the Law of “arranging the financial and material-technical supply of the courts” can also be interpreted in the sense that the Minister of Justice is granted the right to decide himself the allocations provided for in the state budget to each court. This understanding of the Law of the concept is also confirmed by the current regulation of court financing: the Law on the State Budget does not state how much funding is allocated to each court (with the exception of the Supreme Court). It only indicates the total amount allocated for the entire court system. Thus, it is not the Parliament, but the executive that distributes the resources among the various courts, passing the law on the state budget. Legal regulation… is not in line with the constitutional principle of separation of executive and judicial branches and that of independence and autonomy of these branches of power and creates an opportunity for the executive to exert influence on the activity of the courts» (Constitutional Court of Lithuania, 1999).

Another case of interest recently took place in Uganda, where it was reported in 2017 that: «the two branches of government, namely the executive and the legislative, have failed, neglected or refused to provide assistance to the other arm of government, the judiciary, to ensure its effectiveness in the execution of its constitutional mandate [...] This state of affairs has arisen specifically in budgetary processes, with the other two branches of government subjecting the budget of the judiciary to the direct control of the Minister of Justice and Constitutional Affairs and the Secretary of the Treasury in the Ministry of Finance, Planning and Economic Development [...] The judiciary is underfunded and its budget is systematically reduced, preventing the institution from executing its mandate. This offends the constitutional principles of separation of powers and independence of the judiciary».

The case was settled by the Constitutional Court in 2020. It underlined the strict connection between judicial independence and the budgetary autonomy of the courts, contrary to what the executive maintained, according to which judicial independence only includes the independence of the judiciary in judicial decision-making. The Court states that: «the judiciary, as a branch of government, is supposed to take control of its budgetary processes without any interference from the executive. The role of the executive is to send the budget estimates of the judiciary to parliament for consideration... There is no doubt that the way in which the financial autonomy of the judiciary is exercised would have been better clarified by an appropriate parliamentary law. However, the absence of such a required law is not an excuse for the executive to continue interfering in the financial decisions of the judiciary through the actions of the Ministers of Finance, Justice and the secretary of the Treasury». The Court continues by stating that: «The administrative head of the judiciary is the *Chief Justice* [...] Taking the natural meaning of the words in question, it must be inferred that the role of planning, organizing and administering the judiciary is conferred solely by the constitution in the hands of the *Chief Justice*… Consequently, the process of accounting of the judiciary, as well as other similar administrative functions, they must be carried out by the *Chief Justice* or by anyone to whom he delegates accordingly and no one else» (Uganda Constitutional Court, 2020).

Finally, the Constitution of Costa Rica, in order to preserve the budget of the judiciary and thereby its independence, provides that: «In the draft [budget], the Judiciary shall be allocated a sum not less than six percent of the ordinary income calculated for the financial year» (Article 177). Following the line imposed in the Magna Carta, the Organic Law of the Judiciary, in its article 59, states that "it corresponds to the Supreme Court of Justice: (...) 3.- Approve the proposed budget of the Judicial Branch, which, once enacted by the Legislative Assembly, may be executed through the Council».

The Constitutional Chamber of the Supreme Court of Justice of Costa Rica has stated that: «As a matter of fact, the third paragraph of Article 177 of the Political Constitution contains an essential constitutional principle for the functioning of the independence of the Judiciary, which is the establishment of a mechanism that allows for the financing of the jurisdictional function. […] It has the purpose of not obstructing the fulfillment of a fundamental role of the State, which clearly includes the administration of justice in an objective and independent, prompt and fulfilled way" (Constitutional Chamber of the Supreme Court of Justice of Costa Rica, 2017).

IV. COUNCILS OF THE JUDICIARY: PRINCIPLES AND CHALLENGES REGARDING COMPOSITION AND FUNCTION

Among the most widely used tools at a comparative level to protect the independence of the judiciary and guarantee its constitutional role in relation to the other branches of the State, mention should be made of the councils of the judiciary. These bodies, according to the Universal Statute of the Judge approved by the International Union of Judges in 1999, are created: «In order to safeguard judicial independence» and therefore «it must be completely independent of the other powers of the State» (International Union of Justices, 1999). To this end, it is established that these bodies should be composed of a majority of judges elected by their peers and may have members who are not judges, to represent the variety of civil society, but who should not be politicians.

From the same document it can be learned that, indeed, the role of these bodies is particularly relevant in relation to the aspects analyzed in the preceding paragraphs of this report. In this regard, it is provided that «the Council of the Judiciary should be endowed with the greatest powers in matters of recruitment, training, appointment, promotion and discipline of judges» and that «it should be provided that the Council may be consulted by the other branches of government on all possible matters relating to the judicial situation and ethics, as well as on all matters relating to the annual budget of Justice and the allocation of resources to the courts, in the organization, operation and public image of judicial institutions».

The importance of these bodies is also underlined at the regional level, as for example in the Magna Carta of Judges, approved by the Consultative Council of European Judges, which states that «In order to guarantee the independence of judges, each State shall establish a Council for the Judiciary or other specific body, independent of the executive and legislative powers, with the broadest powers to decide on all matters affecting the status of judges, as well as the organization, functioning and image of judicial institutions. The Council must be composed either exclusively of judges, or, as the case may be, by a substantial majority of judges elected by themselves. The Council for the Judiciary is

accountable for its activities and decisions" (Consultative Council of European Judges, 2010).

The Venice Commission, in its Report on the Independence of the Judiciary, «recommends that States that have not yet done so consider the possibility of creating an independent judicial council or similar body. In all cases, the composition of this council should have a pluralistic character, since judges represent an important part, if not the majority, of its members. Except for *ex officio* members, these judges should be elected or appointed by their counterparts». Here again, the importance of the council is particularly emphasized in relation to the career in the judiciary, stating the need to ensure that «an independent judicial council plays a determining role in decisions regarding the appointment and career of judges», and with the budget of the judiciary, stating that «the judiciary should have the opportunity to give its opinion on the budget proposal ... possibly through the judicial council» (Venice Commission, 2010).

At the comparative level, the role of these bodies is guaranteed by their constitutional discipline, which in several cases provides for rules on the composition and functions of councils of the judiciary.

The Italian Constitution provides that "The President of the General Council of the Judiciary is the President of the Republic. The first President and the Attorney General of the Supreme Court shall form part of it, as Members by right. The other members shall be elected as follows: two-thirds shall be elected by all ordinary judges from among those belonging to the various categories, and one-third by Parliament in a joint session from among University Professors in legal subjects and fifteen-year practicing attorneys» (Article 104) and that «The General Council of the Judiciary, in accordance with the provisions of the judicial system, shall be responsible for hiring, assignments and transfers, promotions and disciplinary measures concerning magistrates» (Article 105).

The French Constitution states that «the President of the Republic is the guarantor of the independence of the judicial authority. It shall be assisted by the Higher Council of the Judiciary» (Article 64) and that «the Superior Council of the Judiciary shall be composed of a chamber for magistrates and a chamber for prosecutors. The Chamber of Magistrates shall be chaired by the First President of the Court of Cassation. It shall also comprise five justices and a prosecutor, a State Counselor appointed by the Council of State, an attorney, as well as six qualified personalities who belong neither to Parliament nor to the judicial or administrative careers. The President of the Republic, the President of the National Assembly and the President of the Senate will each appoint two qualified personalities... The chamber of prosecutors shall be presided over by the Attorney General of the Court of Cassation. It shall also comprise five prosecutors and one justice,

as well as the Counsel of State, the attorney and the six qualified personalities…» (Article 65).

The Spanish Constitution states that «The General Council of the Judiciary is the governing body of said body. The organic law shall establish […] its functions, in particular in matters of appointments, promotions, inspection and disciplinary regime. The General Council of the Judiciary shall be composed of the President of the Supreme Court, who shall preside over it, and twenty members appointed by the King for a five-year term. Out of these, twelve from among Judges and Justices of all judicial categories, under the terms established by the organic law; four at the proposal of the Congress of Deputies, and four at the proposal of the Senate, chosen [...] from among attorneys and other jurists" (Article 122).

The Mexican Constitution provides that «The Council of the Federal Judiciary will be composed of seven members, one of whom will be the President of the Supreme Court of Justice, who will also be the President of the Council; three Councilors appointed by the Plenary of the Court, by a majority of at least eight votes, from among the Circuit Justices and District Judges; two Councilors appointed by the Senate, and one by the President of the Republic» (Article 100).

The Colombian Constitution establishes that «The Superior Council of the Judiciary shall be divided into two chambers: The Administrative Chamber, consisting of six judges elected for an eight-year term, as follows: two by the Supreme Court of Justice, one by the Constitutional Court and three by the Council of State; The Disciplinary Jurisdictional Chamber, consisting of seven judges elected for an eight-year term by the National Congress from shortlists sent by the Government" (Article 254); that «To be a member of the Superior Council of the Judiciary it is required ... to have a law degree and to have practiced the profession for ten years with good reputation. The members of the Council may not be selected from among the justices of the same nominating corporations» (Article 255); and that «The Superior Council of the Judiciary [...] has the following powers: Administrating the judicial career; Drawing up lists of candidates for the appointment of judicial officials and sending them to the entity that must do so [.... Examining the conduct and sanctioning the misconduct of the officials of the judicial branch, as well as those of the lawyers in the exercise of their profession, in the instance indicated by law; Controlling the performance of the judicial corporations and offices; Preparing the draft budget of the Judicial Branch, which must be submitted to the Government, and executing it in accordance with the approval of the Congress; Resolving conflicts of competence that occur between the different jurisdictions; Any others indicated by law» (Article 256).

Although the composition of these bodies is mostly judicial, non-judicial members seem quite common. This expresses the pluralism of these bodies and their connection with society but can also give rise to problems of independence of the councils and affect their capacities to guarantee the independence of the judiciary.

The Venice Commission, for example, in its opinion on the reforms of the Montenegro judicial system, expressed itself on the presence of the Minister of Justice in the Judicial Council: «The Venice Commission recalls that, in principle, the presence of members of the executive does not in itself undermine the independence of a Judicial Council. Particularly, the presence of the Minister of Justice can be useful in facilitating dialogue between the various players in the system. However, care must be taken that including *ex officio* members does not increase the risk that the political majority will dominate the Judicial Council. More importantly, the Minister of Justice should not have the right to vote or participate in decision-making if it is a decision regarding the transfer of judges or disciplinary measures against judges» (Venice Commission, 2022).

The Venice Commission itself, in an opinion on the reforms of the Moldovan judicial system, has also affirmed some principles in relation to the members of the Judicial Council elected by the parliament: «It is important [...] that the possibility or risk that the lay members of the Council are a coherent and like-minded group in line with the wishes of the government of the day is avoided at the constitutional level»; therefore, there is a «general preference for the election of the lay members of the parliamentary component to be by a qualified two-thirds majority, with a mechanism against possible deadlocks or by some proportional method that ensures that the opposition has influence on the composition of the Council» (Venice Commission, 2020).

The role of judicial councils has been the subject of controversial policies over the last decade in Europe, especially in Poland and Hungary, where the functions of these bodies and their independence from political power have been undermined.

In Hungary, the CLXI Act of 2011 on the organization and administration of the courts created a new body, the National Office of the Judiciary, which is in addition and potentially in contrast to the National Council of the Judiciary. The latter body, until the reform of 2011, was composed mostly of judges and guaranteed the independence of the judiciary by exercising functions relating to the judicial career. Now, the body is composed exclusively of judges, but it plays a purely advisory role with respect to the National Office of the Judiciary. It is the latter body, and particularly its chairman, who decides on matters such as appointment, transfer and promotion of judges, as well as on disciplinary matters; the President of the National Office of the Judiciary is elected by Parliament for a nine-

year term and is in fact independent of the same Office, with most of the functions of the body being directly and exclusively recognized to him/her.

The Venice Commission, in a 2012 opinion, criticized this reform: «The National Council of the Judiciary is designed as a body of judicial self-government, in which all its members are judges elected by their peers. However, it has hardly any significant powers and its role in the administration of the judiciary can be considered meaningless. Whereas, the president of the National Judiciary Office has abundant powers and is therefore the main agent in the judicial administration. However, the mere fact that only judges are eligible to be president of the Office does not make the Office a body of judicial self-government. Rather, this would imply that judges have a decisive vote in their election. Since the President of the Office is elected by Parliament, i.e. an external actor from the point of view of the judiciary, it cannot be considered a judicial self-government body […] the powers [of the President of the Office] are very broad. Some are part of the usual competences of a head of judicial administration. Others don't. Some are described in fairly broad terms without clear criteria governing their application. This raises concern, especially because they are exercised by a single person. Even if most of the Office's powers are not related to decision-making in individual cases, many of [his/her] faculties […] are closely related to the position of the judge making these decisions. The President of the Office is not only a strong judicial "administrator", but also very closely involved in judicial decision-making through his/her right to transfer cases to another court, their influence on individual judges and on the internal structure of the court» (Venice Commission, 2012).

In Poland, before the 2017 reforms, the guarantee of judicial independence was ensured by the National Council of the Judiciary, which had jurisdiction over the judicial career and was composed of seventeen judges elected by their peers, four deputies, two senators, the Minister of Justice and a person indicated by the President of the Republic of Poland. With a 2017 Law, the parliament was given the competence to elect the judicial members of the Council, voted by a 3/5 majority in the first ballot and an absolute majority in the second ballot, on the basis of a list prepared by a parliamentary Commission; it also provided for the immediate renewal of the body without the previously elected members being able to finish their term of office.

This reform was also criticized by the Venice Commission, which in 2017 stated that «The election of the 15 judicial members of the National Council of the Judiciary by the Parliament, together with the immediate replacement of the members currently in office, will lead to a far-reaching politicization of this body. The Venice Commission recommends instead that the judicial members of the Council be elected by their peers, as in current law» (Venice Commission, 2017).

V. THE INTEGRITY OF THE JUDICIARY: THE REVOLVING DOORS

Threats to judicial independence occur mainly from the practices of the other branches of the State, the political branches, i.e. the legislative and the executive, considered that, as previously stated, the judiciary is the weakest of the constitutional powers. However, the independence of the judiciary can also be threatened, in some way, from the inside, that is, through the practices and conduct of the judges themselves.

In this regard, the phenomenon of the so-called "revolving doors" has been discussed. This expression is traditionally used to describe the permeability between the political class and private companies, in relation to *lobbying* activity *and* the possible conflicts of interest that may emerge from this permeability. Recently, this term has also been used in relation to the judiciary, to describe different behaviors: The passage from the judiciary to the attorney, and vice versa; the passage from the judiciary to the prosecutor, and vice versa; the passage from the judiciary to politics, and vice versa.

Even if all these phenomena may give rise to controversy, it is precisely the latter that is most worrying in terms of judicial independence, since it may affect primary aspects of this principle such as the impartiality and integrity of the judiciary. On the one hand, the possibility for judges to hold political positions, temporarily leaving the judiciary, and then to return to the judicial function, raises relative problems, especially in relation to the appearance of impartiality of the judge. On the other hand, such conduct may affect the level of trust that citizens place in judges and, therefore, the appearance of integrity of the judiciary as a whole. These principles of impartiality and integrity are included, among others, in the 2006 Bangalore Principles of Judicial Conduct, which stress the importance of both being, and appearing to be, impartial and of integrity.

Opinion No. 3 of the Consultative Council of European Judges on the principles and rules governing the professional imperatives applicable to judges and especially deontology, 2002, states that "The involvement of judges in political activities raises some important issues. It is true that the judge is a citizen to whom the exercise of the political rights conferred to other citizens must be recognized. Nevertheless, from the perspective of the right to a fair trial and considering the legitimate expectations of the parties, the judge should be reserved as to the performance of a public political activity».

To prevent the "revolving door" phenomenon, or at least mitigate its most negative effects, some countries have introduced a series of ineligibilities and incompatibilities for holding the highest positions in the judiciary, and for moving from these to other high political positions.

Ineligibility constitutes a condition of impediment to appointment or election to a political office that translates into a limitation of *ius ad officium*. Ineligibility normally corresponds to a personal situation of the candidate, particularly to a particular position he/she covers, which in the abstract could disturb the electoral competition; therefore, ineligibility would be justified mainly by the need to prevent situations of *captatio benevolentiae and metus publicae potestatis.*

The incompatibility does not cause or prevent the nomination of candidates or the nullity of the elective act, but if it affects the exercise of parliamentary or political mandate in general. This institute resides in the potential conflict between charges and therefore represents a limitation of the *ius in officio*. Incompatibility is then an institute that tends primarily to protect the independence of the political mandate, and specularly, to the independence of the other powers of the state and to the very principle of the separation of powers.

Both ineligibility and incompatibilities are in effect substantiated in a series of private or public positions and positions that prevent the assumption of representative or political mandates in general. It is quite common for the relevant regulations to include the judiciary among the grounds for ineligibility and incompatibility, along with administrative, military, religious, or apical mandates in private corporations or other political positions.

Overall, as far as we are concerned, they are tools that mainly prevent or limit a judge from assuming political office, while they do not regulate the opposite case or the following situation, i.e. that of the judge who, having finished a political office, wishes to return to the judiciary. To regulate this moment, the introduction of freezing periods has been discussed, that is, the introduction of a period of time between the end of the political office and the return to the judiciary. Here again, it is an institute that has asserted itself in *lobbying* to regulate transfers between the public and private sectors.

In Italy, with the 2022 justice reform, measures of this type were introduced.

It is stated in this regard that «The justices ... excluding those serving in higher jurisdictions or with territorial competence of a national character, candidates but not elected to the office of national or European parliamentarian, regional councilor [...] mayor or municipal councilor [...] may not be reassigned in function with assignment to an office having competence in whole or in part in the territory of a region included in whole or in part in the constituency in which they presented the candidacy [...]. The justices [...] in service in higher jurisdictions or with territorial competence of national character, candidates, but not elected, after the reassignment in office are appointed by the respective organs of self-

government to carry out activities not directly jurisdictional [...] The limits and prohibitions [...] have a three-year duration».

It is added that «justices [...] who have held the office of national or European parliamentarian, regional councilor [...], president of the region [...], mayor or municipal councilor, at the end of their term of office, if they have not yet reached the mandatory retirement age, remain without office, in the Ministry to which they belong or [...] in the Presidency of the Council of Ministers, or are relocated in their functions and assigned by their respective organs of self-government to carry out activities that are not directly jurisdictional [...]».

In addition, it is provided that «justices [...] placed outside their position to assume positions of head and deputy head of the Cabinet Office, of the Secretary General of the Presidency of the Council of Ministers and Ministries, of head and deputy head of Department of the Presidency of the Council of Ministers and Ministries, as well as in governments and regional councils, for a period of one year from the date of termination of the position, are placed outside their judicial position, in non-apical positions, in the Ministry to which they belong or in the State Attorney's Office or in other administrations [or] may be relocated in their functions and assigned by their respective self-governing bodies to carry out non-jurisdictional activities [...]».

Finally, it is established that «Justices [...] who have served as a member of the Government or as a member of regional or municipal governments, at the end of the term of office, if they have not yet reached the mandatory retirement age, are placed out of the role in the Ministry to which they belong or [...] in the Presidency of the Council of Ministers, or are relocated in their functions and assigned by their respective self-governing bodies to carry out activities that are not directly jurisdictional [...]».

VI. CONCLUSIONS

Independence is a core attribute of justice, and specifically also of electoral justice. Judicial independence represents, together with due process, a fundamental attribute for providing effective and effective justice to citizens and thus protecting their fundamental rights, sometimes the foundations of constitutional democracy.

The centrality of judicial independence exposes this principle to risks and threats perpetrated with the aim of weakening the guarantees that are part of constitutional democracy. These risks or threats are sometimes difficult to detect, because they are sometimes limited in size or because they are camouflaged behind apparently neutral

practices or regulations. However, the sum of these risks and threats jeopardizes constitutional democracy.

In recent years, populist ideologies have caused significant challenges in this regard. The development of so-called populist movements may represent a reaction to a lack of trust in representative democracy. Populism envisions the construction of a pseudo-direct relationship between the political leader and the people, which seems to give citizens the impression of more direct control over political decisions and greater adherence between popular will and political action. This imposition calls into question the usefulness of constitutional guarantees, including judicial independence.

Special attention has recently begun to be paid to new regimes emerging from these practices. In this sense, we speak of illiberal democracy, electoral authoritarianism, competitive authoritarianism, imperfect democracy, semi-democracy or hybrid regimes. Whatever the label, the concept is essentially the same: regimes which are neither pure democracy nor unrestricted autocracy but contain elements of both. They are under the rule of a constitution and are subject to the dictates of the law. Nevertheless, the rulers manipulate the law to reflect their interests, undermining the substance of democracy, without, however, losing its form. Although most or even all individual measures are taken within constitutional limits, in short, they lead to qualitative changes in the legal and political systems.

Recently, we have also begun to study the processes that lead to the establishment of these regimes, pointing out that they are not the result of a coup or a revolution, i.e. violent and sudden events, but of an incremental degradation of the structures and values of democracy. A variety of definitions are used to describe the phenomenon. Just to name a few examples: constitutional capture, democratic decadence, constitutional retrogression, democratic recession, democratic regression, democratic deconsolidation.

These regimes and processes are established based on a weakening of constitutional guarantees, so a rapid identification of possible threats and a shared definition of the available solutions to these threats seems of utmost importance.

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