



Twenty-third opinion, of 21 February 2023, by the Ibero-American Commission for Judicial Ethics on the proposed partial reform of the Ibero-American Code of Judicial Ethics. Reporting judges: Maria Thereza Rocha de Assis Moura, Octavio A. Tejeiro Duque y David Ordóñez Solís

I. Introduction

1. The success of the Ibero-American Code of Judicial Ethics, approved by the Ibero-American Judicial Summit in 2006, is due to its adequate drafting, and the formal and material result, which have facilitated achieving the proposed objectives of cultivating and disseminating a culture of independence, impartiality and integrity in exercising the judicial function in Ibero-America.
2. The Code contains a broad and balanced framework of principles and virtues for the exercise of the judicial function and, at the same time, establishes an appropriate institutional design that, to date, has only required one reform, which was introduced in 2014 by the Ibero-American Judicial Summit.
3. Nevertheless, the evolution of our society and the judicial function itself, as well as developments resulting from the work of the Ibero-American Commission for Judicial Ethics on numerous and diverse opinions, reveal the need to reflect on both the catalogue of principles and virtues, as well as the institutional architecture itself, contained in the current Ibero-American Code of Judicial Ethics.
4. The Ibero-American Commission for Judicial Ethics, in its virtual meeting on 12 September 2022, decided to begin a process of reflection on the need and suitability of reviewing the Ibero-American Code of Judicial Ethics, a decision which is incumbent upon the Ibero-American Judicial Summit.
5. The discussions by the Commission focused, firstly, on reforms to principles and virtues and, secondly, on the suitability of an institutional reform.
6. The Commission queried the Standing Committee on Gender and Access to Justice, which, on 19 January 2023, had issued some highly valuable observations and both its President, Justice of the Supreme Court of Chile, Dr Andrea Muñoz, and one of its members, Justice of the Supreme People's Court of Cuba, Dr Rufina Hernández, were invited and presented their observations virtually during the Commission's meeting held in Santo Domingo, Dominican Republic, on 20 and 21 February 2023.
7. Lastly, as a result of this debate, the Ibero-American Commission for Judicial Ethics selected three areas that would require further attention and, eventually, review or



reform of the Code: incorporation of gender mainstreaming (new chapter XIV and articles 82bis, 82ter and 82quater), new technologies (new chapter XV and article 82quinquies) and legitimisation to request opinions from judges and their associations (modification of article 92).

II. Review of the principles and virtues of the Ibero-American Code of Judicial Ethics

8. With regard to its principles and virtues, the structure of the code has been quite successful and, in view of the evolution and the interpretation by the Commission, it requires nothing but the express consideration of a cross-cutting principle such as that of gender equality, as well as a general consideration of the new technological context. This involves adding new chapters to Part I, which would be expressed under both articles 82bis to 82quinquies of the Code.

A) The cross-cutting principle of gender and non-discrimination in applying the Code.

9. The Commission dedicated its twentieth decision, approved in 2022, to the principle of gender equality and noted therein that it is necessary to "consider, when revising the Ibero-American Code of Judicial Ethics, the advisability of expressly and appropriately enshrining the gender perspective among its principles". To this end, the Ibero-American Commission on Judicial Ethics will collaborate closely with the Standing Committee on Gender and Access to Justice of the Ibero-American Judicial Summit and its work".

10. In the conclusions of the above-mentioned twentieth opinion, we had also underlined, on the one hand: "The incorporation of a gender perspective as a model of analysis for the exercise of jurisdiction and interpersonal relations among members of the judicial structures of the region helps identify, draw attention to and address practices and stereotypes that give rise to discrimination. It also prevents their reproduction, minimises their impacts and provides a proper refutation". And, on the other hand, we also suggested: "The implementation of a gender perspective as a methodological tool for judicial systems in the Ibero-American region represents a paradigm shift in the administration of justice. This implementation, however, also requires its adoption as a principle of judicial ethics that requires members of the judicial institutions to accord due respect to the differences between individuals, the prevention of acts of discrimination or violence on this basis, the possibility of establishing the accountability of aggressors, providing for redress for the damage done to victims and, ultimately, the effective judicial protection of their rights".

11. The Committee on Gender at the Summit, in its observations approved on 19 January 2023, considered the following:

A) It is deemed wise to incorporate a cross-cutting principle of gender equality that permeates throughout all other principles contained in the Code and that enables harmonisation of its approaches without creating any contradictions.

b) It seems more appropriate to discuss the Principle of Gender Equality and Non-discrimination in a way that incorporates the required intersectional approach to ensure effective access to justice.

c) With a view to a clear incorporation of the considerations stated in the Twentieth Opinion and to contribute to a deeper understanding of the scopes of the change, it seems to us that the proposed text could provide an explanation of the dimensions related to complying with the principle of gender equality and non-discrimination — both internally, in terms of interpersonal relations within the Judiciaries, and externally, in terms of how it relates to the judicial service provided to users.

d) Related to the preceding point, it would be appropriate to provide detail on the obligations that arise regarding access to justice, in order to clarify the actions that the judiciary must carry out, including training, in order to maintain the standards of conduct and excellence required to fulfil its role.

e) In that same vein, it seems appropriate to provide detail on the internal obligations of the judiciary.

12. The drafting of the new chapter and the three new articles that, in view of the initial work of the Ibero-American Commission for Judicial Ethics (ICJE), have been suggested by the Committee on Gender and Access to Justice and defended virtually by its president and a commissioner during the in-person meeting of the ICJE, are worded as follows:

Chapter XIV Gender equality and non-discrimination

Article 82bis. The principle of gender equality and non-discrimination will advise how the judicial profession is exercised, both in terms of the relationships within the Judiciaries as well as in the exercise of jurisdiction, thereby guaranteeing the population's access to justice.

Efforts shall be made to adopt the use of language that is inclusive and respectful of all people.

Article 82ter. The judiciary must administer justice without gender bias, gaps or stereotypes when explaining and deciding cases. It is essential that judges incorporate

gender perspective and intersectionality as tools for analysis in order to adequately perform their jurisdictional function.

Judges must receive training in regulatory foundations, technical capacities and ethical attitudes that allow them to incorporate gender perspective in judicial reasoning.

Article 82quater. Judges must conduct themselves in their work in a way that is respectful of the rights of people and must not engage in gender-based discrimination or gender-based violence in any of their roles.

Transparency and justification are necessary conditions when making appointments in bidding proceedings to guarantee the judiciary equal access to positions in judicial institutions.

13. Furthermore, the Committee on Gender, its president and one of its commissioners defended the drafting of inclusive language in the Ibero-American Code of Judicial Ethics, under the terms agreed at the 2017 Summit and the terms proposed by the Committee on Gender itself.
14. It is therefore advisable to adopt a new chapter that contains a definition of the principle of gender equality and non-discrimination and sets out the scope thereof. To this end, in the aforementioned opinion we also outlined essential aspects of this ethical dimension of the judicial function: "To promote and institutionalise the inclusion of a gender perspective in the administration of justice, as an ethical principle that must be expressly reflected in the codes of judicial ethics, thus contributing to the realisation of the principles of equality and non-discrimination for all persons involved in judicial proceedings and serving as a warning in the face of any discriminatory behaviour and gender-based violence observed among members of judicial institutions".
15. Furthermore, and in accordance with the observations of the Committee on Gender at the Summit, it is appropriate to adopt the proposed limits of the principle and definition of its scope.
16. Inclusive language is an inevitable consequence of this new perspective. Drafting the Code in inclusive language could even be considered. In fact, the Committee on Gender at the Summit made a proposal to adapt the Code in line with another proposal made at the same Summit in 2018,
17. however, a consensus was not reached on this matter. In fact, we already confirmed this in our Twentieth opinion: "The importance of inclusive language is a matter on which there is still little consensus among the members of Ibero-American judicial systems, beyond its recognition as a palliative for the phenomenon of sexism

in language, or at least as an instrument with which to draw attention to the absence of neutrality in the use of the masculine gender, which has historically served to erase the presence and participation of women and other groups in society".

18. Nevertheless, the Commission unanimously agrees with the need to ensure that inclusive language is used, whilst at the same time making sure that this use does not affect the grammatical conventions of the official languages of the Summit, i.e. Spanish and Portuguese.

B) The new technological context and its influence in the application of judicial principles and virtues

19. When the Code was approved in 2006, it was impossible to account for the blisteringly fast development of new technologies and their use by citizens in general, judges included. In fact, many dilemmas dealt with in the ethical exercise of the judicial function already concern the use of new technologies, in particular: social networks, personal data protection, exercising the right to free speech etc.
20. The Commission has written several opinions that deal with the consequences of new technologies in the ethical exercise of the judicial function. More specifically, in the Ninth opinion on the use of new technologies by judges (2020), we highlighted: "Effectively, technological means are useful instruments for the administration of justice as, for example, the use of videoconferencing has shown, but they are especially disadvantageous when the judge is not sufficiently trained or when the convenience of incorporating external jurisprudential doctrine is abused, in the sense that it is passed off as original".
21. It is therefore of interest to delve further into how and to what extent this new dimension, which provides the current technological context for the ethical duties of judges, should be touched upon in the current Code.
22. Judges' use of social networks is a matter of great interest from an ethical perspective, which we examined previously in the Commission's Second and Ninth opinions from 2015 and 2020, respectively. In 2015, we stated: "An initial observation reveals that there are no clauses specifically limiting the use of social networks and therefore no special restrictions or duties envisaged with regard to their use. However, it would be misguided to conclude that Judges can make indiscriminate use of these networks". And we reiterated in 2020: "Finally, the ongoing evolution of this reality concerning the personal and professional lives of judges demands a continuous, prudent and reasonable examination of legitimate periodical participation on social networks with the acute observation that their double facet of citizens and judges feeds back positively beyond the risks and

challenges. Their right to expression contains a singular correlative personal and institutional responsibility that must be preserved, in terms of the principle of the judicial role as a duty orientated by public interest".

23. In fact, in a joint meeting between the Ibero-American Commission for Judicial Ethics and the Spanish Judicial Ethics Commission held in Madrid on 4 July 2019, the conclusions adopted included: "[Both Commissions] advise of the need for judges to be completely aware of the positive and negative effects of their participation on social networks, in relation to the image they can give of their independence, impartiality and integrity. It is a matter that requires many nuances and attends to the concurrent circumstances, and both Commissions have already made statements in a number of reports and opinions in this regard. In any case, the opportunity is taken to once again emphasise the convenience of being especially prudent in terms of how to present oneself (stating the position of judge or not), the content of the interventions (which should always stand out for their courtesy and good manners) and online interaction with others (which should always be careful of not creating any appearance of a lack of impartiality)".
24. The protection of personal data is another essential element to the application of new technologies in the exercise of the judicial function. We already touched upon this from an ethical perspective in our Ninth opinion in 2020: "Nowadays, the role of judges and the ethical dimension of their function are inscribed in a context of greater sensitivity towards the protection of personal data but at the same time must respond to the clamour for greater transparency of public authorities, and better security of communications in a sphere where, however, the obligations of professional secrecy, motivation and training are still relevant".
25. Thus, two new Chapters on gender equality and non-discrimination (Chapter XIV) and on new technologies (Chapter XV) are proposed by the former, containing articles 82bis, 82ter and 82quater; and article 82quinquies of the Code, respectively.

III. Review of the institutional architecture of the Ibero-American Commission for Judicial Ethics

26. The institutional system of the Code has demonstrated reasonable soundness and fruitfulness. Since 2006, when the Code was adopted and the Commission was formed, regular renewal of its members and the continuity of its activities, based on the commendable work carried out by the Commission in its foundation stage, have brought about laudably productive work in recent years.
27. The institutional design has also worked adequately. There are only a few problematic and mildly underdeveloped aspects to point out, such as the election

period for commissioners and the executive secretary, which is inconsistent in practice between the Summit (two years) and in the Code (four years); and the figure of the Delegate that, in reality, has not fully materialised and who still has an alternate in the Ibero-American Judicial Integrity Network. In contrast, it seems of great interest to consider the specific issue of the legitimacy of individual judges or their associations to refer queries to the Commission.

28. The four-year term of Commission members' mandates appears rather clear in light of article 84 of the Code. However, in practice, the Ibero-American Judicial Summit has applied the two-year rule, which is in line with other sector commissions, but is not included in the now-in-force regulation. Be that as it may, it would be appropriate to bring the regulation of the Code in line with what is practised at the Summit, considering that, on the one hand, the two-year mandate must be coordinated with the usual mandate of members belonging to other commissions; whilst, on the other hand, we must also remember that a four-year mandate could also provide greater stability to the work carried out by the Commission.
29. The figure of the Delegate under article 84 of the Code has not been duly developed in the Ibero-American Commission for Judicial Ethics. Likewise, the establishment of the Ibero-American Network of Judicial Ethics, with its secretariat managed by the Judiciary of Brazil, forces us to re-examine this type of member and how their functions are established within the Commission's framework for action.
30. The legitimacy to present queries to the Ibero-American Commission for Judicial Ethics should be expanded so that individual judges can also refer queries, although it may be appropriate for the Commission to come up with a way to screen these. In this regard, judicial massification of the Code and explanatory opinions is necessary and appropriate. The Commission must not work, study, debate and expend effort if the judicial community to which this Commission is indebted is not aware of its actions. It is not a question of being knowledgeable about the work itself, but rather about knowing, understanding, interpreting and applying the Code and its explanations. It is likely that, among most judges, there is not a clear conception of the existence of and knowledge about ethics-related texts. Finally, disclosure is needed and it is incumbent upon the Ibero-American Judicial Summit to adopt, as proposed by the Commission, methods to expand Ethics to individual judges, their associations and other commissions whose judicial powers comprise the same functions.
31. It could therefore be of great interest to perfect the system to access the Commission, not only through the bodies of the Summit or the commissioners themselves, as has been provided for to date, but also through individual judges or



their associations, as well as judicial ethics commissions. However, it also seems prudent to establish a screening mechanism that could, by way of example, require endorsement by two members of the Commission in order to address a request for an opinion or consultation from individual judges or judicial associations.

32. It is therefore recommended that a second paragraph be added to article 92 of the Code that includes this initiative.

IV. Conclusions

33. In view of the foregoing considerations, the Ibero-American Commission for Judicial Ethics has formulated the following proposals to be discussed and, where appropriate, approved at the next Ibero-American Judicial Summit for the reform of the Ibero-American Code of Judicial Ethics: the introduction of a new chapter and three articles that outline the principle of gender equality in the exercise of the jurisdictional function; the addition of another new chapter, with one article referring to new technologies and with express mention of the need to account for the context arising from new technologies; and, lastly, the addition of a paragraph in a pre-existing article of the Code itself to expand the legitimacy of judicial associations and individual judges to bring ethical queries to the Commission in the exercise of the judicial function.

34. In conclusion, the Commission proposes the introduction or modification of the following chapters and articles in the Ibero-American Code of Judicial Ethics:

Chapter XIV Gender equality and non-discrimination

Article 82bis

The principle of gender equality and non-discrimination will advise how the judicial profession is exercised, both in terms of the relationships within the judiciaries as well as in the exercise of jurisdiction, with a view to guaranteeing access to justice.

Article 82ter

The judiciary must administer justice without gender bias, gaps or stereotypes when explaining and deciding cases. It is essential that it incorporate gender perspective and intersectionality as tools for analysis in order to adequately perform its jurisdictional function.

Article 82quater



Exercising the judicial function must be conducted in a way that is respectful of the rights of people in all its dealings and must not engage in discrimination or violence in any scope of action.

Chapter XV New technologies

Article 82quinquies

The judiciary must be cognisant of the instrumental importance of new technologies in exercising the judicial function and of the limits that these impose on the fundamental rights of the individual, particularly in as far as the effective protection of their rights is concerned.

The use of social networks by those who make up the judiciary must not compromise their independence and impartiality, nor call into question the integrity of the exercise of the judicial function.

[...]

Article 92

Requests for advice or any other nature from bodies comprising the Ibero-American Judicial Summit or those of the Judicial Summit itself, as well as those of the Ibero-American Commission for Judicial Ethics or its members, shall be submitted to the Executive Secretariat.

Members of the judiciary, professional judicial associations, and commissions or committees on judicial ethics may submit a query or request for an opinion on the interpretation of this Code to the Executive Secretariat. Once received and in order to be considered, the query or request must be expressly supported or restated by at least two members of the Commission.
