



25th opinion, of 8 September 2023, of the Ibero-American Commission on Judicial Ethics on the ethical requirements related to excessive invocation of judicial disqualification. Reporting judge: Justiniano Montero Montero

I. Introduction

1. Parties in judicial proceedings benefit from the protection of a set of guarantees designed to ensure the appropriate behaviour of the persons involved in the delivery of justice. These include the institutional mechanism of disqualification, which may be invoked by defendants or litigants when there is a risk of a breach of the principle of impartiality – a principle inextricably linked to those of equality and fairness, which must be respected by judges in all their actions.

2. While recusal is commonly associated with the recognition that there are grounds for a judge's disqualification, improper procedural practices are often observed which involve the fabrication of grounds for recusal, followed by motions for disqualification, which may harm the image of the members of a particular court or even the judiciary itself.

3. Recusal works in favour of defendants and litigants in the safeguarding and protection of transparency. It is one of a judge's fundamental rights and one of the cornerstones of impartiality; non-disclosure of grounds can lead to a motion for disqualification with the aim of removing the judge from the proceedings, since it is conduct that constitutes ethical behaviour which may well be questionable.

4. Disqualification and recusal concern situations closely linked to the guarantee of impartiality; whereas disqualification is the procedural prerogative of the party concerned, recusal is an action taken by the judge, the essential substance of which, alongside its procedural component, bears a significant ethical burden.

5. Recusal, whether individual or collective, must not be used to shy away from the responsibility of judgment in a social context, whether this is influenced by media pressure from sectors defending their own interests or by professionals who use frivolous litigation or abuse of process as a way of intimidating a judiciary that must live up to the principles and values which constitute its rationale.



6. The ethical dimension of judges' unjustified recusals is an issue of particular relevance to the majority of Ibero-American judiciaries due to their potentially negative effects on the processing and proper swiftness of proceedings. When the right to recusal is not enshrined in the legislation, it impacts on the credibility of the region's justice systems and its constituent democratic states and becomes a problem of social scope. In addition, with respect to judges, excessive recourse to recusals may mask stalling tactics, reflect problems linked to conscientious objection and create a negative work environment among colleagues who see their judicial burden increased.

7. At the 18th meeting of the Ibero-American Commission on Judicial Ethics, held in Santo Domingo in the Dominican Republic on 20 and 21 February 2023, it was agreed that an opinion should be issued on ethical requirements related to excessive invocation of judicial disqualification, based on the tendency toward this practice observed in some judicial systems in the Ibero-American region.

II. The regulation of recusal in the Ibero-American sphere

8. Judicial recusal is a procedural mechanism linked to a right that is also a fundamental guarantee of the safeguarding of impartiality; nevertheless, in its exercise, care must be taken not to undermine the trustworthiness and credibility of the administration of justice. The catalogue of grounds for disqualification includes those that impose an obligation to recuse, which entails a statement of objective grounds for recusal, and this reflects the dual dimension of a judge's responsibility: on the one hand, underpinned by the law and, on the other, by ethical imperatives.

9. There is wide correspondence among the Ibero-American legal systems with respect to the grounds for disqualification and recusal, governed by their corresponding regulatory provisions. In the case of recusal, the similarities in the identification of these objective grounds, as outlined below, should not in any way be considered restrictive, but rather, as can be seen in the light of Dominican procedural legislation, illustrative:

(1) the judge is a spouse, partner or relative within the fourth degree of consanguinity or by adoption, or the second degree of affinity, of any of the parties or their legal or chosen representative;

(2) the judge, their spouse or partner is a creditor, debtor or guarantor to any of the parties, except when these constitute public sector entities, or banking,

financial or insurance institutions. In all cases, the recusal or disqualification only applies when the credit or guarantee is recorded in a public or private document which is recognised or which dates from before the start of the procedure concerned;

(3) the judge, their spouse or partner, or their relatives within the degrees stated in point (1), has proceedings pending with either party or has been involved in proceedings within the two years prior in the case of civil proceedings or within five years in the case of criminal proceedings. Claims or complaints that are not prior to the criminal procedure being heard do not constitute grounds for recusal or disqualification.

(4) the judge has a personal interest in the case because it concerns their business or that of the persons referred to in point (1);

(5) the judge is a contracting party, donor, employer or business partner of any of the parties;

(6) the judge has previously been involved, in any capacity, or in another function or role or in another court in relation to the same case;

(7) the judge has issued an opinion or guidance on the specific procedure concerned which has been recorded in writing or by any lawful means of registration;

(8) the judge has a close friendship or frequent contact with any of the parties or participants;

(9) the judge harbours enmity, hatred or resentment resulting from known facts toward any of the parties or participants;

(10) any other grounds, based on serious reasons, that might affect the judge's impartiality or independence.

III. Judicial recusal as a guarantee of respect for impartiality

10. A judge's right to recusal has an important connection with impartiality. It is of interest to note that the word 'impartiality', according to the definition in the Spanish Royal Academy's *Dictionary of the Spanish Language*, means 'lack of prior intent or prejudice in favour of or against someone or something, which allows one to judge or



act with rectitude'. At the same time, since the word is so closely linked to a judge's profession, it could be said that a judge's first duty is impartiality.

11. The preamble to the *Bangalore Principles of Judicial Conduct* states that 'public confidence in the judicial system and in the moral authority and integrity of the judiciary is of the utmost importance in a modern democratic society'. To this end, it establishes judges' obligation to respect and honour judicial office as a public trust and strive to enhance and maintain confidence in the judicial system.

12. The *Bangalore Principles of Judicial Conduct* link impartiality with the power of recusal and state as follows: 'Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made'. Furthermore, the Code of Ethics for Judges adopted within the framework of the United Nations states that judges must have no interest in the cases which they hear and, in general, 'shall perform their judicial duties without favour, bias or prejudice'. As explained in the *Commentary on the Bangalore Principles of Judicial Conduct*, recalling Judge Hewart's famous 1924 ruling: 'Impartiality is not only concerned with the actual absence of bias and prejudice, but also with the perception of their absence', since it is on this that society's perception and opinion depend¹.

13. With respect to impartiality and its connection with recusal, it is important to consider the position of the Inter-American Court of Human Rights, according to which: '(...) impartiality demands that the judge acting in a specific dispute approach the facts of the case subjectively free of all prejudice and also offer sufficient objective guarantees to exclude any doubt the parties or the community might entertain as to his or her lack of impartiality'².

14. In the same vein, it is said that an impartial judge is one who decides according to the law, free of influence from others and who has no other grounds for their decisions than those provided by the Constitution and the law. It is also said that judges must be free from any connection, inclination or bias, which affects - or may be seen as

¹ *Commentary on the Bangalore Principles of Judicial Conduct*, United Nations Office on Drugs and Crime, Vienna and New York, 2013, paragraph 56.

² Inter-American Court of Human Rights, Case of Apitz Barbera et al. ('First Court of Administrative Disputes') v. Venezuela. Preliminary Motions, Merits, Reparations and Costs. Judgment of 5 August 2008. Series C No. 182.

affecting - their ability to adjudicate independently³. This, therefore, is why the jurisprudence of the European Court of Human Rights and the Court of Justice of the European Union is particularly important.

15. The European Court of Human Rights, in interpreting Article 6 of the Convention - which protects the right to a fair trial - argues that judges must not only be impartial but must also appear to be impartial. In its judgment, the court cites the dictum *'justice must not only be done; it must also be seen to be done'*⁴.

16. In the same vein, the Strasbourg Court has reiterated: 'Impartiality normally denotes the absence of prejudice or bias and its existence or otherwise can be tested in various ways [...] according to a subjective test where regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case; and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality'⁵. With respect to the latter aspect, the European Court of Human Rights states: 'any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw [...] What is at stake is the confidence which the courts in a democratic society must inspire in the public'⁶

17. Moreover, the Court of Justice of the European Union has stated in the same vein: 'the guarantees of independence and impartiality required under EU law presuppose rules that are such as to dispel any reasonable doubt, in the minds of individuals, as to the imperviousness of the body in question to external factors and its neutrality with respect to the interests before it'⁷.

³ Consultative Council of European Judges, Opinion No 1 (2001) on standards concerning the independence of the judiciary and the irremovability of judges, Council of Europe, Strasbourg, paragraph 12.

⁴ European Court of Human Rights, judgment of 17 January 1970, *Case of Delcourt v. Belgium*, EC:ECHR:1970:0117JUD000268965, paragraph 31.

⁵ European Court of Human Rights (Grand Chamber), Judgment of 6 November 2018, *Ramos Nunes de Carvalho e Sá v. Portugal*, ECLI: EC:ECHR:2018:1106JUD005539113, paragraph 146.

⁶ European Court of Human Rights (Grand Chamber), Judgment of 15 October 2009, *Case of Micallef c. Malta*, CE:ECHR:2009:1015JUD001705606, paragraph 98.

⁷ Court of Justice of the European Union, Judgment of 11 May 2023, *Inspekția Judiciară*, C-817/21, EU:C:2023:391, paragraph 47.



18. In the Dominican Republic, the Constitutional Court maintains: ‘(...) for constitutional justice, the right to demand a judge’s impartiality is considered an essential part of due process in which it is recognised that this guarantee is fundamental to the application of the proper administration of justice under the rule of law (...)’⁸.

19. In Spain, under the direct influence of the European Courts, the Constitutional Court considers judicial impartiality as an essential guarantee of the judicial function. It is expressed in two senses, on the one hand as a subjective concept and on the other as an objective concept, with the first requiring the consideration of everything outside the administration of the case and the second, the need to ensure that any potential prior contact with the case is avoided when making a decision⁹. As an essential guarantee of due process, the right to impartiality requires that a claim be resolved by a third party unrelated to the parties and to the interests of the case, which is subject exclusively to the legal framework as a criterion for decisions. This entails an obligation for judges to remove themselves or refrain from hearing a case if there are circumstances that might lead the parties and society to think that they are partial. This is condensed by the Spanish Constitutional Court as follows: ‘This obligation to remove oneself from the case can be summarised in two rules: one, judges cannot procedurally assume the role of a party; and two, they cannot act nor maintain any legal relationships or actual connections with the parties which might reveal or externalise a previously internal standpoint, whether in favour of or against them’¹⁰.

VI. The ethical dimension of the right to recusal from the perspective of the Ibero-American Code of Judicial Ethics

20. Articles 10 to 16 of the Ibero-American Code of Judicial Ethics address and develop the concept of impartiality as an ethical principle. Article 10 includes the following description: ‘An impartial judge is one who pursues the truth of the facts objectively and on the basis of proof, maintaining an equal distance from the parties and their lawyers throughout the proceedings, and avoiding any conduct which might reflect

⁸ Dominican Republic, Judgment TC/0483/15 of 6 of November 2015, paragraph 11.10.

⁹ Spain, Constitutional Court, Judgment No 27/1981 of 20 July 1981; and Judgment No 11/2000 of 17 January 2000.

¹⁰ Spain, Constitutional Court, Judgment No 140/2004 of 13 September, Rapporteur: Pérez Vera, FJ 4.



favouritism, predisposition or prejudice'. Article 11 then sets out the ethical duty of recusal in the following terms: 'Judges are obliged to refrain from involvement in any cases in which their impartiality might be compromised or in which a reasonable observer might consider that there are grounds for thinking that this is the case'.

21. These provisions define the ethical context of this mechanism and their interpretation suggests that it is a guarantee that imposes several ethical obligations.

22. On the one hand, the judicial function requires the observance of values and principles which are determined by and derived from both the legal system itself and society, based on custom, culture and public morality and on ethical standards assimilated by judicial institutions. Consequently, the excessive use of recusal by those who deliver justice requires particular attention, beyond the formal normative level, because it is an issue that has ethical weight.

23. On the other hand, the reasonable management of the use of recusal entails the different judicial systems to ensure behaviour that corresponds to the vision of administering justice in difficult times, where judges' exposure to public scrutiny prevails and which, therefore, requires that in their private life they understand the public relevance of all their actions. Consequently, it is necessary to protect not only those who recuse themselves from proceedings but also the institution to which they belong, with a view to safeguarding the integrity of the judicial function.

24. From an ethical standpoint, it is reprehensible if a party seeks a judge's disqualification when that judge is already aware of the grounds for its application and they do not recuse themselves, since this not only violates the Ibero-American Code of Judicial Ethics but also the constitutional and conventional order and the fundamental rights of the defendant or litigant.

25. Misuse of applications for disqualification, based on legal artifice, constitutes frivolous litigation or abuse of process, and grounds must not be fabricated which provoke forced recusal; attention must be paid to this aspect of the administration of justice since it causes considerable disruption to the process.

26. In some Ibero-American systems for the administration of justice, the right of recusal is frequently exercised, often collectively, which also requires that attention be paid. While it is true that recusal protects the guarantee of impartiality as a fundamental right, it is no less true that its exercise requires an assessment of the grounds, in



accordance with the convictions and values of the judiciary, especially when they are based on subjective issues which are not expressly examined in the corresponding legislation.

27. The importance of judicial impartiality lies in the need for its existence as a guarantee of due process; it is intrinsic to the legitimation of the administration of the process and the judicial function and stands outside the interests of the litigation. In cases of recusal, the judiciary is responsible for resolving an intersubjective conflict of interests based on respect for rights that are subject to effective judicial protection and taking into account the ethical dimension involved.

VI. Conclusions

28. The mechanism of recusal entails abstaining from hearing a specific procedure; it constitutes an act of responsibility in the context of the judicial function and stands as a safeguard of the fundamental right to protect the integrity of the system of administration of justice.

29. Recusal is based on grounds and premises that are duly determined by the normative, objective or subjective order. Nonetheless, for those who deliver justice, irreproachable ethical behaviour must prevail, representative of the integrity and probity expected in the performance of their function, whether the recusal is individual or collective.

30. The misuse of the right to recuse can affect the proper course of the administration of justice when it violates the principle of timely procedures, an issue that members of the judiciary must consider, particularly when the grounds put forward do not correspond to those regulated by the law of the corresponding country.

31. The right of recusal is a pillar that strengthens transparency in the working of justice systems, but its use should not exceed the limits imposed not only by its procedural configuration but by the ethical dimension in which the judicial function is exercised, based on the values and principles established by the legal system of each society.

VII. Recommendations



32. The systems for the delivery of justice in Ibero-American countries must adopt clear and precise safeguarding measures with respect to the misuse of the right of recusal by members of the judiciary. This must include an ethical approach to the problem when it threatens the effectiveness of the administration of justice, the legitimacy of judicial systems and public trust in the rule of law.
33. Judges who recuse themselves must understand that such an act constitutes a waiver or exception to the normal performance of their duties, the object of an initial and genuine ethical and legal oath. Consequently, it must be done with intellectual honesty, probity, loyalty and good faith, as also holds for those who judge its admissibility, especially if there is no possibility of review, in the case of an adverse decision.
34. It does not seem to be the best ethical guarantee that the judges who take on a case by virtue of a potential recusal are those who examine and judge its propriety.
35. The improper and unscrupulous use of recusal or appeals for disqualification is considered susceptible to ethical reproach and is a violation of the guarantee of due legal process.
36. The judiciary's institutional responsibility requires transparency, seriousness and timeliness to establish the natural judge when there are applications for recusal or disqualification, prioritising trust and credibility in the administration of justice.
37. As follows from Article 10 of the Code, 'An impartial judge is one who [...] avoids any conduct which might reflect favouritism, predisposition or prejudice'. Nevertheless, if this situation occurs, for reasons of deep moral conviction that entail a serious and obvious impediment to the principle of impartiality, this conscientious objection may, on an exceptional basis, be analysed and considered in terms of the principles and values at stake.
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