On the verge of discretion: judges, public prosecutors and social networks

TRAINEES:

CATARINA BRANDÃO PROENÇA

LUSA CORREIA DE PAIVA

SOFIA COTRIM NUNES

TRAINER:

MR. DIOGO RAVARA

TABLE OF CONTENTS

I. Introduction

The Portuguese judges and public prosecutors are, such as all the persons invested in the same functions in the European context, bound to observe a series of duties regarding their conduct and overall behaviour, not only in their professional lives, but also in their private lives. Amongst these duties, we can find the so called duty of discretion.

The online interventions of judges and public prosecutors, in blogs or in social networks (such as *Facebook*, *Twitter*, *Instagram*, *Pinterest*, *Google+*) raise a series of questions and perplexities, regarding the type of conduct that these professionals should assume: one that, at the risk of jeopardizing basic values associated with the exercise of this kind of public roles, preserves the freedom that is inherent to the human condition of these players? Or, on the contrary, a stance that, by

limiting the freedom of expression of both judges and public prosecutors, ensures the independence and objectivity as basic standards for each of these careers, respectively.

Looking at it from a different perspective, one must say that the dissemination of the social networks usage by all the actors in the judicial system may raise some concerns about what should be considered as integrating the sphere of social life (and, therefore, could be accessed by anyone), the sphere of private life (that relates to the facts that one shares only with a limited number of close individuals) or, on the other hand, the sphere of intimate life (which should be private and recognized as being part of the innermost core of the individual's privacy).

Relating to this matter, it should also be considered that there are different levels of exposure that members of online social networks (especially on *Facebook*) can select for their posts and updates. Likewise, on these websites there are several categories of *groups*, as we will later emphasise, with diverse confidentiality standards that the users must take into account when they express their points of view about a certain subject.

And so the terms of the discussion on this topic may vary, as we try to determine what must be protected by confidentiality (and thus, should integrate a circle in which the liberty of expression rules) and what doesn't. And even if it does, and in what relates to the behaviour of judges and public prosecutors, is their liberty of expression so comprehensive that it reaches all aspects of their lives? It is not, nor it should it be. As we will later emphasize, the responsibilities associated with these professional positions mandate a certain kind of restraint in any public intervention, which necessarily includes online public interventions. The touchstone in this topic relates to the necessity of analysing and characterizing each situation individually and according to its specific circumstances, in a careful case by case assessment, especially given the relevance of the values at issue.

In the current essay, we will begin by describing the ethical and deontological international framework, and then proceed to analyse the legal framework of the duty of discretion in our country, followed by a series of real life cases that push the boundaries of what is private or not, or of what conduct should a judge or a public prosecutor adopt when intervening online. To finalize, we will present our view on the subject, never overlooking the significance of the values and fundamental rights at stake in this matter.

II. An international overview of the duty of discretion

The duty of discretion which is incumbent upon the judiciary branch, as well as the public prosecutors, is also acknowledged and required at an international level. Regulations are enforced by laws in the common law and civil law systems and they are, usually, set forth in Ethical and Deontological Codes.

This duty has been widely debated at an international level. We will analyse some of the most important international instruments that encourage States to define the content of the duty of discretion, in order to guarantee the reinforcement of public trust in jurisdictional activity.

As the Article 6(1) of the European Convention on Human Rights lays down *"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"*. Similarly, Article 10 of The Universal Declaration of Human Rights establishes that: "*everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him".* Therefore each individual judge should strive to uphold judicial independence and impartiality at both an institutional and at an individual level.

Intricately bound to the principles of impartiality and independence is the duty of discretion, which is the reference from which judges and public prosecutors shall determine and guide their conduct, be it in their professional life as well as in their private life. In Europe, both at the regional and at the institutional level, we have observed an increasing amount of initiatives concerning the judiciary's ethics and deontology. Among the many relevant and innovative efforts that have been made regarding this matter, for their relevance and innovation, we would like to point out some of the opinions and recommendations.

(i) Principles, Recommendations and Opinions

First of all and in an (necessarily) summarized manner, we would like to comment the Basic Principles on Independence of the Judiciary[1]. The task was to secure and promote the independence of the judiciary. For this purpose, the aforementioned principles establish, in paragraph 8, that the members of the judiciary are entitled, as their individual right, to freedom of expression and belief, provided, "*however, that in exercising such rights, 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"*. Accordingly, under the paragraph 15, "*the judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters"*. At this point, it is also important to emphasize the content of the Opinion no. 3 of the Consultative Council of European Judges (CCEJ)[2]. As far as ethics and deontology are concerned, one of the aims of this document was to seize the opportunity to outline an European model of judges' deontology, one that supresses the requirement for its own identity and is distinguished from the already existing models. In order to ensure that public expectations are met in such a way that is compatible with the notion of a

[1] Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

[2] Opinion no. 3 of the Consultative Council of European Judges (CCEJ) for the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality. Drafted on the basis of replies by the Member States to a questionnaire and texts drawn up by the CCEJ Working Party and the specialist of the CCEJ on this topic, Mr Denis Salas (France).

fair trial and that guarantees fundamental rights, a series of fundamental deontology principles were created.

As regards the duty of discretion, the CCEJ encourages judges to uphold some standards of conduct within their private lives, always taking special care concerning the possibility that their rights to freedom of expression, conviction and religion may endanger the impartiality and independence that their professional activity requires. For this purpose, the CCEJ suggests establishing one or more bodies/persons, within the judiciary, that should have a counselling role and be available to judges whenever they have some hesitation as to whether a given activity in the private sphere is compatible with their position of judge. It is further mentioned that when participating in any political activities – and in order to protect the legitimate expectations of the parties – the judge must demonstrate a careful public exercise of his/her political beliefs. Participation in political debates is not advisable as such exposure is considered to be incompatible with the neutrality of the judicial function and can call into question the very principle of separation of powers. Finally, in regards to the judge's relationship with the media, the CCEJ points out the growing media coverage of judicial activity in certain European countries - more specifically the danger of the judiciary being put into a position of vulnerability to external influences. This makes it very important that judges, under the duty of discretion, to refrain from making unwarranted comments about their cases, although in the wake of article 10 of the European Convention of Human Rights, judges may make necessary clarifications about their decisions[3].

Endorsing the same understanding is the Recommendation CM/REC (2010) 12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities. Its paragraph 19 states, *"Judicial proceedings and matters concerning the administration of justice are of public interest. The right to information about judicial matters should, however, be exercised having regard to the limits imposed by judicial independence. The establishment of courts' spokespersons or press and communication services under the responsibility of the courts or under councils for the judiciary or other independent authorities is encouraged. Judges should exercise restraint in their relations with the media."*

Lastly, two instruments concerning Public Prosecutors should be pointed out. Notably the Recommendation Rec (2000) 19, on the role of Public Prosecution in the criminal justice system[4] and secondly the European Guidelines on Ethics and Conduct for Public Prosecutors, also known as "The Budapest Guidelines"[5].

[3] On this subject, see also the European Network of Councils for the Judiciary working group, Judicial Ethics Report 2009-2010.

[4] Adopted by the Committee of Ministers of the Council of Europe on 6 October 2000.

[5] Adopted by the Conference of Prosecutors General of Europe on 31 May 2005.

The previously mentioned instruments establish the duty not to compromise the public prosecutors integrity in their private lives and to retain all the information received from a third party (unless disclosing that information is necessary in order to achieve justice).

(ii) General codes of conduct

At a global level, we must mention the Bangalore Principles of Judicial Conduct[6], which were created to establish standards of the ethical conduct for judges. Paradigmatic of its intentions, the paragraph 2.4 points out that *"a judge shall not knowingly, and while a proceeding is before, or could come before him, make any comments that might reasonably be expected to affect the outcome of such proceeding or to impair the manifest fairness of the process. Nor shall the judge make any comments in public or otherwise that might affect the fair trial of any person or issue".* It also adds "*As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. In particular, a judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office.*" On the other hand, the *"Código Modelo Ibero-Americano de Ética Judicial[7]"* expresses an institutional commitment with high standards and presents itself as a suitable tool to strengthen the legitimacy of the judicial power as referred to in Articles 62 and 66 that the duty of discretion and confidentiality concerning proceedings which are pending processes as well as the facts or any other data known because of the profession or in a simultaneous period, expanding this duty beyond not only to institutionalized information but also the privacy of the judge's life. In a more restrained manner, the Universal Charter of the Judge[8], states, in article 5, "*in the performance of the judicial duties the judge must be impartial and must so be seen. The judge must perform his or her duties with restraint and attention to the dignity of the court and of all persons involved".*

(iii) Local Codes of Conduct

At a national level, we would like to highlight Italian law; Italy was the first European country with a Code of Ethics for judges[9]. This code is a self-regulatory instrument created by the judiciary, and it is defined by Opinion no. 3 of CCEJ, as containing a set of encourage behaviours and rules of conduct, albeit not imposing any disciplinary sanction[10] in case one of those rules are broken. Keeping in mind the issue we have been discussing, Article 6 of the aforementioned instrument dictates that the judiciary, in their relation with the press and other media, must not instigate the publication of news

[6] The Bangalore Draft Code of Judicial Conduct 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November, 25th-26th, 2002.

[7] Adopted in the Copán-San Salvador Declaration, 2004, and created by the Presidents of the High Courts and *Conselhos da Judicatura*, pertaining the Latin-American countries.

[8] The text of the Charter has been unanimously approved by the delegates attending the meeting of the Central Council of the International Association of Judges in Taipei (Taiwan) on November the 17th, 1999.

[9] Adopted by the Italian Judges' Association, on 7 May 1994.

[10] For more information, please consult the Decree no. 109/2006 of 23 February concerning the Disciplinary penalties rules.

about their professional activity. The same article states that regarding the freedom of expression as well as the manifestation of thought the judiciary must guide their behaviour from balanced criteria, primarily when it comes to statements or opinions given in the context of a mass communication media.

In France, those concerned have defined guidelines to establish a code of conduct and to identify specific behaviours that can lead to disciplinary offences. At this point it is important to underline the *"Statut des Magistrats*[11]*"* that, in a comprehensive way, provides for some of the professional duties incumbent upon the judiciary, with which, despite their independence, they must comply with. In accordance with Article 6 the members of the judiciary swear an oath, pledging to faithfully fulfil their duties and conduct their deliberations in a dignified and loyal manner. And under article 43, any violation by a member of the judiciary of his/her duties, honour or scrupulousness is a disciplinary fault. The development of these general principles and indeterminate concepts is the responsibility of the case law of the *Conseil Súperior de la Magistrature* (CSM) and of the *Conseil d'Etat*. It is also important to note the non-binding principles ("soft law") of the *"Recueil des obligations deontologiques des magistrats",* published by the CSM, in 2010, which, in division *F*, establishes the duty of discretion, determining that the judiciary must not compromise justice's image of impartiality, as it is indispensable to maintain the citizen's trust. Judges should not comment on their decisions, or those handed down by their colleagues, and cannot disclose any kind of information, even in anonymous or anecdotally way, as regards freedom of expression, judges must act in a prudent way so as not to compromise their image or the judicial institution prestige.

Finally, it should be noted that, in France, in an innovative way, the College of Ethics for administrative magistrates was implemented in July 2012. It consists of three members appointed by the Vice-President of the Council of State, on the proposal of the High Council for Administrative Courts and Administrative Courts of Appeal. The main purpose of this entity, according to the Chart of Ethics of the members of the Administrative courts, is to give information and advices to all the members of the administrative courts on the application of principles and good practices. It can also deliver recommendations of its own initiative.

To conclude this particular point, we must note the Guide to Judicial Conduct of England and Wales, adopted in 2013[12] that is intended to offer support to judges on matters rather than to be an exhaustive code. It also aims to set up principles from which judges can make their own decisions and so maintain their judicial independence. Chapter V of the Guide states "*a judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the*

[11] Adopted by the Regulation no. 58-1270 dated 22 December 1958.

[12] The Guide to Judicial Conduct has been drafted by a working group of judges set up by the Judges' Council, under the chairmanship of Lord Justice Pill and published by the Judges' Council following extensive consultation with the judiciary.

judicial office and the impartiality and independence of the judiciary". As regards social networking and blogging, in paragraph 8.11 we can read that it is a matter of judges' personal choice, however, they are encouraged to remain anonymous, they must not identify themselves as members of the judiciary, it is also not advisable to give information about their names and addresses, contacts or any other aspects about their private lives. Similarly, the Guidance on blogging by Judicial Office Holders[13], enforces the idea that blogging by members of the judiciary is not prohibited, "*however, officer holders who blog (or who post comments on other people's blogs) must not identify themselves as members of the judiciary. They must also avoid expressing opinions which, were it to become known that they hold judicial office, could damage public confidence in their own impartiality or in the judiciary in general"*. And adds that *"judicial office holders who maintain blogs must adhere to this guidance and should remove any existing content which conflicts with it forthwith. Failure to do so could ultimately result in disciplinary action. It is also recommended that all judicial office holders familiarize themselves with the new IT and Information Security Guidance which will be available shortly".*

In Portugal, there are two codes of conduct that set forth the rules and guidelines by which the Portuguese judges and public prosecutors should lead their conduct themselves, both in their professional and private lives: the *Ethical Commitment of Portuguese Judges* and the *Portuguese Public Prosecutors' Charter of Conduct*, that we will later address later when referring to the duty of discretion in particular.

III. The duty of discretion in the Portuguese legal system

(i) The importance and fundamentals of Portuguese judges and public prosecutors' duty of discretion

The *online* behaviour of judges and prosecutors may have disciplinary relevance in the context of the framework created for this purpose, which can ultimately lead to the application of disciplinary measures[14] by the High Council for the Judiciary (for the judges) or the High Council for the Public Prosecution Service (in the case of public prosecutors). For this to take place, it must be considered (and proven) that the conduct of the judge or public prosecutor in question is in violation of one (or more) of the duties and statutory obligations that are imposed on them.

It should be noted that both judges and prosecutors are not democratically elected, in our country, unlike in the US. This means they are democratically legitimized to exercise their duties, but not in the exact same way. In fact, the democratic legitimacy for the exercise of their professions comes from a different process. On one hand, they are subject to a rigorous recruitment and selection process and their legitimacy arises from their submission to the exclusive practice of law enforcement.

[13] Issued on behalf of the Senior Presiding Judge and the Senior President of Tribunals on 8 August 2012.

[14] The disciplinary measures provided for in articles 85 bis of the Statutes of Portuguese Judges and 166 bis of the Statutes of Portuguese Judges, can range from a mere warning or admonition to the compulsory retirement or dismissal, depending on the severity of the offence and the circumstances involved.

On the other hand, they are controlled by a State body (the High Council for the Judiciary and the High Council for the Public Prosecution Service) which is composed by a mixture of judges or public prosecutors (depending of which High Council one is considering) and citizens appointed by the President and the Parliament, according to Articles 218 (1) and 220 (2) of the Portuguese Constitution. Thus, the need for a posture and irreproachable ethical conduct on the part of those who exercise the function of judge or public prosecutor is even more crucial.

Several ethical obligations are imposed on judges and prosecutors, by virtue of their condition, that aim to ensure that their legitimacy or the way they carry out their assignments does not fall under any suspicion. Among those duties are the duty of discretion to which judges and prosecutors are subject. This duty requires, broadly speaking, that "*a judge or a public prosecutor should not make public comments on the merits of a matter pending or impending in any court*". We can find grounds justifying the provision of this duty on the requirements of independence and impartiality in the activities of judges or public prosecutors and the need for establishing, maintaining and enhancing the community's confidence in the judicial system.

(ii) Statutory provisions of the duty of discretion

The duty of discretion is laid down in Article 12 of the Statute of Portuguese Judges and Article 84 of the Statute of Portuguese Public Prosecutors. Both Article 12 (1) and Article 84 precisely state that a judge or a public prosecutor should not make any public statements or comments on the merits of a matter pending or impending in any court, except when authorized to do so by the judges disciplinary authority to defend their honour or to fulfil another legitimate interest. On the other hand, both articles 12(2) and 84(2) state that in matters not covered by the judicial secrecy or by professional secrecy, the information addressing the fulfilment of legitimate rights and interests (such as access to information) are not covered by the duty of discretion.

In four compelling resolutions related to the duty of discretion that befalls judges and public prosecutors, both the High Council for the Judiciary and the High Council for the Public Prosecution [15] have given important contributions to the densification of these concepts. In its first deliberation, dated 11 March 2008, the High Council for the Judiciary stated [16]: "*I – Safeguarding justice, professional and State secrets and private life, judges can give all information regarding decisions and the reasons therefor. III – The duty of discretion covers, in essence, the statements or comments (positive or negative), made by judges, involving value appreciation in cases that they are in charge of. IV - All judges, even if they are not responsible for a particular case, can breach this duty. V – The duty of discretion regards all pending cases and those that although already decided once and for all, concern facts or situations of irrefutable actuality. VI – Exempt from the duty of discretion is the consideration*

[15] Resolution of the High Council for the Public Prosecution of October 15th 2013, http://csmp.pgr.pt/Destaques/deliberacao.html.
[16] https://www.csm.org.pt/ficheiros/deliberacoes/acta2008_09.pdf.

of decisions resulting from the exercise of teaching or of legal research or comments of a scientific nature, the commented judgement having acquired the authority of a final decision". The High Council for the Judiciary re-emphasized these parameters it had set for interpretation of the duty of discretion, in a more recent resolution, dated 14 April 2015 [17], with regard to recent interventions of judges on social networks (e.g. in *Facebook*), drawing attention for the special precautions that should be taken on social networks, especially given the level of publicity that the comments in question may be subjected to.

The High Council for the Public Prosecution Service (the self-regulating body for public prosecutors) has also referred to the content of the duty of discretion on 10.15.2013. It states that in "recognizing the fundamental value of freedom of expression, it calls upon the honourable Public Prosecutors -, in giving information, issuing opinions or weaving comments, except in findings of merely doctrinal character - to show the utmost restraint, avoiding any comments about pending cases, whether or not in secrecy, most notably as regards cases that they have been involved with by virtue of their functions, and whose pronunciation can be conveyed by any means to the public.

In particular, restraint should be used by the honourable Public Prosecutors when participating in debates or the exchange of views on social networks, or in the publication of articles in blogs and websites, given the immediacy, informality, ease of dissemination and easy decontextualization of contents that characterize such mediums".

(iii) The duty of discretion in the Judges' and Public Prosecutors' codes of conduct

Both judges and public prosecutors should lead their behaviour by the norms provided for, not only by their professional Statutes but also in the codes of conduct approved by the self-regulating bodies of both careers. As we already stated, the codes of conduct that govern this matter are the Ethical Commitment of Portuguese Judges and the Portuguese Public Prosecutors' Charter of Conduct.

These instruments are an important tool in an effort to better understand all the disciplinary duties Portuguese judges and prosecutors are bound to. In fact, even though the Statutes of Portuguese Judges and Public Prosecutors provide for some of the values that should lead their conduct (such as the one we are now examining, and also the principles of independence and non-liability), the remaining deontological duties are set forth by the ordinary law (such as the principle of impartiality, integrity and diligence). It is precisely this shortcoming that the Ethical Commitment of Portuguese Judges and the Portuguese Public Prosecutors' Charter aims to make up for, by gathering the utmost relevant duties that must govern the Portuguese judges and public prosecutors' behaviour.

As far as the duty of discretion is concerned, the Ethical Commitment of Portuguese Judges has noted that judges and public prosecutors must not only have unblemished conduct and ethical posture, but it must be on display to the community in which they live: "*Caesar's wife must be above*

[17] http://www.csm.org.pt/ficheiros/deliberacoes/2015/2015-04-14_plenario.pdf.

suspicion". Indeed, this requirement for high standards of conduct applies not only to the professional life of judges and public prosecutors, but also for their personal life, as far as the latter affects the former.

On the other hand, the Portuguese Public Prosecutors' Charter of Conduct specifically addresses the need for a cautious attitude in any *online* interventions, stating, in no. 22, that the Public Prosecutors' participation in blogs and social networks should be guided by a special duty of care, that safeguards that their own freedom of expression. Disclosing personal data and facts regarding their private or professional lives should not hinder or constrain the exercising of their present or future functions.

By ascertaining the latitude and scope of each of the most relevant duties that the Portuguese judges and public prosecutors' are bound to observe, and by transposing to the Portuguese system the rules also applicable in the international and European frameworks, these codes of conduct assume an unparalleled significance, even though they don't have any binding force.

(iv) The judges and prosecutors' fundamental rights restrictions

"The judge and the public prosecutor should be differentiated from the ordinary citizen, but to what extent? So far as to decline their own citizenship?"[18]

Judges and public prosecutors are citizens, and as such, holders of the fundamental rights granted by the Portuguese Constitution. These rights, and specifically the right to freedom of expression (Article 37 (1) of the Portuguese Constitution), are granted to all Portuguese citizens, under the principles of universality (Article 12 (1)) and of equality (Article 13 (1)). However, due to their institutional status, given the functions they carry and what they represent, the fundamental rights of judges and prosecutors are subject to certain restrictions, aiming to ensure the impartiality, independence (in the case of judges), objectivity and legality (in relation to prosecutors) and also the community's confidence in the judicial institutions.

The duty of discretion to which judges and public prosecutors are bound represents a significant limitation on their right to freedom of expression. In fact, the Statutes of Portuguese Judges and Public Prosecutors establish that they refrain from issuing opinions and/or comments regarding the merits of a matter or of a certain ruling (including their own, in the case of judges), pending or impending in any court, subject to legal confidentiality or not. This obligation constitutes a considerable restriction on their right to freedom of expression, based on the preservation of said values.

In order to properly analyse the contours and implications of this kind of restriction on the right to freedom of expression of judges and public prosecutors, it is important to bear in mind the requirements that the restrictions on fundamental rights must comply with, considering what is established by the Article 18 (2) and (3) of the Portuguese Constitution.

[18] PATTO, PEDRO MARIA GODINHO VAZ, "*A intervenção cívica dos magistrados – sentido e limites*", Revista do C.E.J., n.º 6, 1.º semestre de 2007.

According to this Article, the restrictions on fundamental rights must be limited to the extent necessary to safeguard other constitutionally protected rights or interests and may not reduce the scope and extent of the essential contents of constitutional precepts. This means that these restrictions must meet certain requirements of proportionality, necessity and adequacy, and may not affect the essential core of the fundamental right in question.

It is therefore necessary to achieve a balance between the exercise of the right to freedom of expression by the Portuguese judges and prosecutors and the constraints arising from the duty of discretion, in order to ensure their status and social dignity and to not cast any suspicions on how they perform their duties.

In this context, it is also important to note that, although some limitations on the judges and public prosecutors' fundamental rights are considered admissible and most of the times, necessary, these restrictions must not lead to the eradication of such rights. That is, the restrictions imposed on the right to freedom of expression of judges and prosecutors, which are justified by their particular roles and institutional status shall not amount to the withdrawal of such right, and must leave its essential core untouched. On the contrary, this restriction should strictly be kept to the necessary extent as to ensure and not compromise the community's trust in the judicial system and institutions.

Judges and public prosecutors are, admittedly, citizens with distinct and particular responsibilities. Nonetheless, one must keep in mind that far beyond the role and functions they fulfil, they are human beings and citizens whose fundamental rights should not – must not – be limited or restricted in an excessive manner that would be contrary to the Portuguese Constitution. There are other rights, freedoms and guarantees that, despite being granted to all citizens (and also judges and public prosecutors), are also subject to restrictions set forth in statutory norms. For instance, the freedom to participate in public life (Article 48 (1) of the Portuguese Constitution) and the freedom of association (Article 46 (1) of the Portuguese Constitution).

As regards the participation of judges and public prosecutors in political activities, the articles of the statutes one has to bear in mind are Article 11 (1) of the Statute of Portuguese Judges and Article 82 (1) of the Statute of Portuguese Public Prosecutors. Both these provisions state that judges and public prosecutors should refrain from political activity. Such prohibition concerns any kind of bond to political causes and aims at ensuring a distance from the (usual) partisan disputes, which would only contribute to undermine the image of impartiality and objectivity that a judges and prosecutors should cultivate, as well as the confidence placed in the justice system by the community.

IV. Social networks, the judges and public prosecutors' private life and freedom of expression

The three spheres theory[19] supposes the existence of levels of discretion and confidentiality in one's life: the sphere of social life, with public knowledge information that can be exposed; the sphere of private life, which can be accessed when confronted with other fundamental rights; the sphere of

[19] Originated in German Case Law.

intimate life, related to family, health, sexual behaviour and political and religious convictions. It should be noted that the intimate sphere is completely inaccessible.

For instance, article 16 of the Portuguese labour code prohibits the employer to access and expose information about employees, namely a pregnancy state, miscarriage, diseases and other health conditions. Furthermore, article 32 (8) of the Portuguese constitution considers illegal any evidence obtained through abusive intrusion into one's private and family life.

The issue regarding social networks, judges, prosecutors and their private life is simultaneously the main problem of the three spheres theory: defining which situations belong to each sphere. This is not an easy assignment, especially in what concerns social networks, since a judge or a public prosecutor can publish posts and comments on his own *facebook* profile and make those posts and comments available to the public or, on the contrary, only to his friends, according to the privacy settings previously selected. A post on a judge's *facebook* profile is a matter of his social life sphere or of his private life sphere? What if he posts or comments in a restricted *facebook* group page?

This subject, regarding labour law, has already been assessed by the French *Cour de Cassation* in the Arrêt nº 344 of April 10th 2013[20], which decided that an employee's *facebook* page or profile is not a public place. In this decision, the *Cour de Cassation* ruled that posts on *facebook* profiles cannot provide any grounds for accusations of defamation or slander. For this interpretation to prevail, according to the *Cour the Cassation*, the *facebook* profile must not only be maintained private (using, for this purpose, the privacy settings), so that it is not available to other social network members besides "friends" chosen by the account holder, but also have a limited number of "friends" (the *Cour de Cassation* does not specify this number).

Hence, lining this interpretation with judges and public prosecutors deontology and ethical framing, the use of social networks by these professionals can be qualified as a private matter. Many possible consequences may be contemplated in this case, such as leaking of judges and public prosecutors' posts and comments on social networks to the press, for instance. Other impartiality issues could also be raised. In such a case, judges and public prosecutors could always invoke the protection of privacy of correspondence and telecommunications regulations, such as Article 12 of the Universal Declaration of Human Rights article 34 of the Portuguese Constitution, article 75, 76 and 78 of the Portuguese Civil Code and, if necessary, Article 199 of the Portuguese criminal code. Also, Article 22 of the Portuguese Labour Code, on the protection of confidentiality of employees' messages and access to information about them, seems to extend its scope to social network published contents, given the fact that they are personal – and not professional – messages.

Still, judges and public prosecutors are bound to more strict deontological rules than employees in general. Not only must their professional conduct be flawless – hence, guarding discretion about the

[20] Première chamber civile, procedure 11-19.530, in https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/344_10_26000.html.

procedures they work in - but also the behaviour in their private life (hence, their private sphere) must be impeccable, with few impact in their public image, therefore assuring the community's confidence in their abilities and good character – article 82 of the Portuguese Judges' Statute.

Thus, a more strict perspective can be considered, specifically, the assessment of the Florida Judicial Ethics Advisory Committee, recommending that a judge should not add lawyers who may appear before him as "friends" on a social networking, not allowing such lawyers to add him as a "friend". Furthermore, and to prevent this problem, the Committee recalls that «certain social networking sites permit the member to set levels of privacy permitting the member to restrict information, including the identification of the member's "friends", to certain visitors to the member's page. For example, the member might be permitted to set the privacy settings in a manner such that only the member's "friends" could see the names of the members' other "friends"».

Additionally, the District Court of Appeal of the State of Florida agreed upon the same interpretation on the Domville v. Florida State Case[21]. In this case, the judge, after denying a motion for his own disqualifying of the trial, was definitely removed from the case since he was a *facebook* friend of the prosecutor assigned to the case, and therefore jeopardizing his impartiality, in the Court of Appeal's viewpoint. The following cases will allow a better assessment on this matter in what concerns Portuguese Courts.

V. Social Networks, Judges and Public Prosecutors – Portuguese Cases and Court decisions

Portuguese courts have already overviewed the Social Network deontological subject, especially in what concerns labour law. Thus, the following two decisions concern two employees in companies who wrote some *facebook* posts about their employers. As for judges and public prosecutors, membership of social members can also create risks to the integrity and dignity of the entire judiciary [22], as demonstrated by some cases occurred in Portugal.

(i) Case 1: Oporto Court of Appeal Decision of September 8th 2014, procedure no. 101/13.5TTMTS.P1 [23]

This case concerns an employee in a security company, who was also the union leader. The employee published several posts on a *facebook* restricted group of employees of the company. This *facebook* group had 140 employees.

The content of these *facebook* posts directly concerned the employer, with some offensive words, expressions and even photos (e.g. a photo of three clowns, portraying his three superiors). Because of these and other disciplinary offences, he was dismissed for professional misconduct. According to Portuguese law, all evidence obtained through abusive intrusion into one's private and

[21] Procedure no. 4D12-556, September 5th 2012, http://www.4dca.org/opinions/Jan%202013/01-16-13/4D12-556.rehg.pdf.

[22] SHIMON SHETREET, SOPHIE TURENNE, "*Judges on Trial: The Independence and accountability of the English Judiciary.*"

[23] http://www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/917c9c56c1c2c9ae80257d5500543c59?OpenDocument.

family life or into one's home, correspondence or telecommunications shall be invalid – article 32 (8) of the Portuguese Constitution.

However, the Court of Appeal considered that even though the *facebook* group was restricted, meaning that employees could only belong to the group through an invitation of a page/group administrator, there was no expectation for that group to remain private and restricted. That is to say, with a group of 140 members, the employee dismissed on this case could not argue any legitimate expectation of privacy – there were too many members to guarantee a reliable trust bound between all of them, and the employee here concerned should have foreseen that.

Therefore, the Court of Appeal considered the evidence provided by the *facebook* posts as valid and maintained the dismissal for professional misconduct decision.

(ii) Case 2: Lisbon Court of Appeal Decision of September 24th 2014, procedure no. 431/13.6TTFUN.L1-4 [24]

In this case, an employee of a company wrote an inflamed post on his *facebook* page, insulting his employer (e.g. saying he was a liar). He ended this particular *facebook* post saying "*share this, my friends*". This post was made aware to the employer and consequently the employee was dismissed for professional misconduct. The employee claimed the evidence used for the dismissal was not valid since the *facebook* post is part of his private sphere.

The Court of Appeal considered that the employee invited his *facebook* friends to share the post he had written and therefore he renounced to any privacy intentions of what he had written. As in the previous case, the employee could not have any legitimate expectation of privacy since he encouraged others to share it on the said social network. Therefore, the Court of Appeal decided to maintain the dismissal for professional misconduct decision.

(iii) Case 3: Portuguese Supreme Court Decision of March 2nd 2011, procedure no. 110/10.6YFLSB.S1 [25]

In this case a judge made certain comments to a journalist on a particular judicial procedure: "*only an unwise judge would throw a girl to the lap of a mother with no conditions to raise and take care of her. If my decision shall be corrected by a more qualified court, as the Supreme Court, I will feel comfortable…Judicial procedures involving children always cause great emotion and fuss in the media. I already suspected that this procedure would have great impact on the media. (…) One does not need much skill to bring round a six year old girl*".

As previously stated, article 12 (2) of the Statute of Portuguese Judges allows judges to provide information to the public regarding the access to information about judicial procedures. Nevertheless, the Supreme Court considered that the defendant judge provided more than objective information since he made actual comments and personal opinions on the case. And this he could not do according to the

[24] http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/ecca98e591fa824780257d66004b4283?OpenDocument

[25] http://www.stj.pt/ficheiros/jurisp-sumarios/contencioso/contencioso1980-2011.pdf, p. 251.

terms of the discretion duty set forth in article 12 (1) of the Statute of Portuguese Judges. He was sentenced to an admonition penalty.

(iv) Case 4: High Council for the Judiciary Decision of November 9th 2004 [26]

Still on the discretion duty, this case refers to a judge who also made some public statements in interviews with journalists about the functioning of the High Council for the Judiciary.

The day before the said statements, the judge found out that she would not be placed in the Court she had previously selected and that no other judge would fill that vacancy. The defendant judge then gave two interviews to television channels, claiming that there were lobbies in the High Council for the Judiciary, which could be related to judicial procedures. The defendant judge also stated that the final scores and evaluations given to judges by the High Council of the Judiciary inspectors depended on the charm or friendliness of her colleagues and that some of her colleagues in Court did an insufficient job.

The High Council for the Judiciary considered that the defendant judge's statements were disciplinarily relevant since they directly concerned determinable colleagues and endangered the confidence in the judicial system as a whole and sentenced the judge to an admonition penalty.

(v) Deliberation of the Plenary of the High Council for the Judiciary of January 19th 2011 [27]

Given the fact that the duty of discretion prevents judges from publicly commenting their own decisions and that the media often broadcasts negative news that do not correspond to the truth, the Plenary of the High Council for the Judiciary voted a deliberation in order for a restricted group to be created to write and publish public statements to the press in matters which can affect the Judiciary's prestige. It was also decided to create a press office to enable an urgent access to the press.

(vi) Case 5: High Council for the Judiciary Decision of December 6th 2005, disciplinary procedure no. 83/05 [28]

This is a particularly interesting case on the duty of discretion matter since it concerns the use of a recording of a private conversation between the defendant judge and a journalist. This conversation was taken as private by the judge. However, the journalist illegally recorded it and its content was leaked to the press. In this conversation, the defendant judge made several comments on judicial procedures, especially on the renowned "Casa Pia" case.

The High Council for the Judiciary decided to close the case and not apply any sanction to the defendant judge since the recorded comments on the "Casa Pia" case were not intentionally revealed by the judge. The judge did not know that the conversation with the journalist was being recorded and believed their conversation was strictly private. Besides, according to article 199 (1) of the Portuguese criminal code, recording private conversations without knowledge of the parties involved is considered a crime. Therefore, the High Council for the Judiciary considered there was no breach of the duty of

[26] http://elearning.cej.mj.pt/mod/resource/view.php?inpopup=true&id=12482, p. 725.
[27] http://elearning.cej.mj.pt/mod/resource/view.php?inpopup=true&id=12482, p. 721.
[28] http://elearning.cej.mj.pt/mod/resource/view.php?inpopup=true&id=12482, p. 764.

discretion. Nevertheless, the High Council for the Judiciary alerts that the conversation with the journalist on an individual judicial case, though private, was still a reckless behaviour.

This High Council decision had three dissenting opinions issued. Two of those opinions considered that a violation of article 82 of the Judge's Statute and of the duty of discretion actually occurred, even though it was not intentional but only negligent. According to the first two dissenting votes, the defendant judge, having admitted the content of the conversation with the journalist, had to foresee the consequences of his behaviour. The dissenting opinion considered that the case should have been further investigated.

(vii) Case 6: High Council for the Public Prosecution of January 10th 2012 [29]

This case concerns a public prosecutor who created his own blog and posted several texts of his authorship that any internet user could access and read. In the blog archives there were texts regarding his neighbours ("*boring neighbours*") with rude comments about them: "*I have two neighbours, siblings, who are always nosing around. Two very nasty sisters, and very rude! These are simply unbearable neighbours! A torment! They are always together and have two lovers that provide for them, apparently, since there is no evidence that those two idiots (to say the least…) provide for themselves".*

The defendant public prosecutor also made insulting comments about colleague judges and public prosecutors in his blog. The High Council for the Public Prosecution considered that this behaviour had disciplinary relevance since it infringed articles 163 of the Public Prosecutor's Portuguese Statute and sentenced the defendant public prosecutor to an admonition penalty.

(viii) Case 7: Judges and public prosecutors commenting judicial procedures on social networks (*Facebook*)

This has been a controversial case in Portugal currently, which does not yet have a solution. A group of judges and public prosecutors created a *facebook* restricted group where they posted comments on several judicial and juridical issues. One of those issues was the pre-trial detention of a former Portuguese prime minister, with many inflamed comments from judges and public prosecutor members of the group (mostly against the prime ministers defence).

Although this was a restricted group, the judges and public prosecutor posts and comments content leaked to the press and quickly turned into an enormous public controversy. As a result of these developments, the High Council for Public Prosecutors, in a resolution dated April 14th 2015 [30] decided to start an inquiry on the case and on the public prosecutors involved. However, the Attorney-General of the Republic has voted against this resolution, in dissenting opinion stating that "*given the available elements, it is difficult to foresee any disciplinary infraction, particularly, in places where there is freedom of expression. Besides, there is little valid digital evidence in this disciplinary*

[29] http://elearning.cej.mj.pt/mod/resource/view.php?inpopup=true&id=12482, p. 520.
[30] http://csmp.pgr.pt/boletins2/2015/bi_12_2015.pdf.

procedure, enough to solve this case, especially in what concerns the concrete determination of its perpetrators". Simultaneously, in this resolution, the High Council for Public Prosecutors decided to create a "*deontology committee*" to organize events to raise awareness to this kind of ethical and deontological problems and the duty of discretion.

As seen before, in **case 6**, the content of the comments was revealed by an anonymous member of the restricted *facebook* group and therefore the group members did not act intentionally on the leaking of the *facebook* comments; furthermore, in **case 6** the private conversation between the judge and his friend journalist was unlawfully recorded, and in this case the leaking of the *facebook* comments could be portrayed as a violation of correspondence and telecommunications – a crime under article 194 of the Portuguese criminal code.

Hence, the Attorney General's dissenting opinion points out this interpretantion, when realizing that "*there is little valid digital evidence in this disciplinary procedure, enough to solve this case, especially in what concerns the concrete determination of its perpetrators".*

From another perspective, one needs to consider to what extent can a restricted group on *facebook* remain, effectively, restricted. According to the press news on this matter, the *facebook* group of judges and public prosecutors had dozens of members. It can be difficult to admit that a member judge or public prosecutor maintains a close relationship with all the dozens of other members of the group – one of the strong, valid arguments for **case 1**. This may lead to the conclusion that any of this group members should have foreseen that the information posted on the group could be, at some point, revealed to the public, and therefore bringing disciplinary relevance to their *facebook* comments and posts.

(ix) Other cases have taken place in Portugal

For instance, a public prosecutor who "*liked*" the *facebook* official page of a political party leader of the opposition and later conducted an investigation to the prime minister. The press found out about the *facebook* "*like*" and implied that the public prosecutor was biased in his investigation to the prime minister, questioning if this behaviour contended with the obligation of absence of political party activity for judges and public prosecutors.

VI. Conclusions

(i) In the international context, the duty of discretion is referenced in different instruments, such as the Basic Principles on the Independence of the Judiciary (United Nations, 1985), Opinion no. 3 of the Consultative Council of European Judges (CCEJ), the Recommendation CM/REC (2010) 12 of the Committee of Ministers to Member States on Judges, The Bangalore Principles of Judicial Conduct (Judicial Group on Strenghting Judicial Integrity, 2002); the Universal Charter of the Judge (International Association of Judges, 1999). At a local level we have analyzed the Italian, French and English systems that adopted non-binding principles regarding the guidelines of the CCEJ and the European Committee.

(ii) All the instruments that we have examined indicate that judges and public prosecutors, even in their private lives, must strive to maintain a posture of impartiality, exemption and transparency of justice, avoiding making comments about matters that can jeopardize these values.

(iii) Among the duties imposed on judges and prosecutors by virtue of their condition, we can find the duty of discretion, justified by the requirements of independence and impartiality in the activities of judges or public prosecutors and also by the need for establishing, maintaining and enhancing the community's confidence in the judicial system.

(iv) This duty requires, broadly speaking, that "a judge or a public prosecutor should not make public comments on the merits of a matter pending or impending in any court".

(v) The duty of discretion is laid down in Article 12 of the Statute of Portuguese Judges and Article 84 of the Statute of Portuguese Public Prosecutors, and both the High Council for the Judiciary and the High Council for the Public Prosecution have given important contributions to the densification of these concepts, drawing attention for the special precautions that should be taken on social networks, especially given the level of publicity that the comments in question may be subjected to. The Ethical Commitment of Portuguese Judges and the Portuguese Public Prosecutors' Charter of Conduct also provide for the duty of discretion.

(vi) Both judges and public prosecutors are holders of the fundamental rights granted by the Portuguese Constitution. Nevertheless, due to their institutional status and given the functions they carry out, their fundamental rights are subject to certain restrictions, as the one the duty of discretion imposes on the right to freedom of expressions of these professionals, which must comply with the requirements established by the Article 18 (2) and (3) of the Portuguese Constitution.

(vii) The restrictions imposed on the right to freedom of expression of judges and prosecutors shall not result in the withdrawal of such right, and must leave its essential core untouched.

(viii) Judges and public prosecutors cannot be set apart from new developments on technology and new forms of communications. Though they may use social networks to publish posts and other contents, the discretion duty is constantly underlying their online conduct.

(ix) What happens then if a judge or a public prosecutor posts information, comments or opinions on a concrete judicial procedure (an actual show trial) in a restricted social network group and that content happens to be leaked out to the press, causing great social disquiet and loss of public faith in the judiciary?

(x) This issue may be addressed in two different angles. It can be seen from a confidentiality of messages and contents perspective or, simply from the viewpoint of a strict violation of the duty of discretion.

(xi) According to the three spheres theory there are three levels of discretion and confidentiality in one's life: the social sphere, the private life sphere, the intimate life sphere. When using secret or restricted groups in social networks, or even in a *facebook* profile page, always with a limited number of friends, enough to sustain that between them there is a trustworthy bound, it seems that the according sphere is the private life sphere.

(xii) Consequently, and pursuant the dissenting vote of the Attorney-General of the Republic on the Resolution of the High Council for the Public Prosecutors of April 14th 2015, no disciplinary procedure is legitimate in such a case, provided that any evidence obtained from facebook secret or restricted groups is invalid.

(xiii) Indeed, article 38 of the Portuguese constitution considers illegal any evidence obtained through abusive intrusion into one's private and family life as well as articles 75 to 78 of the Portuguese Civil Code and article 194 of the Portuguese criminal code incriminates violations of correspondence and telecommunications.

(xiv) We believe that disclosing, publicizing, exposing or disseminating judge's and public prosecutors (or anyone's for that matter) social network information (v.g. posts, comments, photos, or other publications) can certainly be included on the possible meaning of a "violation of correspondence", and therefore even constitute a criminal offence.

(xv) However, in truth, this does not mean that judges and public prosecutors are unbound to their duty of discretion when using social networks.

(xvi) Furthermore, the duty of discretion is <u>always</u> binding regarding the concrete judicial procedures assigned to each judge or public prosecutor – pursuant the dissenting vote of member of the High Council of Judges Edgar Taborda Lopes in Resolution of March 11th 2008.

(xvii) According to the dissenting vote "*the present resolution (...) obliterates the new legal, social, political and media reality in which we are in, and that we must not ignore, pulling judges to a situation where they are restrained from participating in the political debate on matters related to the Judiciary, which I find counterproductive. I do not argue that judges can freely comment and criticize their colleagues' decisions, or freely make criticisms in the media about what is happening in concrete judicial proceedings that are currently under trial. But going from concluding a conduct is good or bad to deciding it constitutes a disciplinary infraction is a huge step which I believe is not correct and is a simplistic vision*".

(xviii) Outside concrete judicial procedures, and within the framework of the private life sphere, judges and public prosecutors may freely express their feelings and opinions on the most diverse subjects of the judiciary; even when inserted in their social sphere, we believe that judges and public prosecutors may cautiously comment other judicial proceedings, provided that they comply with the rest of their Statutory duties – correction, discretion (in case of legal secrecy, for instance), civilness.

(xix) The discretion duty cannot be as limiting as to restrain judges and public prosecutors to freely comment case law (even judgments which have not yet acquired the authority of a final decision) for scientific and teaching purposes; otherwise it would mean a step backwards in legal developments.

VII. Bibliography

ANACLETO, NOÉMIA NEVES, "*Legitimação do Poder Judicial*", Revista Julgar, n.º 8, maio – agosto 2009, Coimbra Editora, Coimbra.

BIELSCHOWSKY, RAONI, "*A liberdade de expressão dos titulares dos cargos políticos dos órgãos de soberania da república portuguesa*", Revista Julgar, versão online, 2013.

CÁDIMA, FRANCISCO RUI, *"O Facebook, as redes sociais e o direito ao esquecimento", in* Informação Moeda, 2014, Lisboa.

DIAS, JOÃO PAULO e ALMEIDA, JORGE, "*Independência e/ou autonomia do poder judicial em Portugal: Reflexões sobre as condições externas e internas*", Revista Julgar, n.º 10, janeiro – abril 2010, Coimbra Editora, Coimbra.

MAITREPIERRE, ERIC J., "*Ethics, deontology, discipline of judges and prosecutors in france*", Resource Material Series, No. 80, *online* version.

MOREIRA, Teresa Coelho, A Privacidade dos Trabalhadores e as Novas Tecnologias de Informação e Comunicação: contributo para um estudo dos limites do poder do controlo electrónico do empregador, Almedina, 2010.

NETO, LUÍSA, "*A (ir)responsabilidade dos Juízes*", Revista da Faculdade de Direito da Universidade do Porto, ano III, Coimbra Editora, Coimbra, 2006.

NEVES, J.P. MOREIRA DAS e DIAS, RUI SILVA, "*Do dever de reserva dos juízes – Breves considerações*", Revista Julgar, n.º 7, Janeiro – Abril 2009, Coimbra Editora, Coimbra.

PATTO, PEDRO MARIA GODINHO VAZ, "*A intervenção cívica dos magistrados – sentido e limites*", Revista do C.E.J., n.º 6, 1.º semestre de 2007.

PEREIRA, ALBERTINA AVEIRO, "*A responsabilidade ético-profissional dos juízes*", Revista Julgar, n.º 3 Especial, 2009, Coimbra Editora, Coimbra.

SHETREET, SHIMON e TURENNE, SOPHIE, "*Judges on Trial: The Independence and Accountability of the English Judiciary"*, Cambridge Studies in Constitutional Law, 2nd Edition, Cambridge, 2013.

VERÍSSIMO, JOANA; MACIAS, MARIA e RODRIGUES, SOFIA, "*Implicações jurídicas das redes sociais na internet: um novo conceito de privacidade?*"