



Eighteenth opinion, of 6th April 2022, of the Judicial Ethics Commission on ethical aspects of measuring judges' industriousness, performance and occupational hazard prevention. Judge Rapporteur: Commissioner Ocampos González.

I. Introduction

1. Judges' independence is compatible with and even implies their responsibility as public servants and their commitment to the professional performance of the high-level functions entrusted to them as a branch of government. In fact, judges' independence must necessarily be associated with accountability. When the Ibero-American Judicial Ethics Code repeatedly refers to the technical skills and ethical attitudes of judges (Article 29), it links them to "active commitment to the proper functioning of the entire judicial system" (Article 42). Also, the Code's Article 78 requires judges to have "a positive attitude towards the performance evaluation system.
2. The online meeting of the Ibero-American Judicial Ethics Committee on 19th November 2021 decided, on its own initiative, to issue an opinion to address different aspects of industriousness, ways of measuring judges' performance and preventing occupational hazards from an ethical perspective.
3. The Commission intends to analyse the three issues: industriousness, performance measurement and prevention of health risks in exercising judicial functions by committed and diligent magistrates, subject to monitoring that in no way limits their independence of judgement in interpreting the law, but in circumstances in which judges, as humans, also need to ensure a healthy and dignified exercise of their profession.

II. Part One: Judges' Industriousness in an Ethical Context

4. A justice system that does not consider ethical values is far from being objective, independent, and responsible. It risks being carried away by economic and other ups and downs. Such situations may lead it to become involved in illicit acts such as bribery or prevarication. In such circumstances, different degrees of corruption, financial interests, political favours, undue influence or lack of strength or courage in the face of pressures of various kinds. The best protection and support for any justice system is to be supported and sustained by ethical values. Such support provides legal certainty to its pronouncements and strengthens the apparent moral authority of its actors, radiating respect and confidence by the community and citizens in the constitutional rule of law.



5. Locally in each country, in regions and globally, there are numerous codes of ethics, both for the branches of law governing the Lawyers' profession as judicial assistants and the Judiciary and other professional branches. Those who internalise these ethical values seek to ensure that they work with broad responsibility and put the values into practice for the benefit of all citizens.
6. The legal aspect cannot be separated or distanced from the moral, and the judges' role cannot be conceived of as separate from the rules governing their personal conduct. This is true to such an extent that unworthy or immoral conduct constitutes grounds for prosecution and removal of the Judge. This guideline is accepted by practically all positive law systems that regulate the causes and procedures for removing judges. For example, in Paraguayan legislation, Law No. 1084/97 establishes in Article 14, paragraph "h", as grounds for removal of the Judge "committing acts or omissions that constitute immorality in his public or private life and are detrimental to his investiture."
7. Judge selection must take into account the merits and academic and intellectual preparation needed to meet the requirements for technical competence, integrity and honesty in performing functions, to establish at the same time a regime of legal responsibilities. However, judges must also be provided with necessary guarantees and stability to ensure judicial independence, keeping them free of any political interference which may, in the guise of disciplinary performance monitoring, seek to influence their litigation decisions.
8. In performing their duties, judges must be industrious, a virtue that derives from the ethical principle of institutional responsibility. They should cultivate virtues such as diligence and punctuality in their work and office management to achieve good productivity in managing and resolving the issues under their jurisdiction and avoid delays.
9. For this purpose, the judge is required to direct the proceedings actively, avoiding any behaviour that implies delegating work or actions that he should do personally, following current law. The judge should strive to apply the principles of speed, procedural economy, concentration in analysing the facts, evidence and applicable rules, and ensure immediacy in examining each specific case.
10. In this context, the Judge must diligently perform the work resulting from her functions within her scope. The judge must give this work priority over any other personal activity, seeking to make optimal use of the time and tools provided and resolve the cases submitted for decision in a timely, efficient, and effective manner.

11. From this point of view, the Judge must consider multiple incompatibilities. This means that while performing his duties, the Judge must not hold any other public or private position, paid or unpaid, except, if so provided for by national legislation, part-time teaching or scientific research, much less any trade, industry or professional or political activity, nor hold positions in official or private bodies, political parties, associations or movements. In short, the aim is to avoid assuming commitments or responsibilities of any kind outside the judiciary, including academic posts, which might hinder due concentration on judicial work. This helps avoid delays or actions to the detriment of diligent and efficient work, with promptness, quantitatively or qualitatively, in resolving cases submitted for processing, analysis and decision.
12. In other words, industriousness should steadily increase the promptness of case resolutions and should reduce congestion in the courts as much as possible.
13. Every judge must internalise the commitment to the institution, to promote a culture of service involved with the institutional mission and vision that can ensure growth and professional development for the judiciary and the civil service, as well as a commitment to dedication, constancy and careful work, even with the complexity or difficulty that may arise in its realisation or execution.
14. The *Bangalore Principles* expressly include diligence as one of their core values. The *Commentary on the Principles* explains it: “The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the court’s business. A judge can be efficient and businesslike while being patient and deliberate.”¹
15. Chapter 12 of the *Ibero-American Judicial Ethics Code* covers diligence which it states in Article 73, “aims to avoid the injustice caused by a late decision.” Moreover, as this Commission has needed to comment, resolving a case promptly depends on procedure, case-load and the conduct of the judge and the parties.
16. This Commission has needed to point out these three components of judicial proceedings: punctuality, compatibility and responsibility².
17. Punctuality is a virtue referred to in Article 76 of the *Code*, which requires the judge to ensure that proceedings are carried out with the utmost punctuality. In this

¹ United Nations Office on Drugs and Crime, *Commentary on the Bangalore Principles of Judicial Conduct*, Vienna and New York, 2013, § 207.

² Castro Caballero, Fernando (dir.), *Código Iberoamericano de Ética Judicial Comentado* (Ibero-American Code of Judicial Ethics Annotated), Bogotá, 2019, pp. 114-124.

case, respect for the parties and the legal representatives requires the judge to fulfil this ethical duty. Very serious failure to do so may lead to disciplinary action.

18. That any activity the judge intends to perform must be compatible is a fundamental requirement of the judicial statute. In this regard, from the ethical point of view, Article 77 of the *Code* states resolutely: “The judge must not incur obligations that disturb or impede the proper performance of his or her specific functions.” Article 6.1 of the *Bangalore Principles* provides that: “The judicial duties of a judge take precedence over all other activities.” In short, no activity, even if it is compatible with the judicial function, may be allowed to impair the judge’s professional work.

19. In Article 41 of the Code, institutional responsibility assumes that “the proper functioning of the judicial institutions as a whole requires each judge to be able to perform her function adequately.” And then, Article 42 of the *Code* defines the institutionally responsible judge as “one who, in addition to fulfilling his specific individual obligations, assumes an active commitment to the proper functioning of the entire judicial system.” Finally, Article 47 reiterates that “the judge must be willing to promote and collaborate in everything that means a better functioning of the administration of justice.”

III. Part Two: Judges’ Positive Attitude to Performance Measurement

20. Measurement of judges’ workload is fully compatible with the principle of independence. It is a manifestation of the principle of judicial accountability and is inescapably linked to the right to effective judicial protection. However, it cannot be concealed that setting objective performance targets for the judiciary has, on the one hand, an undeniable disciplinary dimension and, on the other hand, has been linked to the idea of pay increases for judges who reach particular quantitative objectives and, consequently, are more highly valued.

21. Article 19 of the *Statute of the Ibero-American Judge* (2001) already provided for establishing these mechanisms: “As a guarantee for the efficiency and quality of the public service of justice, a system of evaluation of professional technical performance and conduct of judges can be established.” Article 23 then contained this provision on the consequences of a negative performance evaluation: “The inadequate or poor performance in the exercise of the jurisdictional function, duly accredited through the legal and regulatory procedures established, allowing the

hearing of the judge, can entail the application of obligatory training period or, where necessary, the application of other corrective or disciplinary measures.”³

22. Article 78 of the *Ibero-American Judicial Ethics Code* (2006) expressly requires of the judge “a positive attitude towards performance evaluation systems.” It should be reiterated that monitoring and evaluation are not at odds with the independence of judges. They are a clear manifestation of their legal responsibility and the ethical duties they assume in exercising their profession.
23. Firstly, implementing performance measurement for judges is controversial. Surveys of Ibero-American countries show that any monitoring based on objective performance targets or measurement of judges’ work is frequently challenged.
24. For example, Paraguay’s Supreme Court, as overseer of all the country’s courts and tribunals, has a recognised monitoring function to measure judges’ performance. This is established in Article 4 of Paraguayan Law 609/95 on the organisation of the Supreme Court of Justice. The Supreme Court is given disciplinary power and supervision over courts and tribunals, the status of proceedings, and the productivity in dealing with cases filed and resolved in the different courts. This supervision is exercised over the courts and legal representatives (lawyers), Judicial Branch officials, employees, and dependent offices. It continuously and periodically performs audits in the different districts to cross-check information. Indeed, the *Paraguayan Judicial Ethics Code* requires judges to work full time on judicial work, make optimal use of their time and schedule oral hearings in trials, with the consequent timely resolution of cases. Finally, where judicial delays caused by heavy case-load are detected, detecting the factors that cause such failures are invaluable for measuring judges’ performance and preventing work-related risks.
25. In Spain, attempts to establish different performance targets have been very controversial. The courts overturned them in 2006⁴ and 2021⁵. However, in 2020 the

³ Sixth Ibero-American Summit of Presidents of Supreme Courts and Supreme Courts of Justice, held in Santa Cruz de Tenerife, Canary Islands, Spain, 23rd, 24th and 25th May 2001.

⁴ Supreme Court of Spain, judgement of 3rd March 2006 (Administrative Chamber, appeal No. 14/2004, ES:TS:2006:1383, rapporteur: Robles Fernández (annulling the system of judges’ remuneration by targets); on the other hand, several judges formulated individual opinions, one of which is reasoned: “The fact that these targets, which always have room for improvement and are necessarily transitory —like any technical criterion used to measure judicial performance due to their relationship with changes in litigation and the capacity of the Administration of Justice to cope with it— are based on the number and type of decisions rendered is not, in itself, contrary to the Constitution or the Law. They assume an objective fact, comparable and innocuous to judicial independence. Although this is not the only possible or even the best course of action, it is not illegal for such reasons.”

⁵ Supreme Court of Spain (Contentious-Administrative Chamber, 6th Section), judgement of 25th March 2021, Appeal No. 63/2019, ES:TS:2021:1178, rapporteur: Menéndez Pérez (annulling judges’ performance targets for not holding a hearing of the judicial associations).

Spanish Supreme Court allowed the new system of variable remuneration by objectives. It justified its decision because “the combination of this quantitative productivity criterion for setting variable remuneration is not only fully valid but inevitable given the nature and purpose of the remuneration component in question, provided that it is not done in such a way as to nullify or obviate this requirement to satisfy judicial decisions, which are ultimately the result, the effective judicial protection.”⁶ When it overturned them in 2021, on the grounds of formal defects, the Spanish Supreme Court insisted: “Granting genuine, effective judicial protection requires judges and magistrates (and the court itself, as a whole) the intervention, examination and individualised and reasoned resolution of the specific and particular matter in dispute; which translates and must be perceived through resolutions that demonstrate knowledge of the singularities of the case and the legal issues raised in it, and that makes manifest the reasonableness of the response. Although quantitative references to the number of cases that can be resolved are necessary, it is not they, but what has been said above, that must take precedence in determining the workload that the courts can bear.”

26. Secondly, performance measurement has an undeniable disciplinary aspect that goes beyond the strictly ethical framework. In this regard, in Spain, the Supreme Court has had to reiterate that compliance with targets may, in some ways, prevent disciplinary intervention against judges. So, for example, the Spanish Supreme Court overturned a disciplinary penalty for a serious offence by a judge for unjustified delay even though he far exceeded the initial targets set and resolutely reiterated that: “One can overexert oneself for a while, but one can not keep overexerting oneself all the time”⁷. In several cases, the Spanish Supreme Court has also overturned disciplinary penalties or upheld the closing of disciplinary proceedings for the unjustified delay. In the opinion of the Supreme Court, “compliance with the guideline performance targets set by the General Council of the Judiciary itself is of great importance for the purposes of a possible exemption from liability, since ‘in reality, it is difficult to consider that a work performance by a judge greater than that which is recognised as being far higher than the aforementioned targets can be required, to the point of deserving a penalty’.”⁸

⁶ Supreme Court of Spain, judgement of 9th July 2020, Appeal No. 46/2019, ES:TS:2020:2307, rapporteur: Montero Fernández.

⁷ Supreme Court of Spain (Contentious-Administrative Chamber, 7th Section), judgement of 5th July 2013, Appeal No. 329/2012, ES:TS:2013:3910, rapporteur: Pico Lorenzo, legal basis 6 (annulment of serious disciplinary sanction against a judge for unjustified delay despite having far exceeded the initial targets set).

⁸ Supreme Court of Spain (Contentious-Administrative Chamber, 6th Section), judgement of 16th March 2021, Appeal No. 167/2020, ES:TS:2021:4633, rapporteur: Tolosa Tribiño (closure of informative proceedings against a magistrate for delay in bringing a criminal case).

27. Thirdly, performance targets for judges have, on the one hand, a remuneration aspect that sometimes distorts the system. On the other hand, the targets themselves are limited by health considerations for the judges themselves.
28. As for distorting the performance targets, it is easy to imagine the abuses to which the system lends itself. For example, with artificial procedures to boost the score (unnecessarily breaking down repetitive issues, calculating precisely the minimum at which the incentive pay starts) or undisguised trickery to carry out self-reinforcements or participating in reinforcement plans without a minimum guarantee of quality. In this regard, paragraph 23 of the Principles of Judicial Ethics applicable in Spain states: “Judges will avoid both the undertaking of their professional activities outside their function and voluntary participation in reinforcement or substitution plans prejudicing the best jurisdictional performance.”
29. Regarding the limits of the judges’ health in applying the targets, the Spanish Supreme Court corrected an administrative practice according to which the targets were calculated taking into account the days worked, excluding sick leave, but applied the financial incentive only to the 29 days worked and not to the entire period computed, in this case, six months. In the judgement, the Supreme Court argues: “if, during the remaining 152 days, the Judge or Magistrate has not been able to work, for reasons beyond his control, acknowledged in fact by the Council itself, which has given him the appropriate leave for illness resulting from surgery, rendering the appellant unable to particularly effectively fulfil the professional obligations accredited by him, in the only period in which, for reasons not attributable to him, he has been able to perform the jurisdictional activity.”⁹
30. In short, applying the targets appropriately, both their disciplinary and retributive aspects, requires special care by the authorities governing the Judiciary. Obviously, they must consider the statistics and scores achieved but also the particular circumstances in which judges work.

IV. Part Three. Occupational Hazards and Protecting Judges’ Health & Integrity from an Ethical Perspective

31. The Ibero-American Judicial Summit has been concerned about the judges’ health in exercising their functions and is promoting the adoption of a social protection code for judges. In 2020, it adopted this principle: “The judiciary must

⁹ Supreme Court of Spain (Contentious-Administrative Chamber, 6th Section), judgement of 30th June 2015, Appeal No. 911/2014, ES:TS:2015:3115, rapporteur: Garzón Herrero (application of half-yearly targets discounting sick leave periods).

ensure judges' safety and health by establishing measures for preventing occupational hazards arising from the performance of the judicial function.”¹⁰

32. The Panama Summit approved the document. The Working Group that prepared found that eight Ibero-American countries, namely Portugal, Puerto Rico, Colombia, Ecuador, Mexico, Spain, Costa Rica and Chile, have a system for preventing risks arising from the exercise of the judicial profession, while eight other countries do not: Panama, Paraguay, Guatemala, Venezuela, Uruguay, Argentina, El Salvador and the Dominican Republic.
33. In Spain, setting performance targets has been linked to occupational health. The General Council of the Judiciary (CGPJ), the constitutional body that governs judges in Spain, has explained it as follows: “The regulation of workload for occupational health purposes rests on five pillars: (1) Enforcement is within the scope of the CGPJ own powers. (2) Although it is not the same as setting quantitative targets, both should be determined coherently and should never ignore the system for setting input and variable compensation targets. (3) It is a process under construction, a dynamic process. (4) It should be built on a combined system of quantitative, qualitative and temporal criteria that take into account the multiple risk factors that may be present. (5) It should include a prevention and alert system to detect problems and take measures in occupational health risk situations”¹¹.
34. As public servants and in performing their duties, judges must have government protection and support. In fact, and to implement the independence principle, paragraph 4 of the *Principles of Judicial Ethics* applied in Spain provides: “Judges have a duty to demand from the political powers working conditions appropriate for the independent and effective undertaking of their functions, and the resulting provision of human and material resources.”
35. The economic crisis worldwide and in each of our countries, even more so today with the Covid-19 pandemic, has caused widespread bankruptcies, a trade slowdown, and large budget deficits by reducing revenues and increasing spending, and government indebtedness, causing restrictions and budget cuts for public institutions. However, this is how the Ibero-American Judicial Summit describes the effect of the pandemic on our judiciaries: “In general, and except for the cases covered by

¹⁰ Ibero-American Judicial Summit, “Two Essential Pillars for Strengthening the Judicial Independence of the Ibero-American Judiciaries: 1. A constitutionally guaranteed and sufficient budget allocation; 2. Bases for Establishing a Social Protection Code for Judges”, 20th Plenary Assembly (virtual session, Panama), 11th December 2020 (Group 2), paragraph 8.

¹¹ Martínez Moya, Juan, and Sáez Rodríguez, María Concepción (coord's), *La Protección Social de la Carrera Judicial* (Social Protection of the Judicial Career), 2nd edition, BOE, Madrid, 2021, paragraph 752.

minimum services agreements, there has been an almost total suspension of jurisdictional activity including the usual monitoring of productivity, quality and performance in the judicial career. The situation has been resolved in the judges' interest without imposing any special charges or services on them. This has encouraged a favourable reaction by the judicial careers with respect to the measures adopted by each governing body.”¹²

36. Finally, we need to stress the importance of the fundamental right of citizens (and therefore also of judges) to their treatment, especially in health matters. In Europe, for example, “data concerning health” is defined as “personal data related to the physical or mental health of a natural person, including the provision of health care services, which reveal information about his or her health status”. The processing of this data is subject to a stringent prohibition and only in public interest cases or as a result of regulation in the labour field. As stated in the General Data Protection Regulation applicable in the European Union, “Those rules shall include suitable and specific measures to safeguard the data subject’s human dignity, legitimate interests and fundamental rights”¹³.

37. It is precisely in this area of health care that particular ethical dilemmas arise. So, for example, the Spanish Judicial Ethics Committee issued an opinion on whether there is an ethical duty to inform the CGPJ’s occupational risk prevention service of any psychological ailments affecting the judge¹⁴. To this effect, the Committee recognises that the issue raised “from an ethical perspective, is not directly related to any of the Principles of Judicial Ethics, but could indirectly affect those that refer to the proper exercise of judicial functions.” On the one hand, if intermittent or chronic psychological problems and psychological treatment “do not prevent the normal performance of the judicial function, within the framework of the aforementioned principles, there is no ethical duty to bring it to the attention of any of the services of the General Council of the Judiciary.” On the other hand, it refers to cases in which these psychological problems and their treatment have an adverse impact on the normal performance of judicial functions and the service to be provided to citizens who come to court. Furthermore, it gives examples: “could

¹² Álvarez de Benito, Pedro, [El Covid19 y la administración de justicia iberoamericana](#) (Covid-19 and Ibero-American Administration of Justice), Ibero-American Judicial Summit, September 2020, section 2.2.4, p. 33 (retrieved: 21/03/2022).

¹³ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27th April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (*OJEU* No. L 119, 4.5.2016, p. 1).

¹⁴ Judicial Ethics Committee of Spain, *Opinion (Consultation 18/19), dated 23rd October 2019. Integrity Principle. On whether there is an ethical duty to inform the CGPJ’s occupational risk prevention service of any psychological ailments affecting the judge*, Consejo General del Poder Judicial, Madrid.

affect the mental stability necessary to face hearings and trials, resolve cases and issues with contact persons in a reasonable time, etc.” The carefully considered solution offered by the Judicial Ethics Committee is: “In such cases, it would be prudent not to wait for the negative consequences that the passage of time could lead to (for example, a prolonged delay in arriving at a resolution). The occupational risk prevention services should be consulted to try to find a solution that addresses both the situation of the judge suffering from the situation and a way to provide a proper service.”

V. Conclusion: Principles, Ethical Virtues & Incentives for Good Judicial Performance

38. The attitude and work of judges are essential elements of a responsible exercise of the judicial function. So, excellent performance has to be achieved through a balanced combination of ethical principles and virtues as reiterated in the codes and, in particular, in the *Ibero-American Judicial Ethics Code*.
39. So, the first prerequisite for excellent work is the independence principle. That is why judges must demand “that their rights be recognised and that they be provided with the means to enable or facilitate” their work.
40. The second is institutional responsibility, which obliges the judge to maintain an “active commitment to the proper functioning of the entire judicial system” and promote and collaborate in everything involved in better functioning of the administration of justice.
41. Finally, a judge’s industriousness must be based on the virtue of diligence to avoid procedural delay, on punctuality to respect other people’s time and on strict compliance with the regime of incompatibilities in such a way that the judge does not incur obligations that disrupt or prevent the proper performance of his or her specific functions.
42. Objectively measuring judges’ performance is not just a matter of monitoring, compatible with the independence principle. It is also a guarantee against excessive disciplinary actions and an appropriate manifestation of accountability. Article 78 of the *Code* ethically obliges the judge to maintain a positive attitude towards performance evaluation systems. Likewise, any practice or self-interested calculation that perverts the purpose of the reinforcement or substitution plans must also be eradicated.



43. Judges' professional well-being and the prevention of risks in exercising their profession must be pursued as an undeniable objective in a social state governed by the rule of law.
