

2020 INTER-AMERICAN HUMAN RIGHTS MOOT COURT
COMPETITION

Maricruz Hinojoza et al. v. Republic of Fiscalandia

BENCH MEMORANDUM

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I. DEFINITIONS

1. Judicial independence

Under international human rights law, judicial independence is a human right. It is recognized in Article 8.1

public authorities, and when the distinct role of judges and prosecutors is clearly defined, since, in a democracy based on respect for the rule of law, the basis for prosecution must be provided for in the law.³

Like the independence of judges, prosecutorial independence is not a prerogative or privilege conferred in their own interest, but rather in the interest of independent, impartial, and effective justice.⁴ Nevertheless, there are important differences in relation to the design and content of prosecutorial autonomy as compared to the independence of judges,⁵ even if they both play a fundamental role in the justice system.

Thus, while the independence of judges and their absolute separation from the executive branch is a fundamental principle of the rule of law to which there can be no exceptions, there are systems in which prosecutors' offices are attached to that branch of government, without this necessarily entailing undue interference in the exercise of their functions. In addition, while the independence of judges has both institutional and individual facets that protect them from undue influence—including from their superiors or other judges—in the case of prosecutors, the principle of unity of action requires a certain degree of top-down control of their decisions and actions by the Attorney General.⁶

There are different models for prosecutors' offices throughout the world and in the region. In some countries they are independent from other public authorities, while in others they are attached to the executive branch or even the judiciary. There are also some cases in which prosecutors' offices, together with other oversight institutions, are part of the so-called Public Prosecutor's Office [*Ministerio Público*], whereas in other countries the Public Prosecutor's Office is synonymous with the Attorney General's Office. Despite this diversity of models, international law recognizes that prosecutors must enjoy autonomy and independence, and that this must be guaranteed by the domestic legal framework at the highest possible level.

This autonomy should be understood to mean that prosecutors are "free from unlawful interference in the exercise of their duties to ensure full respect for and application of the law and the principle of the rule of law and that they are not subjected to any political pressure or unlawful influence of any kind,"⁷ so that no public authority should seek to influence prosecutors' decisions in individual cases as to how the investigation and criminal prosecution should be conducted. In this regard, the United Nations Guidelines on the Role of Prosecutors state that it is the duty of States to ensure "that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability."⁸

3. Internal and external independence

Regarding the extent of autonomy, international law distinguishes between the autonomy of the prosecutor's office as a whole (external independence),

External independence guarantees the independence of the actions of the prosecutor's office from undue interference from other public authorities, especially from the executive branch. The standards reinforce the idea that the executive branch should not give instructions to the Prosecutor General or to prosecutors in relation to individual cases, although instructions of a general nature, established as a component of a crime policy, may be permitted when they have been adopted by the legislature or the executive branch itself following the appropriate procedures.⁹ These instructions may concern, for example, setting priorities in

- Objective criteria for promotion, transfer, performance evaluation, and case allocation, as well as codes of conduct and rules of professional responsibility, should be established so that the parameters of prosecutors' activity are clearly defined.

At the Inter-American level, the IACHR has underscored how important it is that "investigations and, on a broader level, any activities associated with the prosecution of crime, be independent and impartial so that

at risk, given the nature of the authorities who select them,"²⁰ thus "politicizing" the process.²¹ The IACHR has referred expressly to this risk in connection with the selection of the Attorney General, when he or she "is selected or appointed by a political body, whose appointments may be entirely discretionary."²²

For this reason, the IACHR has viewed positively the existence of "reinforced safeguards" that seek to "make it clear to the public that the candidates selected are the best candidates based on merit and professional qualifications," such as: maximum transparency, the requirement for qualified majorities, and the drawing up of "lists" or "shortlists" by bodies such as the Council of the Judiciary or by the Supreme Courts themselves, which are handed over to the political branches for the final selection.

Principle 30 of the *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* of the United Nations states that: "The principle of irremovability, as the basic guarantee of the independence of judges, must be observed with respect to judges who have been appointed in conformity with the requirements of the rule of law. Conversely, judges unlawfully appointed or who derive their judicial power from an act of allegiance may be relieved of their functions by law in accordance with the principle of parallelism. They must be provided an opportunity to challenge their dismissal in proceedings that meet the criteria of independence and impartiality with a view toward seeking reinstatement."

8. Provisional, transitional, or interim status

Indefinite provisional status is the opposite of security of tenure. Provisional judges and prosecutors are therefore exposed to the risk of being easily removed, even for no reason, when their provisional status is indefinite. The IACHR has warned that indefinite provisional status (without a set time limit or term of office)

Like independence, accountability has an institutional dimension and a personal dimension, and from each of them, it can cover internal and external aspects.

In its institutional dimension, accountability must encompass the entire institutional organization of the justice system (Judiciary, Prosecutors, Public Defenders), which must be responsible for the exercise of its functions, and may encompass the following mechanisms:

- From an internal perspective, the existence of permanent mechanisms and procedures to supervise the independence, competence, objectivity, and impartiality of justice authorities on a permanent basis. To prevent these mechanisms from being used improperly as instruments of

Inter-American case law has established that it is not enough for such a remedy to be provided for in the law or to be formally admissible; rather, it must be genuinely suitable for establishing whether a violation has been committed and for providing the necessary redress.⁵⁰ It has also held that an effective judicial remedy "cannot be reduced to a mere formality, but must examine the reasons put forward by the plaintiff and expressly address them," even if this does not necessarily lead to a favorable outcome for the plaintiff.⁵¹

II. Key issues and standards relevant to the case analysis

1. Attorney General Magdalena Escobar's tenure in office

Paragraph 14 of the case states that Magdalena Escobar was appointed Attorney General on September 1, 2005 for a 15-year term that would end on September 1, 2020. However, a few months after her appointment, there was a coup d'état that led to the adoption of a new Constitution in 2007 (paragraph 2), the Ninth Transitional Provision of which states that the heads of oversight bodies "shall remain in their positions on a transitional basis" provided that they comply with the requirements established for the position. In the case of Magdalena Escobar, she was "confirmed" in the position through a Presidential Decree on March 20, 2008.

Consequently, the first issue that arises is related to Magdalena Escobar's (ME) security of tenure (or irremovability from office) as Attorney General. The response to this problem is fundamental to the coherence of the entire defense strategy of both the State and the petitioners. In this respect, the teams can take several positions:

- First position: ME enjoyed tenure from September 1, 2005 to September 1, 2020, which protected her even in the face of the constitutional change. According to this position, the Ninth Transitional Provision should be considered ineffective in relation to ME, and therefore, she has the right to remain in office until the end of her original term and may be removed only on disciplinary grounds with due process guarantees. If this position is taken, the call for a new selection process for the appointment of Attorney General could be substantively equivalent to a dismissal.
- Second position: ME enjoyed tenure from September 1, 2005 to September 1, 2020 but was not protected from the constitutional change. According to this position, although the Ninth Transitional Provision was in itself a violation of the guarantee of tenure in the office of Attorney General (by converting a permanent position into a transitional one), it did have a legal effect on ME, by making her term of office *transitional*.

- *Second variation of the second position:* ME's term of office became transitional when she was confirmed on March 20, 2008, at which time it was verified that she met the requirements established in the 2007 Constitution. According to this position, the confirmation cannot be equated with a new appointment, as that would violate the constitutional rules for choosing the Attorney General, which require a selection process that involves the Nominating Board. In line with this position, the call for a new selection process is necessary in order to eliminate the transitional status of the position that ME had been occupying on a temporary basis and make it permanent.

Those who argue this position can reinforce it by asserting that nothing prevented ME from participating as a candidate in the new selection process.

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As for the violation of the right to work, the State could argue that there was nothing to prevent Magdalena Escobar from participating in the new selection process, which would have ensured her continuity in office if she had sufficient merit and qualifications to be chosen again.

Finally, with respect to the intent to put a stop to the corruption investigations in the META Emails case, the State could contend that the government is committed to the fight against corruption, and that the progress made towards the establishment of an International Commission against Impunity (CICIFIS) in the country, at the President's initiative, is proof of this. The State can maintain that Escobar is using this argument to hide her selective and politically motivated use of criminal prosecution against the President's immediate circle.

3. International standards applicable to the selection of senior justice system authorities

Paragraphs 25 to 36 of the hypothetical case describe the process for selecting the Attorney General of the Republic of Fiscalandia that resulted in the appointment of Domingo Martínez, and which was subsequently challenged (including its outcome) by Maricruz Hinojosa and Sandra del Mastro, both career prosecutors who participated in that process.

The Inter-American system has established some minimum parameters to be observed in the selection and appointment of justice authorities, which should be "in the requirements and (...) in the procedure and assessment of qualifications (...), with a view to ensuring

qualification of candidates for Attorney General should be taken from representatives of the legal community and of civil society.⁵⁴

It is important to note that

- Although the interviews were open to the public, they were not broadcast live by official media (explanatory question 38).
- The scores obtained during the interviews, the way in which they were assessed, the debate within the NB, and the reasons for changing the existing ranking were not made public (paragraph 36).
- The President did not explain why he chose Domingo Martínez (paragraph 36).

Possible arguments of the State

The State, for its part, could argue that the principle of transparency is already enshrined in Article 2 of Law 266 of 1999, and that the NB has discretionary power to adjust the specific rules on publicity for this selection process. It could also argue that, in submitting their applications, the petitioners accepted the terms set out in the call for candidates, and therefore could not challenge the formation of the NB. In addition, the petitioners made no prior claim concerning these issues. The State may also argue that the NB could have provided information at the request of the petitioners or any other candidate, including any citizen or civil society organization, but that no such request was ever made.

b. Selection based on merit and professional qualifications

Under this standard, justice authorities should be selected on the basis of their merits and professional qualifications, and persons should be chosen who are reputable and suitable, with appropriate legal training or qualifications⁵⁵ in line with the particular nature and specificity of the duties to be performed. The IACHR has insisted that, in order to ensure that those qualifications will be properly assessed, "objective criteria [should be established] [...] for an accurate determination," which should "be embodied in State regulations, so as to ensure that they are observed and are mandatory."⁵⁶ This also makes it difficult for appointments to be motivated by other considerations, such as political interests.

The merit standard not only makes it possible to challenge the appointment of a particular individual, but also to question how the selection process is designed. In order to meet this objective, the process must include tools for identifying and assessing the merit of candidates, while incorporating safeguards to ensure that the final decision is not made on other grounds.

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- Article 103

can argue that the infor

d. Equal opportunity and nondiscrimination

At the Inter-American level, the right to equal access to public office is guaranteed by Article 23.1 of the ACHR and is fully applicable to the selection and appointment of justice authorities. This standard imposes various requirements, including:

- (i) The selection criteria must be objective and nondiscriminatory

Court has indicated that "the independence of any judge means that there is an adequate appointment process, with a term established in office and with a guarantee against external pressure."⁶⁷

It has also indicated that independence must be evaluated "both in its institutional aspect, that is, in relation to the Judiciary as a system, as well as in connection with its individual aspect, that is, in relation to the person of the specific judge;"⁶⁸ and that the American Convention protects the right of individuals to have their dispute resolution authorities "be and appear to be independent."⁶⁹

In this regard, according to the Inter-American Commission, it must be verified if the institutional independence of the sanctioning body is guaranteed by regulations, so that it is not ascribed to nor hierarchically, administratively, or functionally dependent on any other authority. This is so because it is possible for other powers or organs of the State to interfere.⁷⁰ The Commission has pointed out that when disciplinary control is exercised in a hierarchical manner, strict adherence to the principle of legality, and respect for due process guarantees, must be monitored. It has also noted that there are guarantees for the independent action of the disciplinary authority.⁷¹

Paragraph 41 of the hypothetical case and the answer to clarifying question 18 establish that the body in charge of the disciplinary investigation is the Supreme Judge of Internal Control, while the body in charge of imposing sanctions is the entire Supreme Court of Justice. For their part, the 26 judges of the Supreme Court of Justice are elected by the Legislative Assembly by a qualified majority of 2/3 of the number of deputies, from a list proposed by a Nominating Board, to occupy the position for a period of 15 years.

(ii) Competent authority

Regarding (ii)

requires that the judge provide elements that eliminate fears, suspicions, and legitimate doubts about his bias.⁷⁴

For the Inter-American Court of Human Rights, the recusal option is relevant, which it considers a procedural institution designed to protect the right to be tried by an impartial body. The challenge gives the parties the rig

Regarding impartiality, the State can argue that not all judgments that are revoked or annulled by the entire Court, even for reasons of motivation, can give rise to a removal sanction, but only those in which the defects are of such seriousness, that they demonstrate the lack of suitability of the judge to remain in office. In addition, it may indicate that the investigation of the disciplinary offense is carried out by a different and independent body of the entire Court - the Supreme Judge of Internal Control - who must analyze the conduct and present a prior report so that a decision can be made. Finally, it can be argued that Judge Mariano Rex did not use the recusal option, and therefore cannot assume that it had been unsuccessful.

b.2 Sufficient Motivation

judicial error;" a matter that was addressed by the Inter-American Court through the case, *Apitz Barbera et al. v. Venezuela*.

In said case, the Court indicated as a starting point, that "judges cannot be removed solely because their decision was revoked through an appeal or review by a higher judicial body" given that "they should not be compelled to avoid dissenting **from** the reviewing body of its decisions, which definitively only exercises a differentiated and limited judicial function to attend to the recursive points of the parties dissatisfied with the original ruling."⁸⁰

b.3 Right to Review

At the Inter-American level, the state obligation to provide resources for judicial control of the procedure and of the sanction imposed is based on Article 8.2.h of the American Convention and is part of the right to due process of law. But, in addition, the Inter-American Commission has considered that "the stage of reviewing the sanctioning decision is part of the disciplinary process that must be observed in order to effectively dismiss a justice authority."⁸⁴

As it appears from paragraphs 45 to 47 of the hypothetical case, Magdalena Escobar presented her petition before the Inter-American Commission on Human Rights on August 1, 2017. At this point, a final judgment had not yet been issued in the process of Nullity of an Administrative Act initiated against the Extraordinary Presidential Decree of June 14, 2017. The final judgment was issued on January 02, 2018 by the Supreme Court of Justice. The admissibility report was issued on December 30, 2018.

In this regard, the Commission has established that "in situations in which the evolution of the facts initially presented internally implies a change in compliance or non

In the hypothetical case, the State of Fiscalandia raised the exception of lack of exhaustion of domestic remedies in the three petitions that comprise the hypothetical case.

In the case initiated by Judge Mariano Rex, the State maintained that the petitioner did not initiate any internal judicial process to question the dismissal decision. However, it failed to identify the remedy that should be exhausted or to justify how a remedy that would have to be resolved as a last resort would be effective, by the same authority that issued the contested act.

In the case initiated by Magdalena Escobar, the State maintained that, at the time the petition was filed, the petitioner had not used all the resources within the Nullity of Administrative Act process. However, exhaustion occurred before the admissibility report was issued, so this exception must be rejected.

Finally, in the case of Maricruz Hinojosa and Sandra del Mastro, the State did indicate that the domestic remedy that had to be exhausted to challenge presidential decisions and those of the Nomination Board was the Nullity Process. The details of this process have been ex2(i)-4(c)-4(r)4(e)10(m)-4(e)

United Nations. General Assembly. Human Rights Council. *Report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul, A/HRC/26/32, 24 April 2014.*
United Nations. General Assembly.