

Seventeenth opinion, of 6th April 2022, of the Ibero-American Commission on Judicial Ethics on the ethical aspects of the issue of judges' abuse of jurisdiction. Judge Rapporteur: Commissioner Montero Montero

I. Introduction

1. One may distinguish two aspects of the judge's conduct in exercising the judicial function: jurisdiction-related and purely management-related. Abuses of jurisdiction arise both in exercising the jurisdiction itself and managing it within the court itself, whether collegiate or with a single judge. In both cases, it is important to consider the ethical perspective to ensure fulfilment of the principles of independence, impartiality and integrity, and the cultivation of the virtues of prudence, punctuality or even courtesy. These principles and virtues increase the citizens' confidence and ensure their right to a good administration of justice.
2. The *Ibero-American Judicial Ethics Code* refers to the judge's conduct in proceedings. For example, Article 8 imposes a duty to exercise "the power that accompanies the exercise of the jurisdictional function with moderation and prudence." However, Article 75 of the *Code* requires the judge to "avoid or, at least, sanction activities that are dilatory or otherwise contrary to the parties' good faith in the proceedings." Finally, the warning in article 76 of the *Code* is significant. It lays down "the duty to ensure that actions in the proceedings are performed with the utmost punctuality." Also significant is the scope that article 49 gives to the duty of courtesy as "the way to manifest the respect and consideration that judges owe to their colleagues, to the other members of the judicial office, to lawyers, witnesses, litigants and, in general, to all those involved in the administration of justice." In short, these are ethical duties that aim to eradicate and prevent any abuse in the exercise of the judge's jurisdiction.
3. 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 the ethical aspects of the issue of judges' abuse of jurisdiction.
4. The primary task of this opinion is to assess the situations that judges must face in conducting proceedings from an ethical perspective, taking into account their significance and impact on the administration of justice. In fact, the opinion tries to reflect, based on procedural reality, on judges' behaviour and their possible violations of ethical principles and moral virtues, without prejudice to the fact that in the most serious cases, judges may incur administrative, disciplinary or even criminal liability.
5. The opinion is structured in two parts. The first addresses the ethical aspects of the judge's behaviour in the proceedings and the scope of the concept of abuse of jurisdiction. The second part analyses the behaviours with which, from an ethical perspective, judges incur in an abuse of jurisdiction. We discuss cases in which the judge also has the ethical duty to prevent abusive behaviour by the parties and the legal operators in the proceedings.

II. Part One: Proceedings and the Abuse of Jurisdiction from an Ethical Perspective

6. The purpose of proceedings is to ensure that the law is applied, to safeguard certainty and reinforce the predictability of justice as a public service under the effective control of judges. In the proceedings, improper behaviours may occur that not only concern the actions of lawyers and litigants but also originate from the judges themselves. These behaviours may exceed the limits of the prudent and fair exercise of jurisdictional power and merit reproach from an ethical point of view.
7. As Steidel Figueroa explained: “The power conferred on judges must be exercised within the scope of the law and legality, which serve as a check on the possibility of arbitrariness by individuals. However, the law and legality leave ample room for making decisions subject only to a judgement of reasonableness. The judge’s wisdom and equanimity must then serve to restrain abusive behaviour.”¹
8. First, one needs to determine the legal boundaries of the concept of abuse of jurisdiction, which delimit its ethical dimension. In this regard, the Spanish Supreme Court has tried out a definition which, first of all, distinguishes between “abuse of jurisdiction as one of the so-called procedural [*in procedendo*] errors” and error in the decision, which would be an erroneous judgement [*in iudicando*]. Second, it reminds us that “case law teaches that [this ground of appeal in cassation] must be raised against decisions that disregard the limits of jurisdiction concerning that of other jurisdictional orders, the jurisdiction of the Constitutional Court [...] or the authority of other branches of government, but not to allege errors by the judge in applying the Law.” Finally, Spain’s Supreme Court explains that “the Court of First Instance has to limit its activity to the imperative procedural rules that show it the path to follow. In some cases, this obliges it to do something (which must be done) and in others forbids it to do so or leads it along a path other than the one imperatively set out by the law (which it neither can nor should do)”².
9. So, given the legal delimitation of the abuse of jurisdiction, it can be considered that, from an ethical point of view, it affects the judge’s own behaviour during the proceedings and also the control exercised over the parties, the legal operators or the judge’s own assistants and collaborators. This same approach could be applied to relations with the judge’s colleagues to prevent confrontation and conflict in the court from hindering its optimal operation. In short, abuse of jurisdiction consists of excessive actions and behaviours that, if they arise within the internal jurisdiction of the administration of justice, could spread beyond procedural administration and become evils that should be prevented and condemned.

1 Steidel Figueroa, Sigfrido, *Ética para Juristas: Ética Judicial y Responsabilidad Disciplinaria* (Ethics for Jurists: Judicial Ethics and Disciplinary Responsibility), Ediciones Situm, Puerto Rico, 2019, pp. 162-163.

2 Spanish Supreme Court (Sala Contencioso-administrativo, Sección 5ª), judgement of 29th April 2011, appeal No. 1755/2007, ES:TS:2011:2611, judge rapporteur: Rodríguez-Zapata Pérez, FJ 4 and 5.

10. One of the ethical virtues of a good judge is temperance, so every judge should avoid intemperance.³ In this regard, a former member of this Commission gave a very relevant definition of a judge's temperament at a particular moment during his exercise in a public hearing: "the judge's ability to stay even-handed, to maintain his equanimity in the courtroom. Implicit in this equanimity is the ability to behave prudently and with self-control, especially in situations where most people lose it."⁴ Judges also need to cultivate this temperament in the rest of the proceedings outside the courtroom.
11. From this perspective, judges need to improve the quality of their proceedings. They can encourage good practices to achieve a more efficient and transparent justice system by complying with ethical standards. Calamandrei spoke about the concept of proceedings when he taught: "The process is not only a series of acts that must follow one another in a certain order established by law (*ordo procedendi*). Rather, it is also about several persons performing those acts in an orderly alternation (*actus trium personarum*). In that series of acts, each of these persons must act and speak at the precise moment, neither before nor after. When reciting a play, each actor must know how to 'enter' on cue, or in a game of chess, the players must take turns to move their pieces according to the rules. However, there is more to the dialectic nature of the process: It is not only alternation, in a chronologically pre-established order, of acts performed by different subjects. Rather, it is also the logical concatenation that links each of these acts to the one before and after it. It is the psychological nexus by virtue of which each act that one party performs at the precise moment constitutes a premise and a stimulus for the act that the other party may perform immediately afterwards. The process is a series of acts that intersect and correspond like the moves in a game: of questions and answers, of replies and counter-replies, of actions that provoke reactions, which in turn provoke counter-reactions."⁵
12. For example, the *Bangalore Principles of Judicial Conduct* (2002), which the United Nations Economic & Social Council adopted in 2006, enshrines this ethical norm: "A judge shall maintain order and decorum in all proceedings before the court and be patient, dignified and courteous in relation to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity. The judge shall require similar conduct of legal representatives, court staff and others subject to the judge's influence, direction or control."⁶
13. In the Ibero-American sphere, the Judicial Summit has highlighted the ethical dimension of proceedings to eradicate abusive behaviour by judges and has repeatedly called for them to cultivate temperance.

3 Sancho Gargallo, Ignacio, *El paradigma del buen juez* (The paradigm of the good judge), Tirant lo blanch, Valencia, 2022. Mentions judicial skills for conducting oral proceedings, pp. 147-151.

4 Steidel Figueroa, Sigfrido, *Ética para Juristas: Ética Judicial y Responsabilidad Disciplinaria* (Ethics for Jurists: Judicial Ethics and Disciplinary Responsibility), *op. cit.*, p. 161.

5 Calamandrei, Piero: *Derecho Procesal Civil, Volumen 1*, Impresora Publi-Mex, S.A., 1997, p. 251.

6 United Nations Office on Drugs and Crime, *The Bangalore Principles of Judicial Conduct*, United Nations, Vienna, 2019.

14. Thus, the *Statute of the Ibero-American Judge* (2001) emphasises the commitment to the quality of justice as a public service and behaviour that is not only technical but also ethical. To this end, the *Statute* notes that “the evolution of our societies has led to a greater role for the judge. This change requires the judiciary to respond to the demand for openness and sensitivity to the needs expressed by various sectors and social agents and adapt its traditional working methods and attitudes to these new needs.”⁷ Article 39 of the *Statute of the Ibero-American Judge* also enshrines the principle of due process. It states it as follows: “Judges have the duty to comply with and enforce the principle of due process. They must establish themselves as guarantors of the rights of the parties and, in particular, ensure equal treatment that avoids any imbalance motivated by the difference in material conditions between them and, in general, any situation of defencelessness.”
15. The *Ibero-American Code of Judicial Ethics* refers to the judge’s behaviour during proceedings. It gives a mandate that exhorts the judge to assume “an active commitment to the proper functioning of the entire judicial system” (Article 42). Furthermore, and more specifically, Article 8 instructs the judge to exercise “with moderation and prudence the power that accompanies the exercise of the jurisdictional function.” Similarly, Article 75 requires the judge to control the parties or third parties in the proceedings: “The judge must avoid or, in any case, sanction any delaying tactics or other behaviour contrary to the procedural good faith of the parties.”
16. Article 60 of the *Ibero-American Code* also advises the judge to take “an open and patient attitude to listening to or acknowledging new arguments or criticisms that confirm or rectify accepted criteria or points.” And Article 76 of the *Code* requires “that actions during the proceedings take place with the utmost punctuality.”
17. National codes of judicial ethics have recognised the importance of the judge’s behaviour during proceedings. Thus, paragraph 3 of Spain’s *Principles of Judicial Ethics* (2016) warns: “Members of the judiciary must be actively committed towards the good functioning of the judicial system, and ... exercise the jurisdictional function in a manner that is prudent, moderated and respectful to the other powers of the State.” At the same time, paragraph 15 of the Spanish Code, foresees that, in their task of directing oral trials, judges “must endeavour to ensure that an appropriate atmosphere is created for each party and other participants to be able to freely and calmly express their respective versions of the events and their positions on the application of Law. Furthermore, they must practise active listening to make more accurate decisions.”
18. In the Dominican Republic, Rule 5 of the *Code of Ethical Conduct for the Judiciary* (2021), in establishing the principle of prudence and moderation, gives this guidance: “Judges must at all

⁷ *Estatuto del Juez Iberoamericano* (Statute of the Ibero-American Judge), 6th Ibero-American Summit of Presidents of Supreme Courts and Supreme Courts of Justice. Held in Santa Cruz de Tenerife, Canary Islands, Spain, 23, 24 and 25 2001. Published by the General Council of the Judiciary of the Kingdom of Spain, Madrid. p. 3.



times demonstrate respectful behaviour to all those involved in the proceedings, showing due consideration to their psychological, social, moral and cultural circumstances”⁸.

19. In short, one may observe that the Ibero-American community has made an effort to conceive the process not only from the perspective of the strictest legal regulation, which is self-evident but has also tightened the ethical requirements that a court should strive for in exercising its moral authority most carefully to ensure equal treatment of the parties, avoiding favouritism, and encouraging calm discussion.

III. Part Two: Judges’ Conduct and the Abuse of Jurisdiction, an Ethical Perspective

20. The judge’s exercise of the jurisdictional function requires not only an adequate ability with procedural technique but also implies the need for psychological insight and heightened common sense. Judges exercising jurisdictional authority, whether acting alone or as members of a collegiate body, may act unethically. Nevertheless, as director of the proceedings, the judge must also ensure that the parties, the legal operators, and anyone else involved in the proceedings refrain from abusive behaviour. It is a matter of being able to perform the judges’ role as directors of the judicial process with equanimity, avoiding excesses.

A) Different Perspectives on the Abuse of Jurisdiction

21. The judge must act as the director of the proceedings. This role tests her ability regarding objectivity, principles and values that users perceive in dignified and respectful behaviour towards them, based on the demands of maturity, good sense and good practices. In these cases, judges must consider the rules of due process and the values implied by adequate judicial protection as cardinal principles governing the judicial function.
22. Judges are responsible for directing debate during the proceedings, whether oral or written. They must leave the impression that the judge is not a party to the conflict and, therefore, cannot contribute to advancing toward or retreating from the appropriate solution by any manifest abuse in exercising their jurisdiction. This aspect of the problem involves the phase in which the judge adopts solutions and acts as arbitrator between the different claims. The phase is also the scene of fierce struggles during the hearing when tempers flare as the parties debate their interests. This is a real war of passions and feelings, a confrontation like all-out war, but the only are the lawyers and the parties themselves, who sometimes behave like fierce warriors.
23. There are numerous examples of abuse of jurisdiction in the terms discussed below. For example, delegating tasks that are reserved for judges to one of their collaborators, or seeking

⁸ *Código de Comportamiento Ético del Poder Judicial* (Code of Ethical Conduct of the Judicial Branch), Judicial Branch of the Dominican Republic, Santo Domingo, 2021. In the same vein, Paraguay and the Argentine province of Cordoba, among others, have codes of conduct that refer to this issue that have been interpreted by their respective courts or ethics committees.

out evidence favourable to one party to the proceedings, during an informal exercise that strays from the party disposition principle. Other examples of abuse include trying to impose a conciliation beyond the interest of the parties, disregarding the rules of the concentration and immediacy principle, encouraging irresponsible and unjustified delays in the proceedings, and delegating the resolution of a judicial dispute to other courts while having the jurisdictional power to resolve it. Finally, another kind of abuse of jurisdiction includes behaviours such as failing to comply with the duty to give the reasons for the judgement within the time specified without justification, postponing the reading of the full resolutions later than the legally-established time, attending the hearing outside the timetable given in the summons, and failing to provide notifications of proceedings within the legally-established time limits.

24. The behaviours described above constitute abusive conduct by judges. They harm the justice system and injure the institutional and ethical order, affecting procedural economy and reasonable timing. In short, they prevent the proper running of the judicial proceedings as a channel for effective judicial protection.
25. The ethical dimension of proceedings is analogous to the exercise of jurisdictional powers. It is based on what could be called a moral understanding of the process. On the one hand, this understanding binds litigants to procedural loyalty and good faith. On the other it obliges judges to act responsibly, based on trust and the right to the proper administration of justice.
26. Judges' role in the process involves powers, faculties and prerogatives that, from an administration of justice point of view, must respect the impartiality principle and take into account other ethical principles, such as integrity, transparency and independence. These principles are intertwined like the links of a chain that underpins the ethical behaviour that forms the transcendental basis that legitimises the judicial function. There is a need to integrate and structure the legal and ethical dimensions of these components of the process to build a justice system that is both sustainable and respectable.
27. The task of making the process morally robust implies exercising the jurisdictional function with respect for principles such as procedural economy or the right to a fair trial within a reasonable period of time. In short, and without disregarding the essential technical dimension of the process, it must be done with a clear idea of the purpose: of effectively protecting citizens' rights. So, the judge's efforts as administrator of the proceedings must be made within legal constraints but must also aim for the highest ethical standards and vision.

B) Some Cases of Abuse of Jurisdiction by the Judges Themselves

28. The different ways judges can commit abuses of jurisdiction are undoubtedly many and varied. For example, the Puerto Rican judicial system has attempted to systematise these cases. The cases include improperly using powers, improperly using powers against attorneys, exercising power against litigants and the general public, using judicial powers to force

settlements and transactions, improperly exercising power to deliberately deny litigants' rights, and judicial behaviour incompatible with judicial temperament and impartiality.⁹

29. The following are just a few examples of cases common to the different judicial systems of our Ibero-American community and the ethical standards that should be taken into account in each case.
30. Firstly, delegating tasks exclusively reserved for the judge constitutes an abuse of jurisdiction. So, for example, experience in Uruguay and indeed in most other Latin American countries indicates that this abuse of jurisdiction can lead to nullities, disrupting proceedings and harming litigants. This behaviour is, of course, contrary to the principles set forth, for example, in Article 42 of the Ibero-American Code. As part of the judge's institutional responsibility, the Code imposes the duty to comply "with the judge's specific obligations of an individual nature." However, Article 81 of the *Ibero-American Code* also applies in this case, proclaiming: "The judge's behaviour should be such that no reasonable observer would believe that he takes illegitimate, irregular or improper advantage of the work of other members of the judicial office."
31. Secondly, an extremely ritualistic attitude by the judge implies overreaching of her jurisdiction. This behaviour, which always involves shortcomings of form, sometimes on successive or in a series of occasions, hinders the normal progress of proceedings, at times preventing substantiation of a claim within a reasonable period of time. This abusive behaviour by the judge in exercising jurisdiction compromises ethical values, such as acting in a way that facilitates access to justice. Likewise, these behaviours are contrary to the concept in the *Ibero-American Code* of the "well-trained judge," whom it describes in its Article 30 as follows: "one who knows the law in force and has developed the technical skills and adequate ethical attitudes to apply it correctly." This same concept inspires a significant proclamation such as Article 35 of the Ibero-American Code: "The ultimate purpose of judicial activity is to administrate justice by means of the law."
32. Thirdly, it may be considered abusive conduct to use the power that the judge has in some procedural systems to produce evidence *ex officio*, exercising it to request the performance of highly complex, if not unnecessary or irrelevant, evidence in an attempt to delay decision-making. This is an unethical attitude for a magistrate who should seek to safeguard the principle of concentration and celerity. Article 10 of the *Ibero-American Code* requires the impartial judge to maintain "throughout the whole process an equivalent distance from the parties, and their lawyers and avoiding any type of conduct which could indicate favouritism, bias or prejudice."
33. Fourthly, another frequent example of abusive behaviour is the practice by some judges who, within the proceedings, assume the role of attempting conciliation but put undue pressure on the parties to achieve it and thus avoid issuing judgements. From an ethical point of view, this

⁹ Steidel Figueroa, Sigfrido, *Ética para Juristas: Ética Judicial y Responsabilidad Disciplinaria* (Ethics for Jurists: Judicial Ethics and Disciplinary Responsibility), *op. cit.*, pp. 161-203.

is a negative attitude at odds with the industriousness that should permeate a judge's behaviour. Also, the pressure exerted on the parties often implies prejudging, an action that every judge must avoid, not only from a legal point of view but also from an ethical point of view. Again, it should be recalled that Article 10 of the *Ibero-American Code* intends that the judge avoid any behaviour that may show prejudice. Article 12 of Spain's *Principles of Judicial Ethics* preaches the need for impartiality by the judge when dealing with favouritism or preferential treatment of the parties that may call into question his objectivity in directing the proceedings and making the decision. Thus, impartiality is not only limited to the decision but also affects the conduct of the proceedings. In this case, as in any ethical perspective, appearances are more important than in the strictly legal sphere.

34. Fifthly, when the judge conducts the proceedings in public hearings, the judge's character is often exposed, which is not apparent in written proceedings. This exposure may constitute abusive conduct, confusing authority with authoritarianism and distorting the climate of respectful and tolerant dialogue in which judicial hearings should take place. This behaviour is far from the "open and patient attitude in listening to or recognising new arguments or criticisms" of Article 70 of the *Ibero-American Code of Judicial Ethics*. Nor does it correspond to the requirements established by Spain's Principles of Judicial Ethics, which exhorts judges to create a "suitable climate" for the parties to act with serenity while obliging them to practice "active listening" to the litigants' arguments.
35. In short, the excesses that judges may commit in exercising their powers must be subject to legal correction and prevention and ethical control. To this end, and to avoid any excessiveness and intemperance by the judge, suffice it to recall the characterisation made in Article 7 of the *Ibero-American Code* of "prudent judgement," namely, that which requires the judge to be able to understand and strive to be objective. So, throughout the proceedings, the judge needs to avoid any decision that might reveal that she has "prejudged" the litigation. This is well dictated by paragraph 13 of Spain's *Principles of Judicial Ethics*: "In decision-making, judges must avoid reaching conclusions before the appropriate moment in the proceedings, which is immediately prior to the judicial resolution."

C) The Judge's Ethical Duties in the Face of Abusive Conduct by Third Parties

36. The rules concerning procedural fairness impose a framework of conduct on the parties, their lawyers, the Public Prosecutor's Office and any other party involved in the proceedings. The legal systems of the countries members of the Ibero-American Community regulate in detail the sanctions against abusive behaviour in proceedings. These include reckless litigation and acts in bad faith, deliberate procedural negligence, malice and procedural fraud, and disrespect for the solemnities and even the investiture of the judges. This regulation opens up an ethical dimension that completes and perfects the way that disputes are channelled through the proceedings under the judge's control.
37. The judge needs to avoid encouraging, consciously or not, any reckless litigation, whether by his own actions, omissions, negligence or simply improper actions. So, the judge must not

tolerate reckless behaviour or other improper conduct by the parties to the proceedings and must act ethically by keeping to good practices.

38. When dealing with diligence, article 75 of the *Ibero-American Code* assigns to the judge the duty to “avoid or in any event penalise dilatory activities or those which in some way obstruct the good procedural faith of the parties.” The same can be deduced from Article 76, that the judge “ ensures that procedural actions are carried out with maximum punctuality concerning himself and others.”

IV. Conclusion

39. The above legal and ethical requirements for exercising jurisdiction require judges to be thoroughly trained not only in substantive and procedural legal matters but also in ethical aspects. This training must ensure that judges act with prudence and equanimity and encourage procedural fairness by the parties and legal operators. In the Commission’s opinion, it is necessary to strengthen the links to training in judicial virtues. It is up to each country’s Judicial College to inculcate this type of attitude and trait in judges.
40. To prevent abuses of jurisdiction, judges must see proceedings as an essential part of their work, one whose ultimate purpose is to “administer justice by means of the law” (Article 35 of the *Ibero-American Code*). And to paraphrase the *Principles of Judicial Ethics* adopted in Spain, this also means instructing judges, for example, in the task of conducting oral proceedings to ensure that they create an appropriate climate that allows everyone to speak freely and calmly express their respective opinions. Furthermore, judges themselves must practise active listening to make more accurate decisions.
41. In short, the abusive exercise of jurisdiction constitutes malpractice that is not only despicable and legally reprehensible but is also an expression of unethical behaviour. Therefore, we recommend diagnosing and evaluating in each of our legal systems these behaviours that seriously affect the right to effective judicial protection and basic principles such as procedural economy and the resolution of proceedings within reasonable periods of time. Legal solutions are needed, but they must also take into account the ethical dimension of such shortcomings, which ultimately entail an inestimable social cost in terms of the credibility of justice and its legitimacy. In short, the Commission insists on the need to maintain the moral authority of the courts so that judges do not abuse their power in exercising their functions.