

# **JUDICIAL IMPARTIALITY:** **BETWEEN LAW AND ETHICS**

*STATE: SPAIN*

*TEAM :*

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## **1.- INTRODUCTION: METHODOLOGICAL APPROACH**

Studying impartiality from an ethical point of view raises some obvious methodological issues. Judicial impartiality is not only an ethical principle, it is also a legal principle with its own specific rules in each legal system. What is the point of ethical requirements formulated in quite generic codes if there are already specific legal rules regulating impartiality in each legal system? Moreover, can we extract from these ethical codes rules for the daily practice of the judicial function that are not laid down in the legal systems?. Besides these there are other significant issues: (a) Ethical codes are culturally conditioned; (b) They are the expression of minimum agreements adopted between judges and the organisations of various States and as a consequence they are formulated in quite abstract and general terms; (c) Any attempt to analyse the case-law or to detail the mandates relating to the principle of impartiality would offer us the image of *legal* impartiality, not the image of *ethical* impartiality.

In order to resolve these problems we have to attempt an analysis that should: (a) be not only European; (b) be casuistic and not abstract; (c) compare not only legal texts but also ethical texts. This leads us to adopt the following methodology: Firstly, we shall compare Latin American and European codes to systematise and to find a shared ethical basis with regard to impartiality which goes beyond exclusively European or state cultural contexts. Secondly, we shall study the case-law regarding judicial impartiality in the supranational courts of human rights in Europe and Latin America. That is, comparatively examine the case law of the European Court of Human Rights (ECHR) and the Inter-American Court of Human Rights (ICHR) to define the shared area of understanding of impartiality in the legal world. Thirdly, we shall try to draw any conclusions from the comparison that would appear to indicate, at least in the European and Latin American cultural contexts, the role of ethics and law in the definition of judicial impartiality.

## **2.- IMPARTIALITY AND ETHICAL CODES**

### **2.1. UNIVERSAL CODES**

**2.1.1.- Basic Principles on the Independence of the Judiciary.** The Basic Principles on the Independence of the Judiciary, endorsed by the resolutions of the General Assembly of the United Nations in 1985, is the first international text that formulates ethical standards for judges. It is designed not only to ensure the independence of the judiciary but also to ensure the right of everyone to a fair and public trial, conducted before an independent and impartial tribunal, according to the article 10 UDHR and the article 14 ICCPR. The judicial duty of impartiality is

established in the article 2<sup>1</sup> and the article 8 prescribes that judges shall “always” conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary. However, these statements are still too generic to be considered as ethical conduct instructions.

**2.1.2.- The Universal Statute of the Judge.** The Universal Statute of the Judge was approved by the International Association of Judges on 11/17/1999. It generically lists the most basic rules of conduct for judges and one of them is judicial impartiality (article 5). It highlights not only the obligation to be and to be seen to be impartial but also the duty to fulfil their obligations “*with restraint and attention to the dignity of the court and of all persons involved.*” Article 7 also establishes that “*The judge must not carry out any other function, whether public or private, paid or unpaid, that is not fully compatible with the duties and status of a judge.*”

**2.1.3.-The Bangalore Principles of Judicial Conduct.** The Bangalore Principles, endorsed through ECOSOC Resolution 2006/23, set up a veritable code of judicial ethics, although they have not received this designation expressly because it has “*prescriptive and exhaustive connotations in civil law countries*”. In contrast to the Basic Principles of 1985, Bangalore Principles are addressed directly to the judges and according to its preamble, should be considered as a guiding framework of, “*standards for ethical conduct of judges*”. The Bangalore Principles identify six core values of the judiciary: Independence, Impartiality, Integrity, Propriety, Equality, Competence and Diligence. It also describes their content and defines the required conduct of their recipients. The second value is impartiality and it is considered essential for the proper discharge of the judicial function, related not only to the court decision but also to the decision making process. Regarding the conduct required of judges, the text provides a guideline<sup>2</sup> concerning conduct inside and outside the courts and includes limitations to freedom of expression, introducing the “appearance of impartiality” as a relevant factor. It also provides an open list of situations from which the judge must abstain, including not only the objective side of impartiality, but also the subjective internal side. Finally, the section on “Implementation” of the Principles states that: “*By reason of the nature of judicial office, effective measures shall be adopted by national judiciaries to provide mechanisms to implement these principles if such mechanisms are not already in existence in their jurisdictions*”

## **2.2.- LATIN-AMERICAN CODES.**

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<sup>1</sup> “*The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.*” (article 2)

<sup>2</sup> See table 2

In Latin-America the steps towards the creation of a common ethical code began in 2001 with the inclusion of a specific chapter on Judicial Ethics in the Statute of the Latin American Judge. Following this line, the Charter of Citizens' Rights to Justice in the Latin American Judicial Area of 2002 recognises “*the fundamental right of the population to obtain access to an independent, impartial, transparent, responsible, efficient, effective and fair form of justice*”. The process culminates with the adoption of the Model Code of Judicial Ethics in the XIII Latin-American Judicial Summit in Santo Domingo, in June 2006. They are not mandatory texts but their effectiveness lies in the moral force with which they are imbued, due to the fact of having been adopted by those representing the highest judicial authorities in each country. Furthermore, so far 15 countries have enacted Judicial Ethical Codes or similar rules<sup>3</sup>.

**2.2.1- Statute of the Latin American Judge** The Statute of the Latin American Judge (2001) is not designed to be a text containing minimum measures because it is not limited to compiling the lowest common denominator of the legal systems of Latin American countries but instead addresses how to raise the level of guarantees in each State. Section II of the Statute is about Impartiality (Arts. 7 to 10), considered as an indispensable condition for the exercise of the jurisdictional function. In order to ensure the necessary confidence that the courts need to inspire in a democratic society, the Statute introduces the requirement of the appearance of impartiality (art. 8) which means that it has to be obvious to citizens beyond all reasonable doubt. Article 9 establishes the obligation of abstention. It does not specifically mention the causes, but refers only to the existence of a previous link with the object of the process, parties or interested persons, according to the terms established by law. The Statute also provides for sanction of abstentions without foundation and groundless objections accepted by the judge. Finally, it refers to incompatibilities.

**2.2.2.- Model Code of Judicial Ethics for Latin-America** The Model Code of Judicial Ethics provides a catalogue of principles which serve to permit other rules to embody the ideal of judicial excellence, adapting it to changing circumstances of time and place. The Code regulates impartiality in Chapter II Part I: “Principles of Latin American Judicial Ethics” (Articles 9 to 17). Impartiality is based on the right to receive equal treatment and therefore not to be discriminated against in respect of the implementation of the judicial function. Following this statement, as Manuel Atienza has outlined, it raises the question of whether impartiality could be identified with neutrality. We understand that they are not equivalent terms because judicial impartiality refers to the application of the rules and not to the rules themselves, so the impartial application of unjust laws (discriminatory) does not produce just results (not discriminatory). Article 10 provides a

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<sup>3</sup> As the Statement of Motives of the Code refers

definition of impartiality, referring implicitly to pursuing objectivity based on the evidence and truth of the facts, maintaining an equivalent distance from the parties, their lawyers and avoiding any type of conduct which could indicate favoritism, bias or prejudice... However we believe that this reference to distance would also need to be extended to the facts and the rules.<sup>4</sup> Articles 11 to 17 contain a guide to behaviour which will ensure the judge's impartiality. It is worth noting how the abstention requirement is formulated in terms that emphasise the importance of the appearance of impartiality as this obligation is imposed in all cases "*in which a reasonable observer may deem that there is motive to believe that this would be the case*". The Code also sets limitations on freedom of assembly but it does not include specific limitations on freedom of expression. Finally, noting the different institutional treatment that nations give to judicial ethics and understanding that these requirements should not be left to the mere will of its recipients, Part II of the Model Code proposes the creation of a Latin American Committee of Judicial Ethics (CIEJ), whose members must be linked to the judicial function and whose main functions will be to advise the various judicial bodies and to create an area for discussion, dissemination and development of judicial ethics in Latin America, although its decisions will not have binding force<sup>5</sup>.

### **2.3.- EUROPEAN CODES**

At a European level we should clarify that although there are no proper standards of ethical conduct for judges drawn up by the European Union, since all Member States are also members of the Council of Europe, the principles and ethical rules developed by the latter are also addressed to EU members. These principles are based on other rules such as article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms which provides that "*everyone is entitled to a fair and public hearing within a reasonable time by an independent and **impartial** tribunal established by law*".

**2.3.1.-** The process of development of European Standards for Judicial Ethics begins with the **Judges' Charter in Europe**, issued in March 1993 by the European Association of Judges. It is not a genuine code of judicial ethics and it has no direct legal consequences for judges or prosecutors in Europe. It is addressed to the States and its applicability requires legislative approval.<sup>6</sup> Generically the Charter refers to some ethical principles. Thus, Article 3 imposes on the judges the duty of

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<sup>4</sup> Manuel Atienza proposes the following text as preferable: "*The impartial judge is one who pursues objectivity based on the evidence and truth of the facts, maintaining throughout the whole process an equivalent distance from the parties, their lawyers, **applies and interprets the laws without any bias**, and avoiding any type of conduct which could indicate favoritism, bias or prejudice.*", M. ATIENZA, "La imparcialidad judicial y el Código modelo Iberoamericano de ética judicial", in *Estudios de Derecho Judicial*, 151, 2009, pp. 151 y ss.

<sup>5</sup> <http://www.cidej.org> (Latin American Committee of Judicial Ethics website)

<sup>6</sup> Article 12: "*The Judges' Charter must be expressly embodied in legislation*"

impartiality, emphasising the need not only to be impartial but to be seen to be so. Article 9 states the need and appropriateness of disciplinary sanctions, imposed by an internal body of the judiciary, against improper judicial conduct.

**2.3.2.-** The next European initiative is the **Recommendation on the Independence, efficiency and role of judges** (Rec (94) 12) adopted by the Council of Europe in 1994. Like the Charter, this recommendation is not legally binding and it is addressed to the States. It highlights the dual purpose of the ethical standards (individual and institutional): to ensure the duty of judges to guarantee the protection of individual rights and protect the independence of the judiciary as a power of the State. Among the duties of judicial conduct lies the obligation to act independently and free from any outside influence and to conduct cases in an impartial manner. Thus linking independence and impartiality requires the judge to rule on the cases “*in accordance with their assessment of the facts and their understanding of the law*” (Principle V, 3, b) and states that: “*judges should be independent and be able to act without any restriction, improper influence, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason. The law should provide for sanctions against persons seeking to influence judges in any such manner. Judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law*” (Principle I, 2, d). However, the Recommendation does not contain provisions relating to the scope of judges outside work. It establishes that disciplinary measures should be taken by a specific body created by law in case the judge fails to carry out his duties in an efficient and proper manner and it also establishes an open list of sanctions.

**2.3.3.-** The next milestone was the **European Charter on the Statute for Judges** of the Council of Europe, 1998. Like its predecessors, it is not an ethical code and it is not formally binding for the States. It establishes rules to ensure the competence, independence and impartiality which every individual legitimately expects from the courts of law and from every judge to whom is entrusted the protection of his or her rights. (No 1.1). No. 4.3 determines that: “*Judges must refrain from any behaviour, action or expression of a kind effectively to affect confidence in their impartiality and their independence.*” Although the Charter does not impose compulsory duties, it establishes sanctions for violations of the duties of conduct referring them to the conditions that each state establishes in the implementation of the Charter.

**2.3.4.-** In 2002 the Consultative Council of European Judges issued **Opinion No. 3 on the principles and rules governing the professional imperatives applicable to judges**, for the attention of the Committee of Ministers of the Council of Europe. This Opinion states that the two

underlying principles are independence and impartiality. It considers independence as a “*fundamental condition*” of the judge’s impartiality and consequently establishes that impartiality is an “*inseparable complement of independence*”. It provides the basic patterns of behaviour that judges should consider in the exercise of their duties (No. 22 to 26), in the judicial area (No. 27 to 36), in other professional activities (No 37 to 39) and in relation to the media (No. 40). Finally, it considers that these principles should be developed by the judges themselves and should remain outside the disciplinary system. (No. 48 and 49)

**2.3.5.-** Recently, the **Judicial Ethics Report 2009-2010** was published, based on the Decision of the European Network of Councils for the Judiciary, June 2007). This report establishes that: “*Independence, impartiality, integrity, reserve and discretion, diligence, respect and ability to listen, equality of treatment, competence and transparency are the values we have identified as essential to the judicial role*”. Part 1 Analyses impartiality considering its objective and subjective aspects. It presumes subjective impartiality unless proven otherwise and it provides a set of behavioural rules in order to ensure judges’ impartiality, which refer not only to the exercise of their judicial role but also to the sphere of their personal and social life<sup>7</sup>.

**2.3.6.-** Last year, the Committee of Ministers of the Council of Europe adopted **Recommendation CM/Rec (2010)12 on judges’ independence, efficiency and responsibilities**, addressed to the Member States of the Council of Europe. The recommendation is divided into several topics; independence - both internally and externally, of councils for the judiciary, the relation between independence, efficiency and resources, the status of the judge, the duties and responsibilities of judges and judicial ethics. The recommendation is focused on the development of judicial independence, with an external and internal approach, and considering it as an indispensable element for the achievement of impartial justice. The recommendation instructs the Councils for the Judiciary to safeguard that independence. It considers impartiality to be a requirement of judges in the performance of their duties and also takes into account the appearance of impartiality. It only refers specifically to impartiality when it considers the need to restrict the activities of judges outside their professional activity in order to avoid potential conflicts of interest. It states that judges should be guided in their activities by ethical principles of professional conduct which not only include duties that may be sanctioned by disciplinary measures, but offer guidance to judges on how to conduct themselves. The Recommendation establishes that “*These principles should be laid down in codes of judicial ethics which should inspire public confidence in judges and the judiciary. Judges should play a leading*

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<sup>7</sup> See table 2

role in the development of such codes”. It also states that “Judges should be able to seek advice on ethics from a body within the judiciary.” Finally, the Recommendation considers impartiality as one of the values that should be included in training programmes for judges.

**2.3.7.-** The Consultative Council of European Judges of the Council of Europe adopted the **Judges’ Magna Carta** on 11/19/2010. The text highlights all the fundamental principles relating to judges and judicial systems. It reiterates inter alia the fundamental criteria of the rule of law, the independence of the judiciary, access to justice, and the principles of ethics and responsibility in a national and international context. In similar terms to the Recommendation, the Magna Carta proclaims that impartiality and independence are essential prerequisites for the operation of justice. It establishes that in order to ensure independence of judges, each State shall create a Council for the Judiciary or another specific body, endowed with broad competences for all questions concerning their status as well as the organisation, the functioning and the image of judicial institutions. According to this provision, we consider that it would also be possible to include the ethical aspects that affect the image of judicial institutions and that are beyond disciplinary proceedings. Finally, attention should be paid to the provisions establishing the need to include deontological principles, distinguished from disciplinary rules, in the training of judges.

Table 1: Comparative table of the most relevant ethical codes

UNIVERSAL	REGIONAL	
	LATIN-AMERICA	EUROPE
Basic Principles on the Independence of the Judiciary (UN,1985)	Statute of the Latin American Judge (2001)	Judges’ Charter in Europe.(European Association of Judges,1993)
The Universal Statute of the Judge (International Association of Judges,1999)	<b>Model Code of Judicial Ethics for Latin-America</b> (2006)	<a href="#">Rec(94)12</a> on the Independence, efficiency and role of judges (Council of Europe, 1994)
<b>The Bangalore Principles of Judicial Conduct</b> (UNODC, 2002)		European Charter on the Statute for Judges. (Council of Europe,1998)
		<b>Ethical Principles.</b> (European Network of Councils for the Judiciary, 2007)
		Recommendation CM/Rec (2010)12 & <b>Magna Carta of European judges</b> (CCJE of the Council of Europe)



TABLE 2: Comparative table of the principle of impartiality in the most relevant ethical codes

	BANGALORE PRINCIPLES (2002)	MODEL CODE OF JUDICIAL ETHICS FOR LATIN-AMERICA (2006)	ETHICAL PRINCIPLES ENCJ -COUNCIL OF EUROPE(2010)
<b>CONCEPT OF IMPARTIALITY</b>	<p>"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.</p>	<p>"The impartial judge is one who pursues objectivity based on the evidence and truth of the facts, maintaining throughout the whole process an equivalent distance from the parties, their lawyers and avoiding any type of conduct which could indicate favouritism, bias or prejudice."</p> <p>(Art. 11)</p>	<p>"Impartiality and people's perception of impartiality are, with independence, essential to a fair trial. The impartiality of the judge represents the absence of any prejudice or preconceived idea when exercising judgment, as well as in the procedures adopted prior to the delivery of the judgment The judge is aware of the possibility of his own prejudices. It is a matter of subjective and objective impartiality. Objective impartiality is related to the functions and the subjective impartiality concerns the personality of the individual. Subjective impartiality is presumed until the contrary is proven.</p>
<b>RULES OF BEHAVIOUR</b>	<p>A judge <u>shall perform his or her judicial duties without favour, bias or prejudice.</u></p>		<p>Fulfils his judicial duties without fear, favoritism or prejudice;</p>
	<p>A judge shall ensure that his or her conduct, both in and out of court, maintains and <u>enhances the confidence of the public</u>, the legal profession and litigants in the impartiality of the judge and of the judiciary.</p>	<p><u>The judge should avoid any appearance of preferential or special treatment</u> with lawyers and those being judged, arising from his/her own conduct or that of the other members of the judicial profession. (ART. 13)</p>	<p>Adopts, both in the exercise of his functions and in his personal life, a conduct which sustains confidence in judicial impartiality and minimizes the situations which might lead to a recusal ;</p>
	<p>A judge shall, so far as is reasonable, so <u>conduct himself or herself as to minimise the occasions on which it will be necessary for the judge to be disqualified</u> from hearing or deciding cases..</p>	<p>The Judge should endeavour to avoid situations which <u>directly or indirectly would justify his/her distancing from the case.</u>(ART. 12)</p>	<p>A judge has a duty of care to prevent conflicts of interests between judicial duties and his social life. If he is a source of actual or potential conflicts of interest, a judge does not take on the case and withdraws immediately from the case, to avoid being suspected of impartiality.</p>
	<p>A judge shall not knowingly, while a proceeding is before, or could come before, the judge, <u>make any comment that might reasonably be expected to affect</u> the outcome of such proceeding or impair the manifest fairness of the process. Nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue.</p>		<p>He is entitled to freedom of opinion but must be circumspect in expressing his opinions, even in countries in which a judge is allowed to be a member of a political organization</p> <p>In any event, this freedom of opinion cannot be manifested in the exercise of his judicial duties.</p>
	<p>A judge <u>shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially</u></p>	<p>The judge <u>is required to refrain from intervening in any causes which would compromise his/her impartiality or in which a reasonable observer may deem</u></p>	<p>Excuses himself from cases when:</p> <p>— he cannot judge the case in an impartial manner in the eyes of an objective observer ;</p>

<p>or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where:</p> <ul style="list-style-type: none"> <li>– the judge has <u>actual bias or prejudice concerning a party or personal knowledge</u> of disputed evidentiary facts concerning the proceedings;</li> <li>– the judge previously <u>served as a lawyer or was a material witness</u> in the matter in controversy; or</li> <li>– the judge, or a member of the judge's family, <u>has an economic interest</u> in the outcome of the matter in controversy:</li> </ul> <p>Provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice.</p>	<p>that there is motive to believe that this would be the case (ART. 11)</p>	<ul style="list-style-type: none"> <li>– he has a connection with one of the parties or has personal knowledge of the facts, has represented, assisted or acted against one of the parties, or another situation which, subjectively, would affect his impartiality;</li> <li>– he or a member of his family has an interest in the outcome of the trial.</li> </ul>
	<p>The judge and other members of the courts are <u>not allowed to receive gifts or benefits of any type</u> which would not appear justified from the perspective of a reasonable observer. (ART. 14)</p>	
	<p>The judge should endeavour <u>not to hold meetings with one of the parties or their lawyers</u> (in their office, or with greater reason, outside it) which the counterparts and their lawyers may reasonably consider unjustified (ART. 15)</p>	
	<p>The judge should <u>respect the right of the parties to affirm and contradict</u> within the framework of the due process. (ART. 16)</p>	
	<p>The judge's impartiality obliges the judge to <u>generate rigorous habits of intellectual honesty and self-criticism</u>. (ART. 17)</p>	
		<p>A judge ensures that his private life does not affect his public image of impartiality of his jurisdiction.</p> <p>Impartiality does not prevent a judge from taking part in social life in order to carry on his professional activity.</p>
		<p>A just balance is struck between his rights and his obligations so that he may be impartial</p>

INSTITUTION		Latin-American Committee of Judicial Ethics	Judges can seek advice on judicial ethics in a special national body within the Judicial Branch.
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### **3.-ECHR AND ICHR CASE-LAW**

Article 6.1 of European Human Rights Convention<sup>8</sup> and article 8 of American Human Rights Convention<sup>9</sup> establishes that everyone is entitled to a fair and public hearing within a reasonable time by an independent and **impartial tribunal** established by law.

The term impartiality was interpreted by ECHR in the “**Piersack**” case<sup>10</sup> which was then reiterated in the “**De Cubber**” case<sup>11</sup>, concluding that there are two types of impartiality namely subjective and objective. In “**De Cubber**” the difference between these two types is defined as within the scope of subjectivity “an attempt is made to ascertain the personal conviction of a particular judge in a particular case” and subjective impartiality “must be presumed unless proven otherwise” and the objective scope refers to “whether it offers sufficient guarantees to exclude any reasonable doubt”. This doctrine has been consolidated by the ECHR in numerous subsequent judgments<sup>12</sup>. ICHR has also commented on impartiality, making a distinction between both in the case of **Palamara Iribarne vs Chile**<sup>13</sup>. However, we should underline the fact that the ECHR<sup>14</sup> has

<sup>8</sup> Article 6 CEDH “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...”

<sup>9</sup> Article 8 of the CADH “Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature. Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental

<sup>10</sup> Case Piersack, Judgment issued by the ECHR on 1 October 1982, in which the citizen Piersack was found guilty of murder by a Court the president of which had been head of the section of the Ministry of Public Prosecution acting in the investigation of said offence.

<sup>11</sup> Case De Cubber, Judgment of the ECHR of 26 de Octubre de 1984, in which De Cubber, a Belgian citizen was condemned by a court one of the members of which had acted as investigating judge.

<sup>12</sup> Case of Fey , Judgment of 24 February 1993 ; Case Saraiva de Carvalho, Judgment of 22 April 1994; Case of Castillo Algar, Judgment of 28 de October 1998; Case of Gomez de Liaño and Botella, judgment of 22 July 2008. All delivered by the ECHR.

<sup>13</sup> Case of Palamara Iribarne vs Chile, Judgment of ICHR 22 of November 2005, in which Mr Palamara published State Secrets and a military court condemned him for the offence with this court being dependent on executive power and therefore having a direct interest in the case..

<sup>14</sup> Although only because it had been functioning for many more years and had issued considerably more judgments.

made a more exhaustive study of judicial impartiality and for this reason our analysis of this matter will focus primarily on ECHR case-law.

Nevertheless, when analysing whether or not a court is acting with due impartiality, it will be necessary to examine the specific circumstances of the case at hand as, according to the “**Hauschildt**” case<sup>15</sup>, it is these which always determine, a positive or negative assessment by the ECHR of the national court’s compliance with article 6.1 of the Convention. For this reason the ECHR addresses assurance of this guarantee mainly on the basis of details and precisions of how the courts acted and not by developing an applicable doctrine of a general character. The advantage of this system is that the individual right of the appellant cited in article 6.1 of ECHR remains safeguarded from already existing prejudices, as the ECHR will examine the case as if it was the only case; however, there is the disadvantage that a degree of “legal uncertainty” may be generated by the courts when establishing whether the ruling Judge or the members of the ruling Court comply with this guarantee as, in some judgments the difference may be a mere detail or they could even be deemed to be contradictory case in the case of “**Saraiva de Carvalho**” versus “**Castillo de Algar**”<sup>16</sup>.

Following an analysis of ECHR and ICHR judgments relating to judicial impartiality, despite the fact that both courts make a distinction between these two areas, the fact is that those judgements that examine subjective impartiality end up by returning to the objective plane, that is to say, they are objectivised, as subjective impartiality acts on judge’s internal convictions and because of this, the subjective partiality of a judge or a court will only be taken into account when, firstly, it is manifested in elements or facts which can be objectively tested<sup>17</sup> and secondly, they are sufficient to reasonably prove that a judge or a court was not impartial in the case in question. Thus, the ECHR considered that there were no sufficiently consistent items or data attesting to the partiality of the court, and this despite the existence of objective data which could lead the appellant to consider that court was not sufficiently impartial in the “**Del Court**” and “**Vera Fernandez- Huidobro**” case<sup>18</sup>. Similarly, the ICHR did not consider this in the **Barreto Leiva vs Venezuela** case.<sup>19</sup>

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<sup>15</sup> Case Hauschildt, Judgment of the ECHR of 24 May 1989

<sup>16</sup> Judgments of 22 April 1994 and Judgment of 28 October 1998 which will be examined below

<sup>17</sup> In the words of the ECHR in the case of **Pescador Valero**, Judgment of 17 June 2003 “This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the applicant is important but not decisive. What is decisive is whether this fear can be held to be objectively justified”.

<sup>18</sup> Case of “Del Court” of 17 January 1970, case of “Vera Fernandez- Huidobro” 6 January 2010 In this last case the ECHR considered that there were not sufficient elements to attest to the enmity between the accused and the investigating judge as proof of which was the short time that he was secretary of State with the same rank and at the same time as the claimant in the Ministry of the Interior and each had widely differing duties.

<sup>19</sup> Asunto Barreto Leiva vs. Venezuela, Judgment of the ICHR, 17 November 2009 “Personal or subjective impartiality assumes that at least there exists some proof to the contrary. In turn the so-called objective proof consists of

As a result, from an analysis of judgements of supranational courts it is possible to classify different types of impartiality. Thus, the objective scope refers to the fact that the Judge or members of Court had no previous knowledge of the proceedings in question and consequently, they all offer sufficient guarantees from an organic and a functional point of view in order to exclude any reasonable doubt in this respect. The subjective scope implies that the personal convictions of a judge are not altered by his direct or indirect interest in the case, nor because of his relationship with the parties in the procedure; within this category it is possible to distinguish: a) **quasi objectified subjective**, which is questioned in those cases in which it occurs: firstly, objective elements and facts of partiality and, secondly, these are sufficiently relevant to lead ECHR and ICHR to conclude that in the specific case the judge's legal impartiality has been ensured and b) the "**purely**" **subjective**, which would be manifested in all of those cases in which, despite there being objective data pointing to possible partiality, they are not sufficient to refute "the presumption of subjective impartiality" and also in those cases in which the objective facts do not exist and yet the judge's personal prejudice exists or may exist. The main issue is whether within the scope of this "pure" subjective impartiality, any mechanism of control is possible. This question will be addressed at the end of this paper.

In order to respect judicial impartiality, procedural instruments need to be established which will ensure that the court judging the specific case is impartial, specifically, the use of objection. ICHR in the case of **Apitz Barbera et al vs Venezuela**<sup>20</sup> laid down that objection is a procedural instrument destined to protect the right to be judged by an impartial body but it is not a component or defining element of such right. Thus ICHR distinguishes between the right to an impartial Judge and the obligation of guarantee, underlining that the mere fact of prohibiting the objection does not imply a direct influence on the order contained in article 8 of IHRC however, it does imply an indirect influence, since, if an instrument of this kind did not exist, full enjoyment and exercise of the right to an impartial judge right could be threatened<sup>21</sup>. It should be emphasised that through this reasoning, a substantive standard for the requirement of impartiality is set, in addition to the formal model. In this respect, what is important for the Court is the effectiveness of the full enjoyment of the right to an impartial judge, but notwithstanding this fact,, also the right to set up a regulatory system which will provide full guarantees to those who feel that their enjoyment of this right in the case in question has been threatened. Also the ECHR has pronounced on the institution of objection

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determining whether or not the judge in question provide convincing elements which would allay an legitimate or well founded suspicions of partiality regarding his person".

<sup>20</sup> Judgment of ICHR Apitz Barbera et al vs. Venezuela 5 August 2008.

<sup>21</sup> The Court concludes that "*there is no evidence that the State may have disregarded the right of the victims to have a hearing before an impartial tribunal, but it has been indeed shown that its legislation and its case law prevented them from requesting the review of the impartiality of the body trying them. To put it a different way, non-compliance with the duty to respect the right has not been shown, but rather that guarantee thereof is lacking*".

in the **Remili** case<sup>22</sup> in which the TEDH considered that a French Court had not complied with the requirement for an impartial court hearing because it did not allow the objection to a jury which had declared itself to be racist, when the accused was North African.

In order to address the general criteria described above, we should state that in relation to impartiality in **the objective area** the point of departure is based on the **De Cubber** and **Piersack** cases in that a Judge investigating a case may not subsequently judge the defendant, due to the fact that the investigating Judge may have acquired prejudices regarding the guilt of the accused during the inquiry. The ICHR also takes up this idea in the **Uson Ramirez vs Venezuela case**<sup>23</sup>. But since the “**Hasuschildt**” Case the circumstances of the specific case have gained relevance in determining whether there has been a violation of judicial impartiality and for this reason the fact that an investigating Judge decides to order provisional custody of the accused does not mean that he may not subsequently judge the case, as in the event of provisional custody the reasons (for instance, the risk of escape) why prison is ordered differ from those which will be used when judging the case.<sup>24</sup>

The **Padovani** trial<sup>25</sup> is a case in point where the ECHR established that the investigating Judge who ruled on the crime had not violated the principle of by also judging the case because it was a “fast track trial” (“guidizio direttissimo”). However, according to the ECHR in this case and in the **Tierce** case<sup>26</sup>, the determining factor would be, rather than a reasonable period - a concept which has not been precisely defined by the ECHR and which varies depending on the case- but that the investigating Judge was not required to investigate anything.

The ECHR’s position was not clear with respect to the possibility that the Judge issuing an indictment” (*auto de procesamiento*) in a criminal procedure (a judgment in which it is considered that there is prima facie evidence of criminal activity of a person) subsequently intervenes in the judgment of the same procedure. The first time that the Court addressed this question was in the case of **Saraiva de Carvalho**<sup>27</sup>, in which it was considered that the EHRC had not been violated because

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<sup>22</sup> Judgment of ECHR of 30 March 1996.

<sup>23</sup> Uson Ramirez vs. Venezuela , ICHR, judgment of 20 November 2009.

<sup>24</sup> Nor does this infringe the principle of impartiality of those investigating judges who subsequently judge when they have previously carried out various enquiries and formalities such as “ *the order made by the Regional Court’s investigating judge for the applicant’s detention on remand; or a record of the investigating judge’s interrogation of the applicant* “.As the ECHR indicated in the case of Fey 24 February 1993 “*the Court has previously held that the mere fact that a judge has also made pre-trial **decisions** in the case cannot be taken as in itself justifying fears as to his impartiality*”.

<sup>25</sup> Case of Padovani , ECHR, of 26 February 1993.

<sup>26</sup> Case Tierce , ECHR,25 July 2000.

<sup>27</sup> Case of Saraiva de Carvalho, of 22 April 1994, in which the Senior Judge of the Criminal Court o Lisbon issued a ruling and then went on to hold that the evidence was not sufficient to enable a reliable assessment to be made of the probability that Saraiva de Carvalho was guilty and subsequently took part in the tribunal which judged him.

in the order there were only “*sufficient suspicions*” which did not prejudice the case<sup>28</sup>. In the **Castillo de Algar** case<sup>29</sup> the ECHR considered in a military case that the participation of two judges when dismissing the appeal against the “order of indictment” and their subsequent intervention in the trial violated the article 6.1 of EHRC because in the “order “there was sufficient evidence to allow the conclusion that a military offence had been committed”. This contradiction is clearly evident and is repeated in the **Garrido Guerrero y Perote Pellón**<sup>30</sup> cases which are very similar to the **Castillo Algar** case<sup>31</sup>. Therefore, in order to obtain a non contradictory perspective on these judgments relating to the order or delivery of the judgment or equivalent ruling, we need to address how serious or important this evidence of guilt actually is. Thus, the more convincing and consistent this evidence the greater the effect will be on the judge’s partiality when ruling or hearing in appeal, if he is subsequently involved in the court judging the case, although having heard the cases it will be the ECHR in accordance with the “Hauschildt”<sup>32</sup> doctrine which will decide, depending on the circumstances of the case

In the examination of the cases analysed by the ECHR relating to **quasi-objectivised subjective impartiality**, it is possible to differentiate between:

1- The set of judgments in which the guarantee of impartiality is violated because the Judge has a direct or indirect interest in the matter or has a relationship with the parties involved. The Judgment in the **Holm** case<sup>33</sup> merits mention in which impartiality was deemed to have been violated because the political links between the members of the jury and one of the parties, and also the **Pescador Valero** case because the Judge had been Professor of a University whose decision was appealed in this case. In the **Doronzhko and Pozharsky** case<sup>34</sup> the guarantee contained in article 6 of the EHRC was violated because the chief of police who had led the investigation was married to the Judge in the case, and also a case in which the Judge judged the educational authority of a school which had been attended by his son who had been expelled<sup>35</sup>. The Court also declared contrary to Convention apart from judges the presence of State Attorneys in the Criminal Chamber of French

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<sup>28</sup> “*His function in the initial phase of the proceedings was to satisfy himself not that there was a “particularly confirmed suspicion” but that there was prima facie evidence*”.

<sup>29</sup> Casse of “Castillo Algar” ECHR of 28 October 1998.

<sup>30</sup> Case of Garrido Guerrero of 2 March 2000 and the case of Perote Pellón of 25 July 2002 both rulings of the ECHR.

<sup>31</sup> In the first “the appeal jurisdiction was very careful when defining the limits of the order of committal for trial, its nature of formal and provisional decision, which did not have any bearing whatsoever on the final decision” and in the second impartiality was violated because the court hearing the appeal of the procedural order judging the case had pronounced in the appeal on the existence of indications of manifest guilt.

<sup>32</sup> It should also be pointed out that the ECHR declared in the case of “Ferreteli and Santangelo” Judgment of 7 August 1996 and the caes of “Rojas Morales” Judgment of 16 de November 2000 that the CHR was violated if the court delivering judgment in a criminal case rules once more in the same case although with different defendants

<sup>33</sup> Case “Holm”, ECHR, of 25 November 1993.

<sup>34</sup> Case Dorozhko and Ponharsky ECHR of 24 May 2008.

<sup>35</sup> Case Toconoand Profesorii Prometeisti, ECHR, of 26 June 2007.

Cassation Court and also the presence of the General State Court Agent in the French Supreme Court<sup>36</sup>. Conversely, the principle was not violated in the “**De Court**” case<sup>37</sup> despite the fact that the Belgian State Prosecutor acted in the deliberation of the Cassation Court, because in this case the ECHR considered that the prosecution was independent and impartial.

2- Those cases in which the Judge was considered to be partial as a result of statements made outside the proceedings which presuppose prior conviction and prejudice in the case he was hearing. Prominent examples are the **Remili** case<sup>38</sup>, in which the ECHR considered that the French Court had not complied with the requirement for an impartial court because a jury had admitted to being racist when the accused was a North African and, in the **Buscemi** case<sup>39</sup>, because the President of the Court was involved in a conflict with one of the parties who had provoked him and this had been reported in the press<sup>40</sup>. In all of these cases there are objective facts and elements of partiality and these were sufficiently relevant for the ECHR to conclude that the judge’s legal impartiality was not observed.

Finally, the **subjective scope of impartiality** is manifested despite the existence of the objective fact of possible partiality when it was not sufficient to affect the presumption of subjective impartiality. There are several examples of such cases as for instance “**Palamara Iribarne vs Chile**”, “**Del Court**” or “**Vera Fernandez- Huidobro**”. In the latter the ECHR considered that there was not sufficient evidence attesting to the enmity between the accused and the investigating Judge, taking as evidence the brief time (28 days) that he was Secretary of State with the same rank and at the same time as the applicant, in the Ministry of the Interior with clearly differentiated duties.

#### **4. CONCLUSION: complementarity between the Law and Ethics in judicial impartiality:**

Having analysed the foregoing, there is a need for every legal practitioner (in this case a judge) to establish the margins of discretion in order to achieve the legal certainty required for a judge to know when he has to act (or to hear a case) and when not to. This is not a merely

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<sup>36</sup> Cases “Fontaine and Bertin “ of 8 July 2003 and “Lobo Machado “ of 7 July e 1994. Both ECHR.

<sup>37</sup> Case “Del Court” , of the ECHR, 17 Januray 1970.

<sup>38</sup> Case Remili, ECHR, of 30 March 1996.

<sup>39</sup> Case Buscemi, ECHR, 16 December 1999.

<sup>40</sup> The ECHR made this quite clear: “*The Court stresses, above all, that the judicial authorities are required to exercise maximum discretion with regard to the cases with which they deal in order to preserve their image as impartial judges. That discretion should dissuade them from making use of the press, even when provoked. It is the higher demands of justice and the elevated nature of judicial office which impose that duty*”.



theoretical, philosophical or trivial distinction as the passive attitude of the law in this respect leads to certain situations in which many judges (not to say all judges) have been placed at some point in their career namely the “anxiety” of deciding (with no protection) whether or not to continue hearing a case when their particular personal situation is not legally or statutorily rated as worthy of abstention or objection yet nevertheless their impartiality could be called into question. If a Judge appears to be partial yet does not abstain (or if he rejects the objection), on the grounds that it is not sufficiently precise, he will be giving good cause for question to the public in general, to his own colleagues or for the governing bodies of the judiciary..

As a result, the following debate arises: A Judge is in a position which does not clearly indicate grounds for abstention or objection. However, if this Judge considers that in his internal thoughts, his impartiality is questionable (subjective impartiality) or that his impartiality could be called into question by anyone cognizant of the case (objective impartiality or objectified subjective impartiality). The Spanish Judge (and probably every other judge in the European area) is faced with the dilemma as a result of the estimated list of grounds for abstention is: 1- “If I do not abstain (because there are no legal grounds which allow me to do so) I am partial, or at least, public opinion will think that I am partial (with the concomitant loss of confidence in the administration of justice)”; 2- “If I abstain, I will be subject to disciplinary sanctions because there is a clear legal scale of penalisation for unjustified abstention”. As a consequence of this dilemma various questions are raised following the study, in this paper, of the differentiation between the concept of objective and subjective impartiality: should a Judge be required to be impartial when he himself knows that he is not? How can his impartiality be enforced? And this, in spite of public opinion or the clear connection he has with a case? Should Judges be allowed to refrain from participating in these cases? Would this give rise to generalised conscientious objection where as soon as a Judge has a minimum connection with a case, due to his own opinion or ideology or through his relationship with the parties in the case he should stand aside so that another judge can hear the case?

The answer is that we all trust or presume (or we should trust or presume while there is no evidence to the contrary) that a Judge is impartial (as is currently the case with ECHR and ICHR case-law ). While this presumption exists, quite simply we should be concerned because that is how public opinion sees it. That is, we need to foster the appearance of impartiality or objective impartiality. What now becomes important is not the fact that we are impartial judges- (because we assume this fact), but we are concerned with the image we present of the institution, the trust we inspire. The law can only regulate the grounds for objective impartiality because the Judge’s internal convictions cannot be assessed or assumed through clear legal guidelines. The law establishes the grounds for impartiality in a measurable way in order to prevent conscientious objection to which a

Judge should not have access (because he becomes part of the “judicial institution” and is no longer a normal person with his own opinion and ideology when he dons the judicial robes). However, in all the other cases of being seen to be partial required in the specific case, and which cannot be fixed, which border the scope of ethics or deontology should not be left to the purely arbitrary decision of the Judge affected. He should be provided beforehand with a series of guidelines or advice such as advisers bound by ethical codes and who are able to point the way to a Judge so that he can avoid acting contrary to ethical principles worthy of compliance. In this way, it will be possible to avoid exhausting the Judge in the proceedings, as the quality of his judgements will not be affected by any fruitless endeavours to concentrate his efforts both on the case material background and an examination of his own conscience.

In order to continue this line of argument we should take into account that the essence of the concept of impartiality lies in its subjective sense. That is, care should be taken to ensure that the Judge decides exclusively on the basis of the law and not on anything or anyone that could affect his emotions to the extent that this decision might be altered. It is clear that the concept of objective impartiality the appearance of impartiality is or could be considered a fallacy (fallacy in the sense of affecting the concept of impartiality) because this legal precept (or right or whatever we wish to call it) of what may be judged proceeding from this strict sense of impartiality. In other words, someone can be judged in a totally impartial way in spite of existing “doubts” about the impartiality based on objective facts, but which, however, did not influence the judge’s decision. In such cases, the right to an impartial trial would be completely fulfilled. There is no sense in reproaching anyone for his partiality (either for being objectively partial or for not being seen to be impartial) when he has actually been impartial.

As a result of the foregoing, it may be concluded as follows: the debate on impartiality when addressing objective impartiality is wrongly focused in part as it also affects other “deontological” values (which touch on impartiality) which should be ethically or legally protected such as the following which are, probably, considered to be such values:

Caution: the public expects a Judge to be a calm and tranquil person who makes decisions and in doing so conveys to all a sense of security, moderation, sobriety and calm so as to avoid creating any controversy other than that which is the subject of the trial. That is, the judge is required to put out or at least dampen the fire although this may not always be possible, but in particular he is required not to encourage with a provocative attitude anything which would counteract caution. To be seen to be partial would be provocative for the parties. This idea would

explain the clear case-law relating to restrictions on judges hearing different phases of same proceedings.

Dignity: objective impartiality is also determined in some deontological codes through the term of “dignity” albeit in respect of his function or relating to the parties. With respect to the parties, the same goes for dignity as in the aforementioned explanation of caution. With regard to the Judge’s duties, the implication is that the Judge leaves behind his role as an individual in order to become or to represent a power or an institution. While the Judge is representing that power he is required to maintain its prestige, its good name, its “dignity”... and this is not possible if he is seen to be partial because the prestige, the trust or the dignity of the institution will be impaired. The danger in this is not a mere formal attitude (as might appear) but when the public lacks confidence or considers justice or in the judiciary to be unworthy is when other modes of justice beyond legality (either personal or private) are put into practice.

**The Need for an Ethics Committee.** The role of Judge must be circumscribed by the decision made in a specific case. The more concerns there are in each case the more flawed the quality of the judgment will be. It would be appropriate to relieve the Judge of the duty of judging himself (with regard to his own impartiality).

The loss of time and effort in such activity could be mitigated and solved with a series of preliminary guidelines drawn up by a Committee. Moreover it is important that the same committee undertakes to assess the specific case. There is no sense in a Judge who is convinced of his impartiality being required to prove it. It should be the Committee which obviates the need for an internal and moral debate and which should assume the responsibility of preserving ethical values and responding to public opinion and to the parties in the trial. It is a question of division of labour: it is the judge who judges impartially and it is the Committee who should respond in terms of “dignity” and “caution” in the sense in which it is analysed above.

In short, objection and abstention are the instruments through which respect for the principle of impartiality is legally ensured. However, they only are useful when the discussion is a legal one and therefore it is possible to define objective impartiality or objectified subjective impartiality. Thus an ethical committee would be, in this question, useful. It could help judges who search for guidelines in situations linked with their jurisdictional function, thus safeguarding their objective impartiality, their objectified subjective impartiality or the principles of caution and dignity.

However, furthermore, objection and abstention do not resolve problems of pure subjective impartiality. It would be appropriate to create instruments which would allow to judges to consult

the criteria for a self assessment of the degree to which they are “contaminated” so that they may guide their own behaviour in manner which will meet the expectations of the general public and the parties in a particular case. In this way, the creation of ethical Committees or bodies which will establish, not only general criteria but also act in an advisory capacity to judges, could well be useful. Thus this type of Committee would be responsible for deciding on the issues raised above:

1-Objective and objectified subjective impartiality: “I am convinced I am impartial in this case however, there are several circumstances that could lead to others seeing me as partial, should I hear this case? Should I abstain on the grounds of requisite caution or dignity?”

2-Subjective impartiality: “*I think I am partial in this case... should I abstain or on the contrary should I judge this case endeavouring to become an impartial Judge?*”

In both questions, the general answer is the same, we need to look at each specific case. In each case the strength of each value will be examined to ascertain which has the greater force, that of the duty to abstain or to judge impartially (or with caution or dignity).

Only the ethics Committee should be legitimised to unify ethical criteria. Of course, if the Judge follows the Committee’s guidelines his should provide sufficient grounds to prevent a judge from being disciplined due to an unjustified abstention or, conversely for having heard a case.

**Composition of the Committee:** How to create the committee and decide on its membership is another matter. Various examples may be taken from various countries and/or cultures. It would not be appropriate to address this matter here as, depending on the time and place different importance will be attached to the committee’s composition, and to its ethical values. Some consider that members should comprise judges alone and other believe that the committee should include other legal practitoners, legal philosophers. . In any case, although we consider that there is a universal need for a national ethics Committee, we believe that the ethical criteria applied in each place or country and the criteria for choosing the members of these Committees differ according to place. However, it should always be ensured that the committee members inspire tremendous trust and confidence in the public and the parties in the proceedings in this control of the judges’ duties. In this way it will also be possible to avoid “parallel mass media trials” which can sometimes bring to bear more ethical weight than the committee itself. The Committee’s prestige and the manner in which it inspires trust should be the main criterion when selecting its members.

**Effectiveness:** The Committee should not be considered legally binding, as legal and ethical values are interlinked and it is not appropriate to seek coercive means or sanctions of a legal kind for conduct which, for some, is purely ethical but which , for others, is authentic law. It should be taken

into account that the presumption is that a Judge, by his very nature, wishes at least to conserve his prestige. It is through considerable effort that he has come to represent a state power. There is a feeling among judges that advice, guidelines, or wake-up calls from an ethics committee would have a considerable influence on Judges to ensure that these guarantees are fulfilled. And it is certainly true that the greater the legitimacy, prestige and commitment of the Committee the greater the pressure on the Judge in question to ensure his personal commitment.

In turn, it would also be essential to absolve judges from any kind of disciplinary sanction (as, for instance, the consequence of an unjustified sanction) when a judge abandons a case on grounds of partiality in all the cases in which the committee had resolved on the requirement of abstention or acceptance of an objection. This does not mean that conversely (having resolved that there was no risk of partiality and the judge had abstained from hearing the case) he would not be irremediably sanctioned, but that the disciplinary processor or general penalty would continue (of the legal but not ethical kind). Nor in the event that a Judge continues to hear the case when the committee had decided that there were doubts over his partiality. In the last case the consequences would be the ethical reproach deemed appropriate but, but never a direct legal effect (only that of applying the corresponding legal regulations, that is, following the procedure which would have taken place had the committee not existed). It might also be possible to recognise some kind of indirect legal effect in particular, with respect to promotion of judicial rank in specific circumstances in which there would be an external prejudicial effect (on the parties or on the public's confidence in justice) as a result of any refusal to follow the advice issued by the ethics committee