

# Judges' private life and the dignity of the judicial office: the limits of disciplinary actions

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**Team Portugal I**

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## **INTRODUCTION**

This paper will focus on a specific case that regards a real disciplinary proceeding concerning a judge for conduct in his personal and family life and in which the Portuguese High Council for Judicial Magistrates applied a disciplinary penalty.

Regarding judicial ethics, it is recognized by all judicial systems that the lack of integrity is seen as real threat to the respect and trust of the community in the rule of law, that is the base of all democratic states.

The case focuses on judges' integrity and how the lack of it may affect the community's respect for the judge, as well as for the judicial system as a whole.

Our aim is to reflect on the limits of disciplinary actions, with the purpose of answering the following questions: which kind of behaviours can offend judicial integrity and entail disciplinary actions and penalties? Does the decision of the Portuguese High Council for Judicial Magistrates<sup>1</sup> constitute a limitation to the Judge's freedom and right to his personal and family life as fundamental right? Is there any guide that can help judges maintain judicial integrity?

### **I. THE CASE**

A Judge of the Judicial Court of Funchal, island of Madeira, was punished by the High Council for Judicial Magistrates with the disciplinary penalty of transfer to another court, due to have been found guilty of a disciplinary misconduct resulting of the violation of Article 82 of the Statute of Judicial Magistrates (SJM), established by Law n° 21/85, 30<sup>th</sup> of July.<sup>2</sup>

The conducts that were considered to be proven as improper for those who administer justice and carry out the judicial office and which gave rise to the disciplinary penalty applied, were two separate outrageous discussions in public, one started by the Judge's spouse and another by his daughter, when they caught him in the company of another women, with whom he maintained, for several years, an extramarital relationship.

The High Council punished the Judge not because he maintained an extramarital relationship, while still being married, but because that fact achieved notoriety in such a way that, in the eyes of the community, the conduct revealed the loss of values and affected the range of philosophical attributes expected from a Judge.

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1 From now on referred to as High Council

2 From now on referred to as Statute and/or SJM.

On both occasions the scenes happened in public and resulted in reactions from third parties, in the first one, when the Judge's spouse saw him with the women with whom he maintained the extramarital relationship she slapped the women and then her husband across the face and a police officer had to intervene to stop her from slapping the Judge again. In the second occasion, when the Judge's daughter caught him with that woman, a club (disco) doorman had to intervene to stop the discussion.

All this happened in the small community of Funchal, island of Madeira, in the middle of the street, in public eye, in front of everyone that was on the streets that moment. The first scene happened in February 2006, on a Saturday evening, after the parade of the Carnival festival, which is an extremely popular and touristic event and therefore gathers quite a significant amount of people, and the second scene, a few months later, in June 2006, at the door of a club (disco).

The High Council disciplinary decision referred the following:

*“What is at stake is not the fact that the Judge maintains or maintained an extramarital relationship. What stands out is that it achieved notoriety in such a way that, apart from other Judge's, Public Prosecutors, court clerks, and lawyers having knowledge thereof, it gave rise to reactions from his spouse and his daughter on 22 February 2006 and in June of 2006, in the public eye and resulted in reactions from third parties, including a police officer and a club doorman that, despite months having passed, still remembered the event.*

(...)

*The first is a situation where the Judge was in the company of a woman with whom he maintained an extramarital relationship for several years. In a discussion started by his wife, she slapped him, as well as the person who accompanied him, across their faces. A police officer had to intervene, the Judge walked away, and the discussion continued between the two women. All this took place in the presence of several people, on the street, on a Saturday night during the carnival festival, after the carnival parade and in front of City Hall.*

*In a small community, as is the one in which the Judge carries out his office where the identity of everyone is of general knowledge, specifically and with relevance to the Judge, news spreads quickly. Therefore, we cannot fail to see the impact this situation has on the respect that the members of that same community have for him, because he maintained, in parallel, two relationships, the lack of discretion and, on the contrary, the exhibition thereof, at least in the eyes of the community. This is associated with a loss of values, caused by the lack of poise and wisdom, acting in such a way so as to give rise to a scene like that occurring in public.*

*As stated in the decision of the Permanente, "His Excellency, the Judge [...] exposes thus an aspect of his behaviour that does not mix with the image of righteousness and poise that is required*

of a Judge.” At least, or more exactly, that community expects from a Judge, for the unfavourable reactions are obvious from several actions: from the one that the complaint criticizes - the comments made by other Magistrates about that relationship, but that does nothing more than to reveal this discomfort and public distrust in relation to the issue.

The above is also applicable to the second situation, in which the reaction was not from the Judge’s spouse, but from his daughter, also in public, also requiring the intervention of third parties, also affecting those characteristics that the community wants to recognize in a judge’s personality.

These values were harmed, not by the fact that the Judge maintains a relationship other than the matrimonial one, but because of the way that it is displayed and publicly revealed. This resulted in the perception, by the most diverse members of the community, that the circumstances of the coexistence of the two relationships subsequently lead to that conclusion that there was a breach of values. In light of the above, there is no doubt that these circumstances fulfil the objective in Article 82.”<sup>3</sup>

The Judge appealed the decision of the High Council for Judicial Magistrates to the Supreme Court of Justice, the latter rejected<sup>4</sup> the appeal and maintained the disciplinary penalty applied to the Judge.

Thereafter, the Judge appealed that decision to the Constitutional Court<sup>5</sup> in order for that court to assess the constitutionality of the last part of Article 82 of the Statutes of Judicial Magistrates (SJM), when interpreted and applied with the meaning that all acts or omissions of a Judge’s private, family, marital and intimate life can have repercussion in his/her public and professional life and be qualified as “*improper for the office*”, without indicating which concrete acts or omissions are improper and how they can affect a Judge’s office. As well as the definition of what is indispensable to the integrity of the judicial office and therefor violates Articles 13, 18, 26, n° 1 and 32, n° 10 of the Portuguese Constitution.

In this paper we are not aiming at examining the violation of the constitutional principles, but only the facts that led to the disciplinary action of the High Council, taking into account the range of principles and ethical rules that a Judge has to respect and have in mind in the exercise of his/her office, namely judicial integrity and how the lack of it may offend the community’s confidence in the judicial system, which constitute a threat to the rule of law.

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3 Translation of the decision made by the authors of this paper.

4 Decision of the Supreme Court of Justice of the 16 of November of 2010.

5 Decision of the Constitutional Court n° 413/2011, published in Diário da República, 2ª Série n° 211, of the 3rd of November 2011

## II. ARTICLE 82 OF THE PORTUGUESE STATUTE OF JUDICIAL MAGISTRATES

Article 82 of the Statute of Judicial Magistrates reads as follows: “Acts, even if merely culpable, by judges in violation of the principles and duties enshrined in these Statutes and other acts by judges which, by their nature and repercussion, are incompatible with the requirements of independence, impartiality, and dignity indispensable to the exercise of their functions, constitute disciplinary offences”.<sup>6</sup>

The Article encompasses two circumstances that call for disciplinary actions: the first half of the provision determines that a Judge must be subject to disciplinary action when he or she violates principles and duties enshrined in the Statutes. The second half provides that disciplinary action must take place when Judges’ acts, due to their nature and repercussion, are incompatible with the requirements of independence, impartiality and dignity, indispensable to the exercise of their office. In this part we are before a vague and undetermined provision, that does not elaborate on the concrete conducts that can be qualified as disciplinary offences.

Throughout the years the Portuguese Constitutional Court has decided<sup>7</sup> that the demands of the vagueness doctrine are substantially minor in disciplinary law regarding acts that must be considered as disciplinary offences, than in criminal law, where this type of offence and the preconditions therefore have to be certain and determined. However, when disciplinary provisions determine as punishment the suspension from duties or expelling from the profession, then it must define the acts and preconditions that therefore can give rise to those type of penalties.

Although the second part of Article 82 of the Statute does not describe the type of acts that constitute disciplinary offences, the Constitutional Court has conceived that that provision is not unconstitutional, accepting that a multiplicity of acts or misconducts can be included and fulfil the objective in the Article. That Court accepts the use of undetermined concepts in the definition of the type of acts or conducts that constitute disciplinary offences, once the use of closed concepts and definitions would certainly result in situations where certain conducts, that should be subject to disciplinary action for being misconducts, would be left out and therefore not be punished. In

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<sup>6</sup> In portuguese language the referred to Article states “*Constituem infração disciplinar os atos, ainda que meramente culposos, praticados pelos magistrados judiciais com violação dos princípios e deveres consagrados no presente Estatuto e os demais atos por si praticados que, pela sua natureza e repercussão, se mostrem incompatíveis com os requisitos de independência, imparcialidade e dignidade indispensáveis ao exercício das suas funções.*”

<sup>7</sup> In that regard, among others, view the Decision of the Appeal to the Constitutional Court regarding the Case, Acórdão nº 413/2011, of the 03 of November, in Diário da República, 2ª Série, nº 211; Acórdão 384/03; Acórdão 351/11.

order to avoid those situations, the Portuguese legislator choose to leave in the hands of those who enforce disciplinary law the mission of qualifying the concrete conducts that constitute offences, due to the violation of professional ethics and that must be object of disciplinary action and eventually give rise to a penalty.

In Judges' cases, as we can read from Article 82 of the Statute, the legislator left the qualification of the concrete conducts that fulfil the objective in Article 82 in the hands of the High Council for Judicial Magistrates, recognizing that it is impossible to exhaustively list all concrete conducts that are susceptible to offend the dignity of the office. Nevertheless, the qualification of an act or conduct as a disciplinary offence can only occur in situations where that conduct, due to its nature or repercussion, is deemed as incompatible with the requirements of independence, impartiality and dignity expected from a Judge and the exercise of the judicial office.

Regarding public workers, Portuguese Courts have considered that conducts from public workers private or family life, not directly related to his/her office or duties, can be considered and qualified as disciplinary offences when the concrete conduct offends the dignity and prestige of the office.<sup>8</sup>

Similarly, Article 82 of the Statute determines and permits that conducts from a judge's private and family life, with no direct connection with his/her office, can be considered disciplinary offences when they affect his office, especially when the conduct reveals to be incompatible with the principles of independence, impartiality, integrity, and dignity of the function.

It is known that the basic principles that must guide judges' conducts are judicial independence, impartiality and integrity or dignity. These principles must guide judges, not only while in office, but also in their personal and family lives, namely if such conducts may impact the office.

Judicial independence is a cornerstone of democratic societies and constitutes a safeguard to the freedom and rights of all citizens under the rule of law. That way, all courts and all of those who exercise the judicial office must be seen as being truly independent from government and all sources of power or influence in society, ensuring that way the separation of powers.

Judges must also be impartial and strive to ensure that their conduct, both in court and out, safeguards, maintains and enhances the confidence of the community, of the public in general, in the impartiality of judges, courts and of all judicial system.

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<sup>8</sup> Public Prosecution Service Opinion n° 113/2005, of the 16<sup>th</sup> of February 2006, in Parecer da Procuradoria Geral da República | Portal do Ministério Público - Portugal (ministeriopublico.pt)

A judge is also expected to guide his/her office and personal life with integrity. Society expects that a judge puts his/her office and professional duties above his/her own personal interests. To do that, a judge's conduct, both in his professional and personal and family life, must display intellectual honesty, superior respect and observance of the law, prudent management of financial affairs, diligence and care in discharge of judicial duties and discretion in personal relationships, social contacts and activities.

That does not mean that when it comes to his/her personal and family life a judge cannot maintain family responsibilities, friendships or engage in social activities. But judges must accept that the nature of their office puts them under considerable scrutiny and imposes constraints on their behaviours and conducts, which other offices or professions do not impose. He/she must avoid all situations which might reasonably reduce the respect and confidence that the community has in regard to courts and the judicial system, as well as situations that might reduce the respect in the judicial office or cast doubt upon judge's impartiality. A judge must prevent all situations which might expose him/her to charges of hypocrisy due to conducts or acts of their private and family life.

The limitations to a judge's personal and family life, due to the nature of their office and the scrutiny they are subject to by the community, differ and depend upon the values and principles that the community considers as being socially acceptable, as well as, in regard to the Portuguese society and community, the size of that community.

There is no doubt that if a judge exercises his/her judicial office in a small town or village, where the identity of the judge is of general knowledge and in which he/she cannot be anonymous, the scrutiny the community puts on his/her behaviour is far higher than in cases where a judge exercises his /her office in bigger cities, where no one, or practically no one, knows who the judge is. That way, limitations to judges' private and family life are directly influenced by the community in which a judge exercises his/her judicial office.

In the case referred to in this paper, in first place we must take into account that the community where the judge carried out his judicial office, in Funchal, in the small island of Madeira, is one where the identity of the judge is of public knowledge. That way, conducts of the judges personal and family life can affect his office and may lead to charges of hypocrisy.

In second place we must take into account if the judge's conduct constitutes an offence to judicial integrity and therefore be subject to disciplinary action, as it was.

### **III. INTERNATIONAL SOURCES AND THE BANGALORE PRINCIPLES**

To better understand the legal aspects concerning our specific case, it might be useful to take a quick look in a wider scale at other judicial systems.

The core of our reflexion is to know to what extent can a judge's personal and family affect the duties of the judicial office in such a way that the judge may be held responsible and subject to disciplinary action. Which is the same thing as to ask: how much can a Judge's personal rights and freedom, such as the right to protect the privacy of his or her personal and family life, be restricted (be shortened) due to his/her professional duties and demands. As previously mentioned, in Article 82 of the Statute, we find an undetermined concept that one should fill in when given a concrete cause or situation.

The challenge is, as it was also pointed out, to precise the limits of what can be qualified as disciplinary offence and, that way, be subject to disciplinary action.

It is easy to anticipate that this is, indeed, a very complex and difficult task to undertake. Also, one should bear in mind that answers vary and differ according to the place and time. They depend directly on community's values, beliefs and principles, as well as other factors, as we will see.

The doubts resulting from this task concerns every democratic society based on the Rule of Law. In fact, the source of this matter is connected to the importance that the judicial system puts in the validity of the law. Citizens' rights depend on legal recognition, but when a dispute arises, only courts have the (definite) power and the responsibility to solve it, in respect to the separation and independence of powers. Courts are the entities that exercise sovereignty with the competence to administer justice in the name of the people and are responsible for ensuring the defence of those citizens' rights and interests that are protected by law, repressing breaches of democratic legality and deciding conflicts between interests, public and private.<sup>9</sup>

Therefore, all Democratic States based on the rule of law must respect and guarantee the effective implementation of fundamental rights and freedoms, as well as to guarantee the effective function of courts and judicial protection.

For that purpose, the Portuguese Constitution states the right to a fair trial in Article 20:

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<sup>9</sup> As stated in Article 202 of the Portuguese Constitution.



*“1. Everyone is guaranteed access to the law and the courts in order to defend those of his rights and interests that are protected by law, and justice may not be denied to anyone due to lack of sufficient financial means.*

*2. Subject to the terms of the law, everyone has the right to legal information and advice, to legal counsel and to be accompanied by a lawyer before any authority.*

*3. The law shall define and ensure adequate protection of the secrecy of legal proceedings.*

*4. Everyone has the right to secure a decision in any suit in which he is intervening, within a reasonable time limit and by means of fair process.*

*5. For the purpose of defending the personal rights, freedoms and guarantees and in such a way as to secure effective and timely judicial protection against threats thereto or breaches thereof, the law shall ensure citizens judicial proceedings that are characterised by their swiftness and by the attachment of priority to them.”*

Being that the right of a fair trial is also guaranteed in our judicial system through procedural Law, in multiple fields such as criminal, civil, administrative, tax and labour.

In regard to disciplinary procedure, including judges, our judicial system also guarantees a fair procedure in the Statute of Judicial Magistrates.

Furthermore, the guidance in this matter is offered by a set of international legal texts.

Indeed, Article 19 of the United Nations Universal Declaration of Human Rights, of the 10<sup>th</sup> of December 1948, states the following:

*“Everyone is entitled in fully equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations of any criminal charge against him”.*

Although this Declaration is not legally binding to States, it develops and backs the interpretation of the *“human rights and fundamental freedoms”* proclaimed in the United Nations Charter.

Article 14, paragraph 1, of the International Covenant on Civil and Political Rights of the United Nations<sup>10</sup>, reinforces the same, as Article 6 of the European Convention on Human Rights<sup>11</sup>.

The American Convention of Human Rights<sup>12</sup> provides similar provision.

Efforts had been made to come to an agreement with effective impact concerning the quality of courts and tribunals, so the citizens trust and believe that a court decides his or her dispute applying only the law, without any bias or prejudice.

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<sup>10</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16<sup>th</sup> of December 1966.

<sup>11</sup> European Convention on Human Rights was opened for signature in Rome on 4<sup>th</sup> of November 1950 and came into force on the 3<sup>rd</sup> of September 1953.

<sup>12</sup> Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969.

Furthermore, the right that citizens of democratic societies have to the respect for private and family life is also guaranteed by Article 8 of the European Convention on Human Rights<sup>13</sup> which states as follows:

*“1. Everyone has the right to respect for his private and family life, his home and his correspondence.*

*2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”*

This Article encompasses the right to respect for private and family life, home, and correspondence. The European Court of Human Rights (ECHR) conceives that Article as a broad concept of “*private life*” without an exhaustive definition.

For that Court the concept of “*private life*” is not restricted to the notion of the individual’s “*inner circle*” and by comprising to a certain degree the right to establish and develop relationships with other human beings (“*private social life*”), it does not exclude the activities of a professional nature, since they provide a significant opportunity of developing relationships with the outside world.<sup>14</sup>

That way, such right has to be taken into account and respected in disciplinary procedures and actions, including cases where disciplinary actions are against judges, once they are citizens as any other.

It stems from this Article that public authority cannot interfere with the exercise of this right, except when that results of the law and according to law, it is revealed as necessary in a democratic society and serves aims which may justify a restriction to the rights protected by that Article, namely due to interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

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<sup>13</sup> ECtHR, Denisov vs Ukraine, Appl. no. 76639/11, Judgement of 25 September 2018, Decision available at [//hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-186216%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-186216%22]}); ECtHR, case of Fernández Martínez v. Spain OF Fernández Martínez V. Spain, Appl. no. 56030/07, Judgement of 12 of June 2014 , <https://hudoc.echr.coe.int/eng>

<sup>14</sup> European Court of Human Rights, Guide on Article 8 of the European Convention of Human Rights, right to respect for private and family life, home and correspondence, updated on 31 of December 2020, in <https://www.echr.coe.int/>

Which means that a restriction to personal rights due to a person's office may only take place when those results of law and according to the terms set out in law, it is necessary in that specific democratic society and occurs due to one the justifications to infringement of rights stated in paragraph 2 of Article of the ECHR.

Although the text of the ECHR does not refer to it, the principle of proportionality is one of main principles scrutinizing actions adopted by national authorities which restricts rights and fundamental freedom under the ECHR. According to this principle, all restrictions to rights must be established by law, be necessary, relevant, or suitable and restrict the least as possible the right.

The Portuguese Constitution, in Article 26, also establishes as personal rights the rights to personal identity, to the development of personality, to civil capacity, to citizenship, to a good name and reputation, to their image, to speak out, to protect the privacy of their personal and family life, and to legal protection against any form of discrimination. Although those personal rights are fundamental rights and obligations, they may be subject to restrictions in the cases and under the terms that are provided for by law and must respect the principle of proportionality, according to which the action must be limited to what is necessary to achieve the objective and restrict the least possible.

Additionally, around year 2000, United Nations Member States concluded that the level of the public confidence in judicial systems and courts was low and, therefore, alarming. Indeed, the lack of confidence in courts undermines the sustainability of the judicial system.

It is not sufficient that citizens are entitled to an impartial and independent court to settle a dispute, they need to trust in its impartiality and independence. This trust is, therefore, necessary to make sure that the fundamental rights and freedoms in our democracies are alive and well. Also, the level of confidence of the public also may vary according to the perception they have of judges personal and family life, including outside the courtroom.

In this context, the United Nations sought for a response and called for judges to form a group, named "*Group of Integrity*", so they would come up with a document that could improve the situation and assure the trust and confidence of all in the judicial systems.

In sum, the Bangalore Principles are the result of this specific demand and are intended to establish standards of ethical conduct for judges, providing them with a guide, as well as a framework for regulating judicial conduct in all Member States of the United Nations.

They are not binding *per se*. They serve as a guide to judicial systems. Many judicial systems (so called traditional) have already incorporated these principles internally, in such a way, that they become legal support for the examination of the cases within judicial conduct and ethics, especially in disciplinary actions.

Portugal is an example of such. Currently, regarding judges, as it has already been mentioned, the judicial code is established in the Statutes of Judicial Magistrates.<sup>15</sup>

Looking into the Bangalore Principles, we see a clear aim at giving light to good and recommended practices of the judicial conduct, as well as the less appropriate ones that should be avoided.

The Bangalore Principles are as follows: independence; impartiality; integrity; propriety; equality; and competence and diligence.

One can say that all the principles combined provides for an administration of justice according to law.

To quote Gerard Brennan, Chief Justice of Australia<sup>16</sup> in a speech to newly appointed judges:

*“A judge’s role is to serve the community in the pivotal role of administering justice according to law. (...) What you say and what you do, in public and to some extent, in private, will affect the public appreciation of your office and the respect which it ought to command. The running of the risk of being arrested while driving home from a dinner party or a minor understatement of income in a tax return could have public significance. The standards of Caesar’s wife are the standards that others will rightly apply to what you say and do, having conceit of your judicial office, they are the standards you will apply to yourself. These standards apply to matters great and small. In some respects, the management of petty cash or the acquittal of expenditure can be a matter of great moment. (...) You will not grow affluent on the remuneration that you will receive; you will work harder and longer than most of your non-judicial friends; your every judicial word and action and some other words and actions as well will be open to public criticism and the public esteem of the judiciary may be eroded by attacks that are both unjustified and unanswered. (...) Be of good and honourable heart, and all will be well”.*

#### **IV. THE PRINCIPLES OF BANGALORE AND OUR CASE**

A judge has a key and fundamental role when applying the Law. Also, it strikes as undeniable that the image of the judicial system depends on how a judge exercises his/her office

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<sup>15</sup> Law 21/85, of the 30th of July.

<sup>16</sup> Sir Gerard Brennan, Chief Justice of Australia, addressing the National Judicial Orientation Programme, Wollongong, Australia, 13 October 1996, in Page 79 of Commentary of the Bangalore Principles of Judicial Conduct, of the United Nations Office on Drugs and Crime, September 2007.

and, also, as it has been said, might be influenced by the judges personal and family life and all of his/her conduct, even outside the courtroom.

In this case the judge was punished because of a behaviour that was deemed incompatible with the dignity of his office, as referred to above.

Hence, the problem was related to the way the acts, described above, which were acts of the judge's private life, had repercussion in his professional life, in his office, taking into account the specific community in which the judge carried out his office and the perception of the public about his character and moral standards. This does not concern his diligence or lack of competence in office, or any problematic intersection of interests underlying the decisions made by him as a judge. It was, otherwise, the fact that the scenes under public eye in regard to his extramarital relationship were deemed, by the High Council for Judicial Magistrates, to be relevant and constitute disciplinary offence, once it affected the range of philosophical attributes the community expected the judge to have and the indispensable integrity to the exercise of his office.

## THE PRINCIPLE OF INTEGRITY

Especially relevant in our case is the Principle of Integrity. What is integrity? It is defined as *"the attribute and righteousness"*. Honesty and judicial morality are its components: *"A judge should always, not only in the discharge of official duties, act honourably and in a manner befitting the judicial office; be free from fraud, deceit and falsehood; and be good and virtuous in behaviour and in character"*. *There are no degrees of integrity as so defined. Integrity is absolute. In the judiciary, integrity is more than a virtue; it is a necessity.*<sup>17</sup>

The third Bangalore Principle states as follows: *"Integrity is essential to the proper discharge of the judicial office."*

This principle is considered to be the most important Bangalore Principle. Integrity means looking to the judge as a whole or complete person, seeing him/her in perspective of what kind of person he/she really is, and not so much considered with how he/she behaves or acts. In its most simple definitions integrity is the quality of being honest and having strong moral principles that a person refuses to change or give up, to live life following core values, beliefs and principles.

Above all, a judge must be a good person, as well as a good judge. Judges' standards of conduct are considered to be higher than those of the community or society as a whole, they must

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<sup>17</sup> Page 79 of Commentary of the Bangalore Principles of Judicial Conduct, of the United Nations Office on Drugs and Crime, September 2007

always guide their conduct honestly and respectably, in an honourable manner, according to high standards and befitting with the judicial office, avoiding all dishonest conduct.

In judges' cases, the definition of integrity from the perspective of a person as a whole, is not sufficient, it must be seen and understood also from the perspective and the point of view of the community in which the judge belongs or where they exercise their office.

The way an exact conduct affects the judicial office and the judicial system depends on how the community considers that conduct, according to the core values, beliefs and principles of that exact community, that naturally are different from place to place and from time to time. A judges' conduct must not violate universally accepted community standards, although in view of cultural diversity and the constant evolution in moral values, the standards applying to a judge's private life cannot be laid down too precisely or in fixed terms.

The understanding of how the community sees a conduct has to be a guide when determining if a conduct reveals or not lack of integrity, which can give rise to disciplinary offense.

To determine if a judge acts and lives his/her, professional and private, life with integrity the analysis must part from looking at it from the eyes and perspective of a reasonable observer, those members of the community that are considered to be serious, reasonable, fair and well informed (respectable community members with high standards and values) and must also take into account if the concrete conduct, in the eyes of those members, reduce the respect the community has of the judge or/and of the judicial system, as a whole.

In regard to integrity the Bangalore Principle 3.1. and 3.2. state the following:

*“3.1. A judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer.*

*3.2. The behaviour and conduct of a judge must reaffirm the people's faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done.”*

When the above principle refers to “*above reproach*”, that must be interpreted in the following way: a judge must maintain high standards, core values, beliefs and principles, both in his public, as in his personal life. He or she must not violate universally accepted community standards, principles and values. A judge must not engage in activities that clearly bring disrepute and reduce the community's respect of the judge or of the judicial system.

In all acts a judge must seek to embody the ideals of honesty and truth for which the justice system stands and conduct his life according to the Law and judicial order. He or she must ensure that his or her conduct, in the exercise of office or in personal and family matters, is irreprehensible

in the eyes of a reasonable observer.<sup>18</sup> Namely, a judge must always remember that in his office he is going to decide and resolve conflicts in a multiplicity of cases and regarding a variety of matters.

How can a Judge decide and sentence a person to a certain punishment if in his/her personal and family life he does exactly the same thing? If he/she does so, the community will consider the judge to be a hypocrite, and that will lead to the utter loss of respect and credibility of that judge, of the court and of all the judicial system.

Therefore, judges must respect and act according to the standards, core values, beliefs and principles of the community to which they belong or where they exercise their office, and must never forget the importance of the office, they are whom administer Justice, according to law.

Notwithstanding it is important that judges find the balance between the community's universally accepted standards and their conduct, for that, they must always try to consider and predict, before adopting a certain behaviour or conduct, how will that concrete conduct be seen by a reasonable observer. If the judge predicts that the conduct may violate those standards or will affect or reduce the respect the community has in him or in the judicial system, then he must not embrace the conduct.

Considering the cultural diversity and the constant mutation in moral values, it is practically impossible to define which conducts a judge must avoid in his/her personal and family life. Therefore, what a judge must do, before any conduct in which he/she has doubt about it affecting community's standards, is call upon the test and find the balance referred to before.

This implies subjectivity. However, it has been possible to lay down a set of somewhat objective factors, that can guide judges in the seeking of the "*right balance*" between their office, the respect in the judicial system and the exercise of their personal rights and freedom, that a judge is entitled to as any other citizen.

It may also be a guide that can help the High Council establish limits in regard to when disciplinary action must take place without invading judge's personal rights and freedom.

### THE "INTEGRITY TEST"

First of all, and following closely The Judicial Conduct and Ethics – Self Directed Course<sup>19</sup>, the suggestion passes not through knowing if a conduct or act is moral or immoral

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<sup>18</sup> As referred to before the respectable community members with high standards, values and principles.

<sup>19</sup>Page 50 of Commentary of the Bangalore Principles of Judicial Conduct, of the United Nations Office on Drugs and Crime, September 2007.

according to the community's religious beliefs, values, principles or ethical standards, but assessing if the conduct affects the core of the judges' capacity to carry out his/her office, in respect to justice, independence and all people, as well as considering the perspective that the community, namely taking into account the perspective that reasonable observers have of the judges' capability to carry out his/her office.

Let us look into our case using the indicators contained in the "integrity test", which are the following.

***1. The public or private nature of the act and specifically whether it is against the law that is actually enforced***

Considering the values that nowadays most of the people share in Europe, we risk saying that having an extramarital relationship is not an act that is socially accepted by the community. Common sense tells us that, in fact, people tend to perceive and consider it to be a wrongful behaviour.

Moreover, in certain jurisdictions extramarital relationships are legally relevant. In Portugal, Article 1672 of Portuguese Civil Code states that spouses are obliged to one another in terms of respect, fidelity, cohabitation, cooperation, and mutual assistance. The existence of an extramarital relationship is a conduct that represents a violation of the duty of fidelity.

Until 2008, when not consensual, the legal dissolution of marriage could only be affective when one of the spouses violated their marital duties, such as fidelity, and therefore were considered to be the guilty spouse. Since 2008, even when just one of the spouses wants the marriage to be legally dissolved, it is sufficient for that to happen if the breach of the marital bond occurs<sup>20</sup>. Being that, according to the Portuguese law, the violation of marital duties gives the offended spouse the right to claim from the other one a compensation<sup>21</sup>.

Nevertheless, the impact of the violation of marital duties has been diminishing over time, for what they are becoming more of a social and moral matter.

In our case, as mentioned above, the High Council for Judicial Magistrates did not punish the judge for having an extramarital relationship, but only due to the fact of it achieving notoriety that gave rise to discussions in public eye and resulted in reactions of third parties, to calm down the discussions.

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20 Article 1781 of the Portuguese Civil Code

21 Article 1792 of the Portuguese Civil Code



Even though the violation of the marital duties is against the previous legal provisions, the conducts deemed relevant was not the extramarital relationship.

The conduct that claimed attention from the High Council were the public arguments, which in one occasion even involved physical violence between the judge's spouse and the lady who he was with. The judge did nothing against the law in those moments.

Nevertheless, the fact that the judge maintained, while still being married, an extramarital relationship, was what gave rise to those public discussions and led to the exposure of that situation to the local community in a stressful and degrading way.

Therefore, considering this factor the conducts may be deemed relevant and implicate a disciplinary punishment.

## ***2. The extent to which the conduct is protected as an individual and personal right***

Article 26 of the Portuguese Constitution grants personal rights as a fundamental right to every citizen. Therefore, everyone is accorded the right to personal identity, to the development of personality, to their image, to speak out, to protect the privacy of their personal and family life. The protection of "*personality rights*" is also protected by the Portuguese Civil Code.

To choose whom to maintain a relationship with, is without a doubt, a matter of one's personal life. Like any other citizen, a judge is entitled to his/her private life and to freely choose whom he wants to maintain a relationship with, whatever kind of relationship that is, from a marital relationship to friendship. This is to say that a judge is entitled to lead his/her personal life as he/she finds best when he is out of court and not carrying out his office.

However, as said above, a judge's office demands the respect of certain standards, core values, beliefs and principles, once he or she cannot forget the fundamental role he has in the administration of justice and in order to assure the community's respect and confidence in the judicial systems.

Therefore, the judge's private life may influence how people see the judge and that affects the range of philosophical attributes they expect from a judge, such as justice, righteousness, wisdom, independence, poise, dignity and honesty. Therefore, a conduct that is incompatible with those range of attributes must be avoided.

Notwithstanding, it would be illegal and against the fundamental rights granted by the Portuguese Constitution, if judges could be deprived of their individual freedom, and other personal rights, since the Constitution only permits the deprivation or restrictions on civil capacity

in the cases and under the terms that are provided for by Law, and may not be based on political motives.<sup>22</sup>

The Portuguese Statute of Judicial Magistrates, in line with many other countries, understands that the profession is influenced by the personal character of the judge and by what they do in their private lives. And because of the importance of the function the judge is called to exercise, and to which he or she applied, and voluntarily decided to carry out, being that no one is obliged to be a judge, that Statute lays down the rules of that office, as well as rules and principles that judges must respect and are bound to, both in his office as in his/her personal life.

We cannot forget that an incorrect conduct of a judge can seriously breach the dignity of the office and affect the respect the community has in the judge and in the judicial system as a whole, that is, in the administration of justice.

Bearing also in mind that, as well as all said until this point, we consider that the rights of a judge to a private life are not jeopardised by the fact, as stated in the Statute, of having to avoid certain conducts, especially those that have repercussions and affect the judicial office. Some conducts of judges personal and family life can reveal and represent a lack of integrity, which is a real threat to the respect and confidence that the community must have in the judge and therefore directly affects the judicial system and the rule of law, to which all democratic states are based.

Looking back to our case, it seems perfectly reasonable that a judge should not maintain an extramarital relationship, while still being married, that not only gives rise to discussions in public eye but also achieved notoriety, in such a way, that was of the knowledge of the community in which he carries out his office. So, we can conclude that the prohibition of the conducts in question does not constitute an illegitimate limitation of a judge's right.

### ***3. The degree of discretion and cautiousness exercised by the judge***

This factor leads the interpreter to pay attention to how the conduct that is being subject to the “*integrity test*” was practiced. So, one must verify whether the judge has acted disregarding the consequences of his actions. For instance, if it was an action that occurred carelessly or if, on the contrary, the judge tried to be discrete and prudent.

In our case, as we could see from the public places where the discussions took place, the judge was not careful, nor cautious, with his acts. He didn't, at all, avoid giving his extramarital

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<sup>22</sup> Article 26, n° 4 of the Portuguese Constitution

relationship public notoriety, to the extent that it was of general knowledge, not only of other judges, public prosecutors, court clerks and lawyers, but of the public and community in general.

***4. Whether the conduct was specifically harmful to those most closely involved or reasonably offensive to others***

This factor puts the tonic on how the conduct may negatively affect others. We find two main possibilities: the conduct can harm those directly involved or be offensive to third parties/others.

Taking that into account, the fact the judge maintained that relationship, while still being married, can be considered to be a harmful conduct to his wife and daughter, to his family.

But, as said, the judges conduct was punished due to the public notoriety given to his extramarital relationship and the public scenes that occurred, all of which incompatible with the dignity of the profession, but not because the judge harmed his wife.

Considering now the other subfactor: reasonably offensive to others, we must see if the conduct was offensive to others. In regard to the public/people that witnessed the scenes, although the scenes may have been disconformable, the judges conduct did not offend them personally.

Beyond a doubt, the judges conduct was offensive to the community. As we have already said, with his acts the judge violated universally accepted community standards, principles and values, as marriage and fidelity are community values, not only in the specific community of Funchal, as in all of the Portuguese society.

But not only of the Portuguese society. In the Commentary of the Bangalore Principles of Judicial Conducts when it refers that the high standards a judges must maintain in his personal life and that it must be viewed according to cultural diversity, the examples given are precisely regarding extramarital relationships and disciplinary action<sup>23</sup>.

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<sup>23</sup> As referred in the Commentary of the Bangalore Principles Of Judicial Conduct, of the United Nations Office on Drugs and Crime, September 2007, page 80: “*in the Philippines, a judge who flaunted an extra-marital relationship was found to have failed to embody judicial integrity, warranting dismissal from the judiciary (Complaint against Judge Ferdinand Marcos, Supreme Court of the Philippines, A.M. 97-2-53-RJC, 6 July 2001). In the United States, in Florida, a judge was reprimanded for engaging in sexual activities with a woman who was not his wife, in a parked motor car (In re Inquiry Concerning a Judge, 336 So. 2d 1175 (Fla. 1976), cited in Amerasinghe, Judicial Conduct, 53). In Connecticut, a judge was disciplined for having an affair with a married court stenographer (In re Flanagan, 240 Conn. 157, 690 A. 2d 865 (1997), cited in Amerasinghe, Judicial Conduct, 53). In Cincinnati, a married judge who was separated from his wife was disciplined for taking a girl friend (whom he since married) on three foreign*

**5. *The degree of respect or lack of respect for the public or individual members of the public that the conduct demonstrates***

As said above the judge did not respect community values and did not respect his office, as he knows that as someone who administers justice, according to law, he cannot give rise to situations like the ones that happened.

By permitting that his extramarital relationship achieved notoriety to the point that it got out of his control and led to public discussions, he showed a lack of respect for the community.

Choosing to potentiate a family argument, the judge did not show must respect to the public, in the sense of not avoiding distressful moments in public. He willingly put others to the discomfort of witnessing these notorious discussions, in which third parties had to intervene to stop them, in one case a police officer and in the other a doorman.

**6. *The degree to which the conduct is bias, prejudicial or improper***

Bias or prejudice has been defined as a leaning, inclination, bent or predisposition towards one side or another of a dispute, conflict or of a particular result. This factor has relevance when a judge has to decide a case or issue, being that his judicial mind must be opened and no influenced by one side or another.

In our case, the judges conduct is not showing any kind of bias, prejudice, or improper influence.

As we can see, not all of the previous indicators of the “*integrity test*” can be applied in our case, namely, the last one is not applicable. But, taking in consideration the rest of indicators/factors we can state that the judges conduct did not pass that test and therefore it violated the principle of integrity enshrined in the Bangalore Principles.

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*visits, although they did not ever occupy the same room (Cincinnati Bar Association v Heitzler, 32 Ohio St. 2d 214, 291 N.E. 2d 477 (1972); 411 US 967 (1973), cited in Amerasinghe, Judicial Conduct, 53). But in Pennsylvania, also in the United States, the Supreme Court declined to discipline a judge who had engaged in an extra marital sexual relationship which included overnight trips and a one-week vacation abroad (In re Dalessandro, 483 Pa. 431, 397 A. 2d 743 (1979), cited in Amerasinghe, Judicial Conduct, 53). Some of the foregoing examples would not be viewed in some societies as impinging on the judge’s public duties as a judge but relevant only to the private zone of consensual non-criminal adult behaviour.”*

The judges conduct had public repercussion and were based on the breach of marital obligations, being that how the events happened showed disrespect to the local community, to its values, as well as lack of cautious and prudence.

The respect and trust the community must have in the judicial office is not compatible with situations like the ones that occurred in the case and therefore its prohibition must not be seen as inadmissible restrictions of the judge's private life

## CONCLUSIONS

The conduct of our case was deemed as disciplinary relevant once it constituted the violation of Article 82.º of the Portuguese Statute of the Judicial Magistrates.

The qualification of a conduct as disciplinary offence can only occur in situations where that conduct, due to its nature or repercussion, is deemed as incompatible with the requirements of independence, impartiality and dignity expected from a judge

Following closely the Bangalore Principles, namely, the principle of integrity, we have to conclude that in our case the judges conduct was a disciplinary misconduct that should be subject to disciplinary action, as it was.

In Article 82 we are before an undetermined concept that does not exhaustively list all behaviours that constitute disciplinary offence, especially those that are incompatible with the dignity of the judge's office.

There is an intimate connection between the principle of integrity and the concept of "*dignity*" inserted in Article 82º.

For that reason, the integrity test can be used to establish whether a conduct is incompatible with the dignity of the judicial office. In sum, if such conduct fails the test, it may entail disciplinary action.

In this task we must assure a careful balance between judges' right to a private and family life, like every other citizen, and the restriction of that right imposed by the need to guarantee the community's respect and trust in the judicial system.

To establish those limits, the Bangalore Principles, and in our case, the "*Integrity test*" was an important tool, as they can be a useful guide in the qualification of a conduct as a disciplinary offence.

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