

**DISSENTING OPINION OF
JUDGE EDUARDO FERRER MAC-GREGOR POISOT**

CASE OF CORDERO BERNAL V. PERU

**JUDGMENT OF FEBRUARY 16, 2021
(PRELIMINARY OBJECTION AND MERITS)**

INTRODUCTION

1. With the greatest respect, I dissent from the decision taken in this judgment. I consider that an opportunity was lost to reaffirm inter-American case law concerning judicial independence and to explore in detail the level of reasoning that is required in an administrative proceeding to sanction a judge involving open or indeterminate disciplinary offenses.
2. My dissent focuses on the conclusion adopted by the majority on the absence of State responsibility for the violations alleged by the Inter-American Commission on Human Rights and Mr. Cordero Bernal, thereby closing the case. I consider that the majority should have considered a different analysis to the way in which the case was approached by way of the examination of *judicial independence and the principle of legality*, and by *due process and the effectiveness of the application for amparo*.
3. The purpose of the instant case was the administrative disciplinary proceeding that was instituted, and that concluded with the dismissal of a judge owing to the delivery of a decision that was strictly jurisdictional granting unconditional release to two defendants. This domestic ruling was the reason for his dismissal because the National Council of the Judiciary (hereinafter "the CNM") considered that the conduct was "serious" and, pursuant to domestic law, the CNM's decision could not be reviewed by a court. The application for amparo was the only remedy admissible as we will see below. It is worth noting that, after eight years had passed, Mr. Cordero Bernal was acquitted of the offenses of "complicity" and "breach of trust" that he had been accused of, based on the same facts that were the grounds for the disciplinary proceeding leading to his dismissal.
4. The majority opinion considered that the decision issued by the CNM was duly substantiated and, consequently, this provided context to the categorization of the action of then Judge Cordero Bernal as serious. On this basis, in the judgment, the Court did not declare the State's international responsibility for the violation of Articles 8, 9 and 23 of the American Convention on Human Rights (hereinafter "the American Convention" or "the Pact of San José").¹
5. On the contrary, as I will explain below, I consider that it should have analyzed judicial independence — in its aspect of an enhanced guarantee of the tenure of judges — and the principle of legality together. Indeed, the problem of the imprecision of the disciplinary offense applied to Mr. Cordero Bernal is related not only to the alleged violation of the principle of judicial independence in relation to the guarantee of tenure, but also to the alleged violation of the principle of legality. This is because as it relates to disciplinary sanctions imposed on judges, compliance with the principle of legality is of vital importance

¹ Cf. *Case of Cordero Bernal v. Peru. Preliminary objection and merits*. Judgment of February 16, 2021. Series C No. 421, paras. 86 to 91 and 96.

insofar as it constitutes a guarantee for their independence;² therefore, I considered that the analysis of the alleged violation of those rights should have been made together.

6. Regarding the principle of legality, when open or indeterminate disciplinary offenses exist, such as those applied in this case to impose the sanction of dismissal, it requires prior normative or jurisprudential criteria that is predictable so that the sanctioning bodies can specify and provide content to the said open concepts, a situation that I consider did not occur in this case. The CNM's decision merely gave an account of the facts that originated the ruling made by Judge Cordero Bernal, without it being possible to note an explanation of the relationship between the facts and the law (which contained the indeterminate concepts) on which the sanction was based, or that an analysis of proportionality had been made as to whether the sanction of dismissal was the appropriate measure.
7. The majority opinion also declared that neither due process nor judicial protection contained Articles 8 and 25 of the Pact of San José had been violated. It should be clarified that, under domestic law, the CNM's decision was not subject to review by a court and the only possible remedy was the application for amparo – and only for violations of due process and not with regard to other fundamental rights, such as those alleged by Mr. Cordero Bernal related to the guarantees of the tenure and irremovability of judges.
8. Based on the preceding conclusions, I consider it necessary, pursuant to Article 66(2) of the American Convention,³ to attach this dissenting opinion to the judgment in order to provide a different reasoning to the majority opinion. To this end, I will set out some considerations on the following elements: (i) the inter-American standard regarding the use of open and indeterminate disciplinary offenses in judicial disciplinary proceedings (*paras. 9 to 21*); (ii) judicial independence and the principle of legality in the Cordero Bernal case (*paras. 22 to 44*); (iii) due process and judicial protection in the instant case (*paras. 45 to 53*); and (iv) conclusions (*paras. 54 to 57*).

I. THE INTER-AMERICAN STANDARD REGARDING THE USE OF OPEN OR INDETERMINATE DISCIPLINARY OFFENSES IN JUDICIAL DISCIPLINARY PROCEEDINGS

9. I consider that the case of *López Lone et al. v. Honduras*, which the Inter-American Court of Human Rights (hereinafter “the IACtHR” or “the Inter-American Court”) decided in 2015, is especially relevant. In that case, the Court established important standards with regard to how the principle of legality should be approached in disciplinary proceedings involving judges, in particular when open or indeterminate disciplinary offenses are applied.
10. In the case of *López Lone et al.*, the Inter-American Court addressed the State's international responsibility with regard to the principle of legality from two points of view: (a) the sanctions imposed on the victims, and (b) punishable conducts in the disciplinary norms.⁴

² Cf. *Mutatis mutandis*, *Case of Urrutia Laubreaux v. Chile. Preliminary objections, merits, reparations and costs*. Judgment of August 27, 2020. Series C No. 409, para. 131, and Bangalore Principles of judicial conduct. Principles 1.1 to 1.6.

³ Article 66(2) of the American Convention establishes: “If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to have his dissenting or separate opinion attached to the judgment.” Also see Articles 24(3) of the Statute, and 32(1)(a), 65(2) and 67(4) of the Rules of Procedure, both of the IACtHR.

⁴ Cf. *Case of López Lone et al. v. Honduras. Preliminary objection, merits, reparations and costs*. Judgment of October 5, 2015. Series C No. 302, para. 258.

11. Regarding the first point, it considered that “the grounds for removing judges from their posts must be clear and established by law” and “[t]aking into account that dismissal or removal from office is the most restrictive and severe disciplinary measure that can be adopted, the possibility of its application must be predictable: [(i)] because the punishable conduct is expressly and clearly established by law, precisely, rigorously and previously, or [(ii)] because the law delegates its imposition to the judge or to an infra-legal norm, under objective criteria that limit the scope of discretion.”⁵ Moreover, the IACtHR added “that some degree of imprecision does not result, *per se*, in a violation of the Convention; in other words, the fact that a law grants some discretionary power is not incompatible with the degree of predictability required.” However, the Inter-American Court conditioned this “imprecision of the law” indicating that “the scope of the discretion and the way in which it should be exercised [must be] indicated with sufficient clarity in order to provide adequate protection against arbitrary interference.”⁶
12. In that case, the Inter-American Court noted that, in principle, the law and its regulations that were applicable to the case established a system of sanctions (ranked according to the gravity of the offense) under which dismissal was applied both for serious offenses, but also for offenses classified as minor or less serious in case of non-compliance with or serious or reiterated violation of certain obligations. Thus, the IACtHR considered that the regulatory framework affected the predictability of the sanction because it permitted the dismissal of a judge based on non-compliance with any of the obligations or incompatibilities of his office when the court understood that it involved serious non-compliance; thus, it granted excessive discretionary power to the body responsible for applying the sanction.⁷
13. Accordingly, with regard to the sanctions imposed on the victims, the IACtHR did not assess whether or not the domestic norms were open in relation to the conducts that the norm should have defined; rather, on this point, international responsibility was circumscribed to the fact that “the disciplinary norms applicable to the cases of the [...] victims granted excessive discretionary powers to the court *in the establishment of the sanction of dismissal*” [italics added].
14. That said, regarding the second element – punishable conducts in disciplinary laws - the IACtHR considered that “[i]n the case of disciplinary sanctions imposed on judges, the requirement of including a statement of reasons is even greater than in other disciplinary proceedings, because the purpose of the disciplinary control is to assess the conduct, suitability, and performance of the judge as a public official and, consequently, the seriousness of the conduct and the proportionality of the sanction require analysis. In the disciplinary sphere, it is essential to indicate the offense precisely and to develop arguments that allow it to be concluded that the offending conducts are sufficiently serious to justify removing the judge from his post.”⁸
15. In particular, regarding the use of open or indeterminate disciplinary offenses, it indicated: “[...] in these assumptions [...] it is fundamental to provide a statement of reasons [...] because it is incumbent on the disciplinary court to interpret these norms *respecting the*

⁵ Cf. *Case of López Lone et al. v. Honduras. Preliminary objection, merits, reparations and costs*. Judgment of October 5, 2015. Series C No. 302, para. 259.

⁶ Cf. *Case of López Lone et al. v. Honduras. Preliminary objection, merits, reparations and costs*. Judgment of October 5, 2015. Series C No. 302, para. 264.

⁷ Cf. *Case of López Lone et al. v. Honduras. Preliminary objection, merits, reparations and costs*. Judgment of October 5, 2015. Series C No. 302, paras. 263 and 264.

⁸ Cf. *Case of López Lone et al. v. Honduras. Preliminary objection, merits, reparations and costs*. Judgment of October 5, 2015. Series C No. 302, para. 267.

*principle of legality and observing the greatest rigor when verifying the existence of punishable conduct.*⁹ [italics added].

16. In that case, the IACtHR considered that the dismissal decisions issued against the victims “lacked adequate reasoning, precisely because they did not explain adequately the relationship between the acts that constituted a punishable conduct or behavior and the norms that were presumably violated.”¹⁰ In addition, it indicated that “[f]aced with the multiplicity of norms cited by the domestic organs that intervened in the disciplinary proceedings [...] this Court considers that it is not incumbent on it to choose those that are best suited to the conducts of the [...] victims in order to determine whether or not they meet *the requirements of precision and clarity called for by the principle of legality for norms of a punitive nature.*” The IACtHR concluded that, at least in that case, “*it is not possible to make a detailed analysis of the requirement of the substantive legality of the norms supposedly violated, owing to the absence of a statement of reasons*” [italics added].¹¹

17. In paragraph 272 of the judgment in the case of *López Lone et al.*, the IACtHR, referring back to paragraph 257,¹² reiterated that “even though it may be admitted that the precision required in matters of disciplinary sanctions is less than in criminal matters, the use of open assumptions or vague concepts [...] requires the establishment of objective criteria that guide the interpretation or content that should be given to such concepts in order to limit discretion in the application of sanctions.”¹³ On that occasion, this ruling was made in relation to punishable conducts.

18. In the opinion of the Inter-American Court:¹⁴

272. Such criteria can be established [i] by law or [ii] by means of interpretation in light of case law that places these concepts within the context, purpose and objective of the norm, in order to avoid the arbitrary use of such assumptions, based on the personal and private opinions or prejudices of the judges when they are applied.

273. In this regard, the Court recalls that the purpose of disciplinary control is to assess the conduct, suitability and performance of the judge as a public official. Thus, the disciplinary regulations for judges should be aimed at protecting the judicial function and, therefore, to assess the performance of the judge in the exercise of his or her functions. Accordingly, when applying open or indeterminate disciplinary norms that require considering [indeterminate] concepts, it is essential to take into account

⁹ Cf. *Case of López Lone et al. v. Honduras. Preliminary objection, merits, reparations and costs.* Judgment of October 5, 2015. Series C No. 302, para. 270.

¹⁰ Cf. *Case of López Lone et al. v. Honduras. Preliminary objection, merits, reparations and costs.* Judgment of October 5, 2015. Series C No. 302, para. 270.

¹¹ Cf. *Case of López Lone et al. v. Honduras. Preliminary objection, merits, reparations and costs.* Judgment of October 5, 2015. Series C No. 302, para. 271.

¹² In this regard, in the said paragraph the Inter-American Court indicated that: “257. The Court has established that Article 9 of the American Convention, which establishes the principle of legality, is applicable to matters pertaining to administrative sanctions. In this regard, it should be recalled that, administrative sanctions, like criminal sanctions, are an expression of the punitive powers of the State and, at times, they are of a similar nature to criminal sanctions because both of them entail impairment, deprivation or alteration of human rights. Consequently, in a democratic system, it is necessary to take special care to ensure that such measures are adopted strictly respecting the basic rights of the individual and following a careful verification of the effective existence of a wrongful conduct. Furthermore, in the interest of legal certainty, it is essential that the norm establishing the sanction exists and is known or can be known before the act or omission occurs that violates it and that it is sought to sanction. Accordingly, the Court considers that the principle of legality also applies to disciplinary matters, even though its scope depends greatly on the matter regulated. The precision of a norm establishing a sanction of a disciplinary nature may be different from that required by the principle of legality in a criminal matter, owing to the nature of the disputes that each one is designed to resolve.”

¹³ Cf. *Case of López Lone et al. v. Honduras. Preliminary objection, merits, reparations and costs.* Judgment of October 5, 2015. Series C No. 302, para. 272.

¹⁴ Cf. *Case of López Lone et al. v. Honduras. Preliminary objection, merits, reparations and costs.* Judgment of October 5, 2015. Series C No. 302, paras. 272 and 273.

the effects that the conduct examined could have on the exercise of the judicial function, ***either positively by the establishment of normative criteria for its application or by means of an adequate interpretation and statement of reasons by the judges when applying them.*** To the contrary, the scope of these disciplinary measures would be subject to the private or moral beliefs of the judges (bold and italics added).

19. Thus, what the case of *López Lone et al.*, establishes is that: (i) the level of precision called for in criminal laws is not required in disciplinary proceedings; (ii) open or indeterminate disciplinary offenses are permitted; (iii) however, this requires the establishment of objective criteria that guide the interpretation or content that should be given to such concepts in order to evaluate the substantive legality; (iv) these criteria may be established by law or by jurisprudential interpretation. Also, adding to what was indicated in the said case, the objective criteria would need to be established beforehand – in other words, predictable¹⁵ – so that the disciplinary body could have elements for substantiation and interpretation when applying them and providing a statement of reasons. Even though the latter element was not addressed in the case, due to the specific particularities of the matter, it is fundamental to ensure that members of the judiciary have certainty *vis-à-vis* the potential application of open or indeterminate disciplinary offenses.

20. Nevertheless, in my opinion, the statement of reasons in disciplinary proceedings in which the maximum sanctions are applied to members of the judiciary must include specific elements in order to be considered adequate substantiation (such as, including the reasoning behind the pre-existing jurisprudential or interpretive criteria). The IACtHR did not analyze this matter on the occasions of the case of *López Lone et al.*, because, as indicated “there was no statement of reasons.”

21. That the precision of a law of a punitive nature is or may be different – as has been recognized by the Inter-American Court – from that required by the principle of legality in criminal matters (a question related to rigor and clarity), does not automatically exempt the State from the obligation to draw up prior objective criteria and to place a limit on the possible arbitrary application of the said norms, either by law or by interpretation.

II. JUDICIAL INDEPENDENCE AND THE PRINCIPLE OF LEGALITY IN THE CORDERO BERNAL CASE

22. As indicated in the judgment, the IACtHR has stipulated that judicial independence gives rise to guarantees: (a) to tenure and irremovability from office; (b) to an adequate process of appointment, and (c) to be protected from external pressures. Regarding the guarantee of tenure and irremovability from office, the Court has considered that this, in turn, entails: (i) that the separation of judges from office must be exclusively as a result of the permitted causes, either by means of procedures that comply with judicial guarantees or because the mandate has concluded; (ii) that judges may only be dismissed on serious grounds of misconduct or incompetence, and (iii) that any procedure must be decided pursuant to the established rules on judicial conduct and in accordance with fair procedures ensuring objectivity and impartiality set out in the Constitution or the law.¹⁶ Moreover, the judgment

¹⁵ In this regard, the consistent case law of the IACtHR in this regard has affirmed that the classification of an act as unlawful and the establishment of its legal effects must pre-exist the conduct of the subject who is considered the offender either in criminal matters or in administrative matters resulting in sanctions. To the contrary, the individual would be unable to tailor his conduct to a legal order in force and certain that expresses social reproach. and its consequences. See, in this regard: *Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs.* Judgment of February 2, 2001. Series C No. 72, para. 106; *Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile. Merits, reparations and costs.* Judgment of May 29, 2014. Series C No. 279, para. 161 and *Case of Argüelles et al. v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of November 20, 2014. Series C No. 288, para. 207.

¹⁶ Cf. *Case of Cordero Bernal v. Peru. Preliminary objection and merits.* Judgment of February 16, 2021. Series

indicates that:

75. This Court has established that the separation from office of provisional judge should be for reasons established by law, whether these are: (i) the occurrence of the resolutive condition to which the appointment or designation was subject, or the expiry of a predetermined period owing to the holding and conclusion of a public competition, based on which the permanent replacement of the provisional judge was appointed or designated, or (ii) serious disciplinary offenses or proven incompetence.¹⁷

23. However, the reference in the judgment to the report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, should not be forgotten. In it, the Special Rapporteur indicated that “although judges may be subject to disciplinary proceedings for conducts that bring judicial office into disrepute or that violate judicial ethics, disciplinary offenses relating in general to “threat or harm to the correct administration of justice, [...] risk undermining the independence of the judiciary.”¹⁸ In addition, the same Special Rapporteur has indicated that although compromising the dignity of the office may be a sanctionable conduct, even leading to dismissal, the disciplinary offense cannot be indeterminate. Accordingly, “the law must give detailed guidance on the infractions by judges triggering disciplinary measures, including the gravity of the infraction which determines the kind of disciplinary measure to be applied in the case at hand.”¹⁹
24. That said, in this specific case, the sanction that was applied to Mr. Cordero Bernal was established in article 31.2 of the Organic Law of the National Council of the Judiciary (hereinafter “article 31.2 of the LOC”) of November 25, 1994, which indicated that the sanction of dismissal was in order for “[p]erpetrating a **serious act** that, without being a crime, compromises the **dignity of the office** and **devalues it in the opinion of the public**” [bold added].
25. On reading the said provision, it is clear that it is imprecise, not only as regards what “a serious act” could mean or “conducts that could be classified as serious,” but also what “the dignity of the office” and “devalue [...] in the opinion of the public” could mean. Moreover, the State did not indicate that it had developed objective legal or jurisprudential/interpretive criteria to correct the imprecision of those expressions, whose particularly open wording entailed risks for the independence of the judiciary.
26. It should not be overlooked that both the IACtHR itself and the Special Rapporteur on the independence of judges and lawyers have insisted on the fact that judges can only be removed from their posts for conducts defined precisely by law.²⁰ In this regard, the Special

C No. 421, para. 72.

¹⁷ Cf. *Case of Cordero Bernal v. Peru. Preliminary objection and merits*. Judgment of February 16, 2021. Series C No. 421, para. 75.

¹⁸ Cf. *Case of Cordero Bernal v. Peru. Preliminary objection and merits*. Judgment of February 16, 2021. Series C No. 421, para. 76.

¹⁹ Human Rights Council. Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul. Mission to El Salvador. UN Doc. A/HRC/23/43/Add.1, para. 76. Available at: <https://undocs.org/A/HRC/23/43/Add.1>. Similarly, the Consultative Council of European Judges in its Opinion No. 1 (2001) on Standards concerning the independence of the Judiciary and the irremovability of judges, indicated that “it would be useful to prepare standards defining not just the conduct which may lead to removal from office, but also all conduct which may lead to any disciplinary steps or change of status, including for example a move to a different court or area,” para. 60. Available at: <https://rm.coe.int/1680747830>

²⁰ In this regard, the Special Rapporteur in the independence of judges and lawyers has indicated: “the law must give detailed guidance on the infractions by judges triggering disciplinary measures, including the gravity of the infraction which determines the kind of disciplinary measure to be applied in the case at hand.” Human Rights Council. Report of the Special Rapporteur in the independence of judges and lawyers, Leandro Despouy. Doc. UN. A/HRC/11/41, para. 57. Available at: <https://undocs.org/A/HRC/11/41>. Also, on this matter, the judgment in the case of *López Lone v. Honduras* indicates: “the Court reiterates that the guarantee of tenure for judges requires that

Rapporteur has indicated that “disciplinary measures to be adopted must be in proportionality to the gravity of the infraction committed by the judge.”²¹

27. Based on the foregoing, with regard to the breadth of Article 31.2 of the LOC, I consider that the majority opinion should have considered that the CNM, when sanctioning Mr. Cordero Bernal using the said provision, applied a norm that was not sufficiently defined, which constituted a violation of the principle of legality, taking into consideration also that the decision did not specify the interpretive criteria used.
28. Unfortunately, in this judgment, on the basis of its considerations in the case of *López Lone et al.*, the Court held that “the precision of a disciplinary sanctioning norm may differ from that required by the principle of legality in criminal matters, owing to the nature of the disputes that each one is called on to decide” so that “the problems of the imprecision of a disciplinary offense cannot be examined in abstract, but rather in light of the grounds established by the judge when applying it.”²² Therefore, it considered that “the Court must establish whether the decision imposing the sanction of dismissal on Mr. Cordero Bernal was adequately substantiated” and “decide whether the arguments made by the National Council of the Judiciary provided content to the norm that was applied,” “whether the decision took into account the effects that the conduct examined could have on the exercise of the judicial function, by an adequate reasoning and interpretation” and “the seriousness of the conduct and proportionality of the sanction.”²³
29. Thus, the majority opinion considered that “the [National Council of the Judiciary’s] decision was duly substantiated and was not arbitrary and, consequently, neither the guarantees of due process nor the principle of legality established in the [American] Convention were violated.”²⁴
30. To reach this conclusion, the majority opinion assessed different matters that revealed the irregularities committed by Mr. Cordero Bernal when he adopted a decision of a jurisdictional

they may not be dismissed or removed from office, unless they commit acts that are clearly punishable; in other words, based on the most serious grounds of misconduct or incompetence. Therefore, the Court considers that, based on the guarantee of judicial tenure, the grounds for removing judges from their posts must be clear and established by law. [...]. Moreover, the possibility of dismissal must abide by the above-mentioned principle of extreme gravity. Indeed, the protection of judicial independence requires that the dismissal of judges be considered as the *ultima ratio* in judicial disciplinary matters.” *Case of López Lone et al. v. Honduras. Preliminary objection, merits, reparations and costs.* Judgment of October 5, 2015. Series C No. 302, para. 259.

²¹ Cf. Human Rights Council. Report of the Special Rapporteur in the independence of judges and lawyers, Leandro Despouy. Doc. UN. A/HRC/11/41, para. 58.

²² Cf. *Case of Cordero Bernal v. Peru. Preliminary objection and merits.* Judgment of February 16, 2021. Series C No. 421, para. 77.

²³ Cf. *Case of Cordero Bernal v. Peru. Preliminary objection and merits.* Judgment of February 16, 2021. Series C No. 421, para. 82.

²⁴ Cf. *Case of Cordero Bernal v. Peru. Preliminary objection and merits.* Judgment of February 16, 2021. Series C No. 421, para. 89.

nature²⁵ regarding which the judgment considered that it “was not totally unsubstantiated.”²⁶ Nevertheless, the Court concluded that “the CNM assessed the gravity of the judge’s conduct; that is, he adopted an irrational decision, as well as its impact on the judicial function. Based on this assessment, it proceeded to adopt the decision of dismissal,”²⁷ and that “[t]he report prepared by the disciplinary authority reveals the reasons that led the CNM to determine that Mr. Cordero Bernal’s conduct was not only serious, but also compromised the dignity of the office, and devalued it in the opinion of the public, because it was irrational and had public impact.”²⁸

31. On this point, the considerations in the case of *López Lone et al.* should be recalled regarding the fact that, in the presence of indeterminate disciplinary offenses and in the absence of norms that develop objective criteria, the statement of reasons – which, from my perspective is reflected in the clear and detailed arguments and reasonings – has special relevance in relation to the obligation of the disciplinary body to indicate how the conduct matches or is circumscribed by the indeterminate elements established in the open disciplinary offense (which, in this case, were the three established in article 31.2 of the LOC, *supra* para. 24); because, in addition to the fact that these indeterminate elements should have been developed previously by law or interpretation, that normative or interpretive development should be present in the disciplinary body’s statement of reasons.
32. According to the majority opinion, “the Investigation Report and the decisions of the OCMA (Office for Control of Judges) and the CNM describe in detail the irregularities in which Mr. Cordero Bernal allegedly incurred,”²⁹ and, therefore, “the CNM’s decision was duly substantiated and was not arbitrary.”³⁰ However, I must underline that, although the Investigation Report and the decisions of the OCMA and the CNM describe the acts and omissions of Mr. Cordero Bernal when adopting his decision and classify them “as serious,” it should not be overlooked that the three decisions merely give an account of the facts that originated Judge Cordero Bernal’s decision *without explaining sufficiently the relationship between the acts and the norm indicated* (in particular the decision of the National Council of the Judiciary in its tenth consideration).³¹ I therefore transcribe some of the pertinent parts of the Investigation Report and of the two decisions in the disciplinary proceedings

²⁵ In particular: (i) the National Council of the Judiciary made “a detailed analysis of the facts that led to the dismissal decision and of the reasons that allowed this conduct to be classified as a serious disciplinary offense”; (ii) that the Investigation Report and the decisions of the OCMA and the CNM describe in detail the irregularities in which Mr. Cordero Bernal allegedly incurred by taking the decision granting unconditional release to two defendants”; (iii) that “[a]ccording to the disciplinary bodies, that decision was not in keeping with the supposed provisions established in the laws of Peru for granting this benefit”; (iv) that, by “not conducting any procedure of a substantive nature during the proceedings; [by taking] the decision to grant unconditional release prior to the expiry of the corresponding legal time frame, and not assessing] all the evidence,” this revealed the judge’s misconduct because they were considered irregularities, and (v) “[i]n the opinion of the CNM that conduct was serious and compromised the dignity of the office because it had no rational legal support, which was the minimum requirement for any jurisdictional decision.” *Cf. Case of Cordero Bernal v. Peru. Preliminary objection and merits.* Judgment of February 16, 2021. Series C No. 421, paras. 84, 85 and 86.

²⁶ *Cf. Case of Cordero Bernal v. Peru. Preliminary objection and merits.* Judgment of February 16, 2021. Series C No. 421, para. 88.

²⁷ *Cf. Case of Cordero Bernal v. Peru. Preliminary objection and merits.* Judgment of February 16, 2021. Series C No. 421, para. 86.

²⁸ *Cf. Case of Cordero Bernal v. Peru. Preliminary objection and merits.* Judgment of February 16, 2021. Series C No. 421, para. 87.

²⁹ *Cf. Case of Cordero Bernal v. Peru. Preliminary objection and merits.* Judgment of February 16, 2021. Series C No. 421, para. 86.

³⁰ *Cf. Case of Cordero Bernal v. Peru. Preliminary objection and merits.* Judgment of February 16, 2021. Series C No. 421, para. 89.

³¹ *Cf. Mutatis mutandis, Case of López Lone et al. v. Honduras. Preliminary objection, merits, reparations and costs.* Judgment of October 5, 2015. Series C No. 302, para. 265

against Mr. Cordero Bernal.

33. First, the Investigation Report of July 21, 1995, considers:

I) [...] it is validly concluded that, by granting unconditional release to the drug-traffickers, Hector Cordero Bernal [...] has not only seriously compromised the respectability of the Judiciary, but also the dignity of the office, devaluing it [...] in the opinion of the public and should therefore be dismissed from his post que [...] ³² [underlining added].

34. The OCMA decision of August 3, 1995, indicates:

CONCLUSION. [...] Héctor Fidel Cordero Bernal, the judge appointed to the First Criminal Court of Huánuco, for the sole purpose of benefiting the defendants in the criminal proceedings he was hearing with unconditional release, an act that was further exacerbated because it concerned a crime of international illicit drug trafficking: That, this type of conduct, which borders on wilful intent, seriously undermines the gravitas of the Judiciary, the image of our institution and the dignity of its members; therefore, a disciplinary sanction must be imposed that is proportionate to the gravity of his acts: That, there should be awareness that the Judiciary is not an institution in which rights may be acquired through corrupt officials and employees; rather, the Judiciary is a power of the State, to which the life, honor and patrimony of the individual are entrusted, trust that must be reaffirmed for the citizenry, always rendering to each individual what legally corresponds to him, and any conduct that contravenes this must be sanctioned ³³ [underlining added].

35. Lastly, the CNM's decision of August 14, 1996:

TENTH: That, consequently, the National Council of the Judiciary, having granted the judge subject to this proceeding the guarantee of the exercise of his right to defend himself, received his statement and the presentation of documents and the pertinent criminal case file, in other words, respecting the principles of due process, reaches the conclusion that the conduct of the defendant judge warrants a disciplinary sanction because no reasonable substantiation whatsoever can be found in the decision to prematurely grant unconditional release and such conduct is defined as an offense and is serious and, therefore, falls within the premise of Article [31.2 of the LOC]; in other words, a serious act that, without being a crime, compromises the dignity of the office and devalues it in the opinion of the public ³⁴ [underlining added].

36. Even though both the Investigation Report and the decision of the OCMA, "classify" the action of Judge Cordero Bernal as serious, a matter referred to by the decision of the CNM, *none of the three refer in detail to the other two elements that are also present – and indeterminate – in Article 31.2 of the LOC which refer to the conduct "compromises the dignity of the office" and "devalues it in the opinion of the public."* To the contrary, the Investigation Report reiterates, in general terms, that the dignity of the office had been compromised, devaluing it "in the opinion of the public" without indicating how the dignity of the office was compromised and, in particular, what is the scope of "public devaluation" in jurisdictional actions. The CNM decision contains similar wording.

37. Furthermore, the words of the CNM should be emphasized when it indicated that "the conduct of the defendant judge [...] is defined as an offense and is serious and, therefore, falls within the premise of Article [31.2 of the LOC]." In this regard, I consider that the majority opinion should have considered and analyzed whether there were sufficient prior objective criteria/elements in the decision of the CNM that were applied to the case to consider that the decision was not adopted arbitrarily. Thus, the indication that the "conduct falls within" the terms of the article cannot be considered sufficient grounds if it is only indicated that "it is serious" without specifying other prior elements concerning the assessment, context and

³² Cf. The Judiciary's Office for Control of Judges, Report of July 21, 1995, Annex 8 (folio 1103).

³³ Cf. The Judiciary's Office for Control of Judges, Report of August 3, 1995, Annex 6 (folios 1064 to 1065).

³⁴ Cf. National Council of the Judiciary, Decision No. 008-96-PCNM of August 14, 1996, Annex 7 (folio 1074).

purpose of the norm.

38. Meanwhile, even though the Investigation Report and the OCMA decision include a detailed description of the facts, both of them suffer from the use of vague concepts without explaining their scope. For example, the Investigation Report states that the Judge's irregularities "compromise the respectability of the Judiciary" and the OCMA decision indicates that it undermines "the image [of the Judiciary] and the dignity of its members."
39. Lastly, since it is the instance that decides and determines whether a sanction is imposed, it was fundamental that the CNM indicate in detail the jurisprudential or interpretive standards that allowed it to conclude that, when Mr. Cordero Bernal issued his ruling, the results of that action were sufficiently predictable and that, as that organ indicated, the said conduct "fell within" the norm. In addition, it was necessary that it indicate clearly how the other two elements present in Article 31.2 of the LOC had been verified and not merely transcribe the norm and its elements. The core issue is that the greater the discretionality of the norm, the greater the importance of the logical, rational and interpretive statement of reasons of the disciplinary body, both to ensure legal certainty and to eliminate any possible question of the arbitrariness of the decision.
40. On this basis, it was reasonable to understand that, in this case, the principle of legality was violated in relation to judicial independence. On the one hand, because the norm applied to Judge Cordero Bernal was too broad inasmuch as it contained three indeterminate concepts. In addition, the considerations provided on three occasions should have been more thorough as regard arguments and reasonings – in order to clarify the causal nexus between the conduct (fact) and the norm (law) – and, thus, allow the context and purpose of each of the indeterminate elements present in the norm to be understood. Finally, it is also true that, for the sake of legal certainty, in the absence of normative developments that provided objective criteria, it would have been desirable that those indeterminate elements had previously been provided with content via interpretation or case law, in order to ensure a sufficient reasoning when applying open disciplinary offenses.
41. In the presence of disciplinary offenses that use indeterminate concepts and in the absence of domestic provisions or grounds that limit the scope of the disciplinary offenses (for example, by regulations), a sufficient statement of reasons acquires a stricter and more rigorous character. It is not sufficient to describe the facts and the norm that is applied; rather the statement of reasons must necessarily include arguments on what has been understood or how the elements that make up the open disciplinary offense have been developed and how the conduct fits in with how this offense has been understood.
42. Added to the preceding considerations, it should not be overlooked that Mr. Cordero Bernal, was acquitted of the offenses of "complicity" and "breach of trust" in the criminal jurisdiction eight years later, based on the same facts that were grounds for the disciplinary proceeding.
43. It should also be emphasized that, in the judgment, the majority opinion considered that the sanction imposed by the CNM "had not violated the principle of proportionality."³⁵ In my opinion, neither of the two decisions issued in the case of Mr. Cordero Bernal adequately reveal why the sanction of dismissal was the necessary measure. On this point, the proportionality of the sanction is not weighed in the decisions imposing it on Judge Cordero Bernal.

³⁵ Cf. *Case of Cordero Bernal v. Peru. Preliminary objection and merits*. Judgment of February 16, 2021. Series C No. 421, para. 88.

44. Lastly, it is necessary to call attention to the reference made to the majority opinion in the case of *Casa Nina v. Peru*.³⁶ We should not lose sight of the fact that the considerations made in the instant case are very different from the analysis made in that judgment, because on that occasion, the IACtHR ruled on a dismissal “based on the needs of public service” of a provisional prosecutor and not on the sanction of dismissal in an administrative disciplinary proceeding.

III. DUE PROCESS AND JUDICIAL PROTECTION IN THE INSTANT CASE

45. As mentioned in the judgment,³⁷ the analysis of the arguments presented by the Commission and Mr. Cordero Bernal’s representatives reveals that the dispute in this case relates to the effectiveness of the application for amparo against the decisions of the National Council of the Judiciary.
46. In this regard, the IACtHR found that the Peruvian Constitution established that the decisions of the National Council of the Judiciary could not be contested and that, at the time of the facts, the judges interpreted that the only admissible remedy was the application for amparo based on violations of due process; therefore, not for alleged violations of other fundamental rights. In this case, for example, Mr. Cordero Bernal argued the violation of the guarantee of irremovability, which was not analyzed.³⁸ However, the majority opinion concluded that “the judges of the amparo procedure examined the decision adopted by the CNM and concluded that it was duly substantiated and that the right to due process had not been violated.”³⁹
47. I disagree with that conclusion. We should recall that the Inter-American Court has indicated that Article 25(1) of the Convention establishes the obligation of the States Parties to ensure to everyone subject to their jurisdiction a simple and prompt remedy, that is rapid and effective against acts that violate their fundamental rights.⁴⁰ On this basis, the IACtHR has indicated that, pursuant to Article 25 of the American Convention, it is possible to identify the State obligation to enact and to ensure the due application of effective remedies before the competent authorities that protect everyone subject to their jurisdiction against acts that violate their fundamental rights or that involve the determination of their rights and obligations.⁴¹ The right established in Article 25 is closely linked to the general obligation of Article 1(1) of the Convention, by attributing protection functions to the domestic law of the States Parties.⁴² Consequently, the State has the responsibility not only to design and enact

³⁶ Cf. *Case of Cordero Bernal v. Peru. Preliminary objection and merits*. Judgment of February 16, 2021. Series C No. 421, para. 81.

³⁷ Cf. *Case of Cordero Bernal v. Peru. Preliminary objection and merits*. Judgment of February 16, 2021. Series C No. 421, para. 102.

³⁸ Cf. *Case of Cordero Bernal v. Peru. Preliminary objection and merits*. Judgment of February 16, 2021. Series C No. 421, para. 48.

³⁹ Cf. *Case of Cordero Bernal v. Peru. Preliminary objection and merits*. Judgment of February 16, 2021. Series C No. 421, para. 103.

⁴⁰ Cf. *Case of Mejía Idrovo v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of July 5, 2011, Series C No. 228, para. 95, and *Case of Martínez Esquivia v. Colombia. Preliminary objections, merits and reparations*. Judgment of October 6, 2020. Series C No. 412, para. 130.

⁴¹ Cf. *Case of the “Street Children” (Villagrán Morales et al.) v. Guatemala. Merits*. Judgment of November 19, 1999. Series C No. 63, para. 237, and *Case of Noguera et al. v. Paraguay. Merits, reparations and costs*. Judgment of March 9, 2020. Series C No. 401, para. 79.

⁴² Cf. *Case of Castillo Páez v. Peru. Merits*. Judgment of November 3, 1997. Series C No. 34, para. 83, and *Case of López et al. v. Argentina. Preliminary objections, merits, reparations and costs*. Judgment of November 25, 2019. Series C No. 396, para. 209.

an effective remedy, but also to ensure due application of that remedy by its judicial authorities.⁴³

48. With specific reference to the effectiveness of the remedy, this Court has established that the meaning of the protection provided by the article is the *real possibility of having a judicial remedy so that a competent and capable authority may issue a binding decision, determine whether or not there has been a violation of any right that the person who files the remedy considers he possesses* and that, if a violation is declared, the remedy is useful to restore the enjoyment of the right to the interested party and to provide redress.⁴⁴ This does not mean that the effectiveness of a remedy is evaluated based on whether it produces a favorable result for the defendant [italics and underlining added].⁴⁵
49. On this basis, the majority opinion should have concluded that, even though a remedy existed under Peruvian law, this was not effective because it limited its admissibility to alleged violations of due process, rather than to the violation of fundamental rights possessed by those who form part of the judiciary, as judges, in a situation of dismissal or disciplinary proceedings.
50. This is even corroborated by the information provided by the State, which indicated that subsequent jurisprudential interpretation had established the effectiveness of the application for amparo to examine any violation of the fundamental rights resulting from the decision to dismiss a judge.⁴⁶ In other words, it can be understood that, at least at the time of the facts, although the application for amparo, as it was defined, protected fundamental rights, in the case of judges, even if they cited other rights, these were not examined because this remedy was only admissible for violations of due process.
51. Nevertheless, the majority opinion merely noted the admissibility of the application for amparo in conformity with the only grounds for which it could be filed and did not examine it further in this case. And this was despite the fact that Mr. Cordero Bernal had argued "infringement of the guarantee of irremovability from office."
52. In addition, it is worth noting that, pursuant to Article 2 of the American Convention (the violation of which was not argued in this case), the State was obliged to eliminate practices of any nature that entailed a violation of the guarantees established in the Pact of San José. Therefore, the State had failed to adopt the necessary measures to ensure the possibility of filing a simple, prompt and effective remedy before a competent judge or court against acts that violated fundamental rights other than due process which had occurred during a disciplinary proceeding. This failure should have resulted in a violation of Article 2 of the Convention in relation to the right to judicial protection.
53. Based on the above, I consider that although Mr. Cordero Bernal had access to the

⁴³ Cf. *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits*, Judgment of November 19, 1999. Series C No. 63, para. 237, and *Case of López et al. v. Argentina, Preliminary objections, merits, reparations and costs*. Judgment of November 25, 2019. Series C No. 396, para. 209.

⁴⁴ Cf. *Judicial Guarantees in States of Emergency (Arts. 27.2, 25 and 8 American Convention on Human Rights)*, Advisory Opinion OC-9/87, October 6, 1987. Series A No. 9, para. 24; *Case of Castañeda Gutman v. Mexico. Preliminary objections, merits, reparations and costs*. Judgment of August 6, 2008. Series C No. 184, para. 100, and *Case of López et al. v. Argentina, Preliminary objections, merits, reparations and costs*. Judgment of November 25, 2019. Series C No. 396, para. 210.

⁴⁵ Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*. Judgment of July 29, 1988. Series C No. 4, para. 67, and *Case of López et al. v. Argentina, Preliminary objections, merits, reparations and costs*. Judgment of November 25, 2019. Series C No. 396, para. 210.

⁴⁶ Cf. Answering brief of the State (folio 290) and final written arguments of the State (folio 882).

application for amparo, this did not constitute an effective judicial remedy that allowed him to argue possible acts that violated fundamental rights other than due process before a competent judge or court.

IV. CONCLUSIONS

54. As I have indicated in the preceding paragraphs, I consider that the case of Judge Cordero Bernal could have been addressed from other perspectives, both with regard to judicial independence and to the principle of legality, as well as with regard to due process and judicial protection. The judgment should have declared the violation of Articles 8, 9, 23 and 25, in relation to Articles 1 and 2 of the Pact of San José and established the corresponding measures of reparation, rather than closing the case.
55. I consider that the IACtHR could have reaffirmed its case law on judicial independence and made a more thorough analysis of the level of reasoning required in an administrative disciplinary proceeding when the disciplinary body applies the most severe sanction to a judge based on open and indeterminate disciplinary offenses, because “the requirement of including a statement of reasons is even greater than in other disciplinary proceedings.”⁴⁷ It should not be overlooked that, several years later, Mr. Cordero Bernal was acquitted of the offenses with which he had been charged, which were the same facts that were the grounds for the disciplinary proceeding in which the sanction of dismissal was applied.
56. In an administrative disciplinary proceeding against judges in which the sanction based on indeterminate concepts is applied, a statement of reasons does not suffice with the mere description of the facts and an indication of the norm applied; rather, prior objective standards must exist that the disciplinary body uses to be able to conclude objectively that the conduct falls within the norm. Also, as in this case, if a norm contains more than one open element, the statement of reasons must refer to this in detail. This was even more important in the instant case, because at the time of the facts there was no effective judicial remedy that allowed an analysis of the fundamental rights at stake – but merely with regard to due process – a matter that years later was permitted through domestic case law, as the State indicated in the information provided to the Inter-American Court.
57. Under the constitutional and democratic rule of law great care must be taken to ensure that the disciplinary measures that are adopted strictly respect the basic rights of the individual and follow a meticulous verification of the effective existence of the unlawful conduct.⁴⁸ This is particularly relevant when judicial independence is at issue, as the guarantees of the tenure and irremovability of a judge are involved. The principle of legality governs the actions of the organs of the State in their respective areas of competence, particularly when it is necessary to exercise punitive powers, where the State imposes, with full force, one of the most severe sanctions against the judiciary: dismissal.⁴⁹

Eduardo Ferrer Mac-Gregor Poisot
Judge

⁴⁷ Cf. *Case of López Lone et al. v. Honduras. Preliminary objection, merits, reparations and costs*. Judgment of October 5, 2015. Series C No. 302, para. 267.

⁴⁸ Cf. *Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs*. Judgment of February 2, 2001. Series C No. 72, para. 106.

⁴⁹ Cf. *Mutatis mutandis, idem*.

Pablo Saavedra Alessandri
Secretary