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THE PARTICIPATION OF JUDGES IN CIVIL SOCIETY ORGANIZATIONS



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1. INTRODUCTION

Ethics is a comprehensible and personal conception of life: “...*the field of ethics (or moral philosophy) involves systematizing, defending, and recommending concepts of right and wrong behaviour.*”¹

Deontology, and specifically professional deontology, creates a set of standards of behaviours to mark the performance of the profession. These behaviours have multiples purposes. They can protect the professional, indicating how to behave in some situation, and also defend the image of a class of professionals, acting according to society’s expectations.

The judiciary as one of the pillars of the democratic estates, is under a great deal of pressure regarding the professional and personal conduct of judges. This is why there are some rules of conduct. However, it is only possible to determine if a conduct is ethically admissible or not and, most of all, impartial, in a specific context. In fact, “(...) *The personal impartiality of a judge must be presumed until there is proof to the contrary (see Hauschildt v. Denmark, 24 May 1989, § 47, Series A no. 154). (...) In the vast majority of cases raising impartiality issues the Court has focused on the objective test (see Micallef, cited above, § 95). However, there is no watertight division between subjective and objective impartiality since the conduct of a judge may not only prompt objectively held misgivings as to impartiality from the point of view of the external observer (objective test) but may also go to the issue of his or her personal conviction (subjective test) (see Kyprianou, cited above, § 119)*”²

This paper analyzes the restrictions on the fundamental rights of judges, in particular as regards the freedom of association and participation in public and economic life, by virtue of their professional status, in the light of the principle of proportionality, considering, on the other side, the relevant social contribution that they can give in the field of extra-professional associative activity as citizens.

It is intended to find a field of participation in public life, through civil society organizations, for judges, which does not jeopardize their independence and impartiality, stimulating their active citizenship.

One final note just to clarify we always assume that the main activity of a judge is to be a judge and participation in society is carried out on a secondary basis without harming the performance of his function.

¹ Internet Encyclopedia of Philosophy in <https://www.iep.utm.edu/ethics/>, consulted on 15.06.2019

² Case of Morice v. France, judgment of the European Court of Human Rights (ECtHR) of 25 April 2015, para. 74 and 75 https://www.menschenrechte.ac.at/orig/15_2/Morice.pdf

2. FREEDOM OF ASSOCIATION

Since the liberal revolutions of the eighteenth and nineteenth centuries, freedom of association has been one of the pillars of democratic societies, integrating the nucleus of so-called civil and political rights of citizens, as enshrined in the Universal Declaration of Human Rights (Article 20), International Covenant on Civil and Political Rights (Article 22) and the European Convention on Human Rights (Article 11).

Accordingly, Article 2 of the Constitution of the Portuguese Republic (CPR), stipulates that *“The Portuguese Republic is a democratic state based on the rule of law, the sovereignty of the people, plural democratic expression and political organization, respect for and the guarantee of the effective implementation of the fundamental rights and freedoms, and the separation and interdependence of powers, with a view to achieving economic, social and cultural democracy and deepening participatory democracy”*. In turn, Article 46/1 CPR, establishes that *“Citizens have the right to form associations freely and without the requirement for any authorisation, on condition that such associations are not intended to promote violence and their purposes are not contrary to the criminal law”*.

Developing this concept, the CPR sets forth that *“Freedom of association includes the right to form or take part in political associations and parties and through them to work jointly and democratically towards the formation of the popular will and the organization of political power”* [Article 51(1)]. Moreover, the same constitutional norm [Article 51(2)] prescribes that no one may be deprived of the exercise of any right because he is or ceases to be registered as a member of any legally constituted party.

And along the same lines, Articles 48 and 50 of the CPR define the rights of participation in public life³ and access to public offices⁴ in universal terms.

The constitutional norms establishing these rights, freedoms and guarantees are directly applicable and binding on public and private entities, and may only be restricted in the cases expressly provided for in

³ *“Every citizen has the right to take part in political life and the direction of the country’s public affairs, either directly or via freely elected representatives”*.

⁴ *“1. Every citizen has the right of access to public office under equal and free conditions. 2. No one may be prejudiced in his appointments, job or professional career or the social benefits to which he is entitled, due to the exercise of political rights or of public office. 3. In governing the right of access to elected office, the law may only lay down the ineligibilities needed to guarantee both the electors’ freedom of choice, and independence and absence of bias in the exercise of the offices in question”*.

the Constitution and the restrictions should be limited to what is necessary to safeguard other rights or interests constitutionally protected [Article 18(1) and (2) CPR]. In addition, laws restraining rights, freedoms and guarantees must be general and abstract in nature and may not have retroactive effect or diminish the extent and scope of the essential content of constitutional precepts (3).

Finally, with regard to the constitutional provision in this area, reference should also be made to Article 13 (principle of equality), which prohibits arbitrary or unjustified discrimination on grounds of political and ideological beliefs, and Article 216 (guarantees and incompatibilities) of the CPR. The latter provision provides, *inter alia*, that “*Serving judges may not perform any other public or private function, save for unremunerated teaching or academic legal research functions, as laid down by law*” (3), as well as “*The law may lay down other incompatibilities with the exercise of the function of judge*” (5).

In this case, the reference to ordinary law rests primarily on the Statute of Judicial Court Judges (SJCJ), approved by Law no. 21/85, of July 30, in its current version⁵, which also applies to magistrates of administrative and tax courts, pursuant to article 3/3 of the Statute of the Administrative and Tax Courts (SATC), approved by Law no. 13/2002, of February 19, and successively amended. In this field, mention should be made of Articles 11 (prohibition of political activity) and 13 (incompatibilities) of the SJCJ. Subsidiarity, as regards the regime of duties, incompatibilities and rights, the General Labour Law in Public Functions (GLLPF), approved by Law no. 35/2014, of June 20, in its current version is also applicable to Judges, by reference to Article 32 of the SJCJ. In this legal instrument, the provisions of Articles 19 (Incompatibilities and impediments), 20 (Incompatibility with other functions), 22 (Accumulation with private functions or activities) and 23 (Authorization for cumulating of functions) are relevant for this purpose.

With this normative framework in mind, let us turn to actual cases of this problem, namely the participation of judges in non-profit associations, trade union associations and political parties.

2.1. Scope of freedom of association of judges

Article 13(1) of the SJCJ establishes the general principle of incompatibilities, reproducing, in essence, the constitutional text: “*Judicial magistrates, except for retired persons and those on long-term unpaid leave, may not perform any other public or private professional function, except for teaching or scientific research of a legal nature, unpaid, and also directing functions in union organizations of the judiciary*”.

⁵ The legislative process amending the SJCJ is under way. The approved bill is available [here](#).

It appears from this legal provision that nothing prevents judges from participating in non-profit associations, in particular in their representative bodies, provided that those functions are voluntary and are not remunerated. In fact, in the absence of functions of a professional nature, there is nothing preventing the judges from giving their assistance to the pursuit of the statutory purposes of the associations, contributing to their relevant social role (MARÇALO, 2011). However, there were those who supported the interpretation, based on the preparatory work of the SJ CJ, that magistrates could not perform functions in humanitarian or cultural organizations, since this reference, which appeared in the Government's proposal, wasn't included in the approved text (ROCHA, 1985). However, in our view, such an interpretation would lead to an unconstitutional result, as it would thus disproportionately offend the essential content of freedom of association (in the same sense, *vide* Judgment of the Portuguese Constitutional Court – CC - No. 457/93⁶).

In fact, it should not be forgotten that the restrictions on the fundamental rights of judges are aimed at guaranteeing their independence, hence the rule of functional exclusivity. In fact, "the meaning of the principle is not only to prevent the judge from being spread thin by other activities, jeopardizing his function as judge, but also preventing him from creating professional or financial dependencies that jeopardize his independence" (CANOTILHO and MOREIRA, 2014, pg. 587/588). It is therefore a question of professional incompatibility, for which the only exception is unpaid teaching and scientific research. This exception is explained, in the opinion of the same authors, because these professional activities are not incompatible with judges' judicial functions and can contribute to their improvement; they do not create financial dependence, since they are not remunerated; and do not cause undue functional dependence, given the constitutional guarantee of freedom of education (see Article 43 of CPR).

Regarding leisure activities, such as volunteering, the judge cannot be prevented from engaging in humanitarian, cultural, recreational, social or other causes since, they are part of his right to personality development (Article 26 of CPR). Moreover, Article 22 (3) of the GLLPF points in the same direction⁷. It should also be noted that there is only incompatibility of functions, under paragraphs 1 and 2 of the

⁶ Available on Internet at www.tribunalconstitucional.pt/tc/acordaos .

⁷ "The exercise of public functions may be cumulated with private functions or activities that: a) Are not legally considered to be incompatible with public functions; b) They are not developed in overlapping hours, although partially, to the public functions; c) Do not compromise the exemption and impartiality required for the performance of public functions; (d) they do not cause prejudice to the public interest or to the legally protected rights and interests of citizens".

same legal provision, if those are concurrent, similar or conflicting with public functions, considering as such the private activities that, having identical content to the public functions performed, are developed in a permanent or habitual way and address the same group of recipients.

A different question is whether the participation in this type of association is, or not, subject to the authorization of the High Council of the respective jurisdiction. Indeed, Article 23 of the GLLPF makes combining functions with functions or private activities dependent on the competent entity's authorization. However, in spite of the need for transparency in order to preserve the independence of judges, this permission requirement appears to be excessive. Compulsory notification, for this purpose, would suffice. In effect, *"the judge is often confused with a mere agent of the State or a public official, in a social framework that is representative of some decades of the functionalization of its status"* (COELHO, 2016, pg. 109). Though, such cultural atavism needs to be replaced by a principle of confidence in the sense of responsibility of judges commensurate with their constitutional status. In this way, if the accumulation of functions is communicated, there should be only a restrictive reaction *"a posteriori"* of the competent authority, when there are objective indications of the judge's loss of independence (in the same sense, MARÇALO, 2011)⁸.

2.2. The freedom of association in union organizations

For its part, Article 13 (1) of the SJCJ expressly provides for the possibility for judges to form and join trade unions in the judiciary, as well as to exercise management functions within them. However, the meaning and scope of this associative freedom are controversial. On the one hand, there are those who believe that the professionalization of judges can not lead to their being placed on an equal footing with holders of other public or private functions for the exercise of the right to participate in trade union organizations or to strike (BRITO, 2010). On the other hand, there are those who recognize the freedom

⁸ In the same vein, Article 8-A (2) of the new SJCJ, contained in Draft Law no. 122 / XIII / 3 (GOV), which has not entered into force yet: *"For the purposes of the previous paragraph, unpaid executive functions in foundations or associations of which judicial magistrates are associates that, by their nature and purpose, do not jeopardize the observance of their functional duties, are not considered of a professional nature, but the exercise of those functions should be preceded by a communication to the Superior Council of the Judiciary"*.

of association of judges, but have doubts about the right to strike, given their status as holders of sovereignty bodies (CANOTILHO and MOREIRA, 2014).

However, although Article 202 (1) of the CPR grants the courts the status of sovereign bodies, there is no doubt that judges have a complex professional status. In fact, "*the statute of judges is also based on a relationship of service or public employment with the State and is distinctively asserted in the experiences of the model of the professional career of judges (bureaucratic model or judge-employee), which unfolds in a set of rights and duties that is in some ways analogous to the employment relationship of civil servants*" (COELHO, 2016). Therefore, in the current constitutional model, it makes sense that judges can exercise trade union rights, including the right to strike, in order to claim from other public powers the right balance between their rights and their functional duties, without which their independence would be more vulnerable (MARQUES, 2016)⁹.

2.3. The political freedom of association

Following Article 216 of the CPR, Article 11 of the SJCJ prescribes that "*1. Serving judges are forbidden from participating in political party activities of a public nature*"; and "*2. Serving judges cannot occupy political positions, except that of President of the Republic or member of the Government or of the Council of State*".

Moreover, along this line, electoral laws stipulate that judges are ineligible to hold office in the Assembly of the Republic, the European Parliament and bodies of local authorities (see, respectively, Article 5 (c) of Law 14/79, of May 16; Article 5 (d) and (f) of Law 14/87 of 29 April; and Article 6, paragraph (1 e)) of Organic Law 1/2001, of August 14), although this restriction is conditional, at least in the first two cases, upon the effective exercise of functions.

Of course, these legal provisions restrict the political participation rights of judges, in particular those provided for in Articles 48 and 51 of the CPR, as transcribed above, and are therefore subject to the proportionality principle set out in Article 18 of the CPR. Thus, these restrictions must be adequate, necessary and balanced, or they can be found unconstitutional.

⁹ It is acceptable, however, that the call for a strike may be subject to prior approval by the judges' congress or another mechanism for consultation of them by the Directorate of the trade union.

In that sense, with regard to the ineligibilities of judges, the Constitutional Court, in its judgment no. 364/1991 of 31 July¹⁰, held that *"the existence of a system of ineligibility is justified by the necessity, in a democratic State of law, to guarantee the dignity and genuineness of the electoral act, either as a means of providing correction to the formation of the will of the voter, without disturbing his freedom of choice"*.

Explaining these ideas, in its Judgment no 250/2009, of 18 May¹¹, the same court wrote that *«it will always be necessary, as a result of the constitutional configuration, to predict a body of preordained measures to guarantee the independence of the exercise of such functions, which is the “ratio of the rules establishing grounds for incompatibility with the exercise of certain functions, resulting, mostly, from the need to prevent possible conflicts of interest in order to guarantee the impartiality of the public authorities and, in the specific field of the judicial function, the requirement to guard the image and substance of the independence of judges, regardless of the category to which they belong” (Corte Costituzionale, Sentenza no 60, of 16 February 2006). Nonetheless, it should be borne in mind that, in addition to that requirement, the ineligibility associated with the members of the bodies exercising the judicial function also presupposes the recognition that the exercise of those positions may lead to electoral conditioning – “captatio benevolentiae” or “metus publicae potestatis” (in the judgment of Corte Costituzionale, Sentenza no. 5, 1978) - which is an obstacle to the free exercise of the right to vote»*.

Assuming this restriction is justified, the consistency of the possibility of participation of a serving judge in the Government is not clear. It is true that, in Portugal, the members of the Government are not directly elected, being appointed by the President of the Republic, on proposal of the prime minister (see Article 187 (2) of CPR). Nevertheless, although the prime minister is usually the leader of the most voted political party in legislative elections, there is nothing to prevent the President of the Republic from appointing a serving judge as prime minister, after hearing parties with parliamentary representation and taking into account the electoral results (see Article 187 (1) of CPR). This means that, in theory, it is possible for a serving judge to head the Government, although he cannot be a member of the Parliament. The question is whether the requirement to protect the image and substance of the independence of judges would not be compromised in this case, in particular in the event of a return to judicial duties at the end of the political mandate.

¹⁰ Available on Internet at www.tribunalconstitucional.pt/tc/acordaos

¹¹ Judgment concerning the personal case of one of the members of this Themis team, in connection with his candidacy for the 2009 European Parliament elections, while serving as justice of the peace. This judgment is also available in the same URL mentioned above.

For that reason, it has already been proposed that the only acceptable government office for serving judges is that of Minister of Justice and Secretary of State or Under-Secretary of the same Ministry, considering the functional affinity of this position with the exercise of the judicial duties (ROCHA, 1985). But the constitutionality of the current legal solution has also been questioned, because it was considered too restrictive (RODRIGUES, 1999).

In any case, judges who are not in judicial office may be candidates in the aforementioned elections. This group will include judges whose functions are suspended, namely because they are on unpaid leave. However, judges who are on authorized secondment, pursuant to Article 216 (4) of the CPR, continue to be considered to be in judicial office for this purpose. And this is another point of some perplexity, given that the authorization of certain service commissions, particularly in ministerial or parliamentary offices, may also jeopardize the independence of judges once they have ceased (BRITO, 2010). So, the regime should be harmonized by making prevail that which most favours the effectiveness of the fundamental political rights of judges and, therefore, their eligibility, while they are seconded, in functions that are separate from the activity of the courts, as is the case with those who are on unpaid leave.

However, the Bangalore Principles of Judicial Conduct seem to point in the opposite direction, when they refer to the value of independence: *"1.3 A judge shall not only be exempt from inappropriate connections and influence of the executive and legislative branches of government, but shall also appear to be free from them to a reasonable observer"*. Nevertheless, the preoccupation with the image of judges cannot make them hostages of the slander of the *"vox populi"*, enclosing them in a kind of monastic cell. And, likewise, deontological requirements cannot be placed on an unattainable plane of duty that imposes the denial of the actual human being that the judge does not cease to be. Yet, it is acceptable to impose a limited period of inhibition on a judge who has returned from political office, restricted to the cases in which one of the parties was his former colleague in the government or parliament as well as in cases where he had prior intervention.

Finally, the question of partisan membership of the judges deserves reference. The rule in Article 11 of the SJCJ does not seem to prohibit such a link, provided that it is not exercised publicly (RODRIGUES, 1999). It may be said that the *"ratio legis"* also covers these cases, since it will be difficult to keep a judge's political affiliation secret. And the quoted (Bangalore) principle goes in the same direction. However, it should be noted that, with regard to the restriction of fundamental rights, extensive interpretation of the legal rules must be cautious; otherwise the essential content of those rights may be called into question. Thus, although it may be advisable for judges not to have partisan membership, this

condition is not illegal and cannot be imposed, in spite of the judge's duty of reserve in this field. After all, even if not affiliated, the judge will most certainly have his political and ideological convictions, but this, in itself, cannot or should not harm him or jeopardize his independence¹².

3. THE PARTICIPATION IN PROFESSIONAL AND NON-PROFESSIONAL SPORTS CLUBS

3.1. The social framework

Though the interest in and the legislative forecast are not limited to football - as there are other sports with great economic scope and that are capable of attracting massive crowds (such as futsal or cycling), we will use football as an example only because it has the most extensive media coverage and for that reason is the most problematic example of the participation of judges in public life.

In Portugal, where there are three daily sports newspapers, along with some publications in digital format, the broadcasting of football news and events is continuous.

There are also a lot of sports programs (on various TV channels and cable sports channels) that are dedicated to the exhaustive analysis and commentary of what happened in a specific football game or what player X or coach Y.

It is impossible not to mention the football fervour that floods Portuguese culture (which is not a Portuguese exception or originality), which means people are not always able to calm their emotions, allowing themselves be contaminated by an exacerbated vision of the football phenomenon.

From the 1980's, several judges have appeared, in this context, on the board of professional football clubs or even in professional football disciplinary and organizational institutions, under the guise of the impartiality and independence of their profession, and with a view to contribute to the credibility and prestige of the football phenomenon.

To preserve the ethics and deontology that are central to the function, judges must avoid conducts, activities and frequenting circles that may harm their image of independence, impartiality and integrity.

¹² Accordingly, with regard to this idea, the European Court for Human Rights held that the Finnish law which enables judges to simultaneously be members of Parliament didn't violate Article 6 (1) of the Convention (see CASE OF PABLA KY v. FINLAND - Application no. 47221/99).

It so happens that the exacerbated passion and the blind identification with something, in the case a club, stops everything. And suddenly we have judges whose impartiality and independence is distrusted because of their participation in football. And here we come to the heart of the matter. It is that when doubt is cast on a judge, it is not only that judge that is called into question but the whole professional class, seen as the ultimate guardian of justice (one of the pillars of the effective democratic rule of law) whose dignity, credibility, independence and impartiality is questioned.

3.2. The perspective of the Superior Council of the Judiciary (SCJ) / Superior Council of Administrative and Fiscal Courts (SCAFC) and the legal framework

3.2.1. Legislative evolution and intervention of the Superior Council of the Judiciary (SCJ) / Superior Council of Administrative and Fiscal Courts (SCAFC)

As a result of the participation of judges in professional football institutions, at least since 1993 (and with replicas in 2005, 2006 and 2008), the SCJ has expressed, through its deliberations, the dislike of the relationship between judges and football.

As a consequence of the deliberation of the SCJ of 1993, and by the Decree of the Assembly of the Republic (AR) n. 120 / VI, a rule was added to the Statute of Judicial Court Judges (SJCJ), where it was established that SCJ could "*prohibit unremunerated activities, when, by their nature, they are liable to affect the independence or dignity of the judicial function.*"

This decree was subject to an abstract preventive review of constitutionality, by the Constitutional Court (CC), in Judgment no. 457/93, of 08/12/1993, and the CC concluded that the fact that this statute did not contemplate a minimum classification of activities outside the function (MEIRIM, 2007), but attributed this faculty to the SCJ, did not fit "with the special and particular requirements, adequacy and proportionality of the restrictions of rights, freedoms and guarantees, laid down by Article 18 CPR, and a legal solution that would confer such a wide margin of compression and restraint on the fundamental rights of judges as citizens to an organ of a nature and administrative vocation, such as the SCJ", pronouncing the unconstitutionality of the precept.

In 2006, through bill no. 312 /X40, Article 13 (3) of the SJCJ, would read as follows: "*Judicial magistrates, except for retired persons and those on long-term unpaid leave, are prohibited from performing functions in statutory bodies of sports clubs, sports associations or of sporting companies that*

are public limited liability companies, involved in professional competitions". However, this bill was criticized in an opinion of the Committee on Education, Science and Culture - responsible for sport - of the AR, and the legislative initiative was shipwrecked. At the end of 2006, the SCJ also approved a proposal for a standard to be introduced in the SJ CJ, which was addressed to the AR and the Ministry of Justice. In that proposal, and by the margin of a single vote, the argument of the relative incompatibility to the detriment of the absolute prohibition was avenged, and the intervention of the SCJ was foreseen, authorizing or not the exercise of those functions. The future Article 13-A of the SJ CJ would provide: "*1. Judicial magistrates, except for retired persons and those on long-term unpaid leave, may not be members of statutory bodies of entities involved in professional sports competitions unless previously authorized to do so the Superior Judicial Council. 2. The authorization shall be granted if the exercise of such activities does not result in damage to the service or to the independence, prestige and dignity of the judicial function.*" However, this initiative has not benefited from the necessary follow-up in the legislative sphere.

Already in 2008, in the preparatory work that gave rise to the “Compromisso Ético dos Juizes Portugueses”¹³ (2010), the second principle of Article 10 (2) stated: "*Judges should engage in extrajudicial activities aimed at improving the administration of justice, contributing to the progress of law and to the independence of the Courts. They must refrain entirely from joining organizations that engage in any form of discrimination prohibited by law. f) In addition to situations provided by law or expressly authorized by the Superior Council of Judiciary, judges must abstain from exercising any type of activity, even if totally free of charge and without payment of any type of expense, in sports associations linked to any form of professional sport, in particular football.*"

This idea was then matched in the final version of the “Compromisso Ético”, approved at the 8th congress of portuguese judges, which stated: "*Participation in civic activities outside the functions of the judge, even if there is no objection to the impartiality of the judge, is rejected in all cases where it is reasonably foreseeable that subjection to vexatious and undignified public assessments is implied. It will usually be the case of participation in associative bodies linked to professional sports, where, through their specific emotional context and the type of language used and controversies developed there, the judge is easily subject to references that can be discrediting and is connoted with situations of little transparency.*"

¹³ Ethical Commitment of Portuguese Judges

The legal opinion of the SCAFC (2012), recommended that "*for the future, the SCAFC should impose on the judges a duty of prior communication of the exercise of functions in bodies outside the jurisdiction*" and that, "*regarding the current situation (...), the SCAFC determined that a survey should be carried out with a view to determining whether there are serving judges in the administrative and fiscal jurisdiction or retirees exercising functions in bodies outside their jurisdiction, in particular in organs of sports institutions*" (Inverbis).

The truth, however, is that these non-binding guidelines did not aim at the objective of removing judicial magistrates from the football phenomenon.

3.2.2. The current legal framework

Article 216 (3) of the CPR, quoted above, stipulates that practicing judges may not perform any other public or private function other than teaching or scientific research of a legal nature, provided they are unpaid.

Constitutional Law No. 1/97, dated 20/09 (fourth constitutional revision), added a paragraph 5 to this provision, which states that: "*the law may establish other incompatibilities with the exercise of the function of judge*".

The SJCJ, in the above mentioned article 13 (1), governs the incompatibilities of judges and Article 82 of the SJCJ provides a concept of disciplinary infraction, stating that "*constitute disciplinary infraction the facts, even if merely guilty, committed by judicial magistrates in violation of professional duties, and acts or omissions of their public lives or which are reflected therein, incompatible with the dignity essential to the performance of their duties*."

These rules also apply to magistrates of the administrative and fiscal jurisdiction, as stated above.

Thus, under the current legal framework, the participation of judges in professional sports clubs is not prohibited, but rather the decision to participate or not is left to the ethical discretion of each one, as citizen before being a judge.

3.2.3. Future legal framework (Draft Law no. 122/XIII/3.^a (GOV))

It was recently approved the legislative amendment that determines that "*It also lacks authorization by the Superior Council of Judiciary, which is granted only if the activity is not remunerated and does*

not involve prejudice to the service or to the independence, dignity and prestige of the judicial function:
a) *The exercise of non-professional duties in any statutory bodies of public or private entities that have the specific purpose of exercising disciplinary activity or settling disputes;* b) *The exercise of non-professional functions in any statutory bodies of entities involved in professional sports competitions, including their respective shareholders”.*

This raises the question of compliance with the CPR, in parallel with the situation referred to in the above-mentioned judgment of the CC No 457/93, since an administrative entity (the SCJ or the SCAFC) is empowered to limit the exercise of a fundamental right, which limitation must be exceptional, without being clear the criteria which will support the decision in each case.

Nevertheless, and considering the circumstances outlined above, we believe that it would be desirable to adopt a more restrictive and clearer legal solution, which would simply prevent judges from taking part in professional sports clubs, namely those where football is the main activity.

The legislative amendment still leaves room for associative activities that do not conflict with the judicial function, such as the participation in modalities and non-professional clubs, namely in amateur teams of any sport, which is applauded, taking into account what has already been said about the freedom of association of judges.

4. PARTICIPATION IN BUSINESS

Individual judges must be free from unwarranted interferences when they decide a case. And there are many factors, some of which will be appORTioned below, in order to determine whether a court of law or tribunal is independent.

As the European Court of Human Rights has stated in the past “(...) *that in order to establish whether a tribunal can be considered as «independent» regard must be had, inter alia, to the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question of whether it presents an appearance of independence*”¹⁴

Such independence also means that judges must decide cases despite their personal preferences and must have no interest or stake in a case. This implies that the judge may not hold pre-formed opinions

¹⁴ In *Findlay vs the United Kingdom*, judgment of the European Court of Human Rights (ECtHR) of 25 February 1997, Series 1997-I, p.16 para. 73 see also: *Bryan v. the United Kingdom* judgment of 22 November 1995, Series A no. 335-A, p. 15, para. 37).

about cases or as regards the parties involved. Cases must only be decided “*on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason*”¹⁵

However, an additional requirement is made as regards the judges, in the sense that they may “*not carry on any other function, whether public or private, paid or not, that is not fully compatible with their duties and status (...)*” as established at article 6(4) of the International Association of Judges, the Universal Charter of the Judge, adopted by the IAJ Central Council in Taiwan on November 17th, 1999, and updated in Santiago de Chile on November 14th, 2017.¹⁶

So, it is commonly accepted and promoted that judges must avoid participating in companies, regardless of whether such companies are family companies, small or large companies, or whether they actively make decisions or if they are completely passive as regards the decisions of such companies.

But is this restriction necessary to guarantee the independence of the judge?

Is the full scope of this restriction not in violation of the basic human rights of judges?

As regards this matter, Article 8 (2) of the European Convention of Humans Rights (ECHR) establishes, with reference to the right to respect for private and family life, that “*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*”.

Article 11(2) of the ECHR establishes, with reference to the freedom of assembly and association, a similar rule, although adding that “*This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, or the police or of the administration of the State*”. It is interesting to find that such limitations are not allowed with regard to the right to respect for private and family life.

Similarly, as already mentioned, Article 18 of the Portuguese Constitution establishes that the law may only restrict rights, freedoms and guarantees in cases expressly provided for in the Constitution, and the

¹⁵ UN Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in 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, Principle 2.

¹⁶ Similar to the chapter 3 - 12 of the *Compromisso Ético dos Juízes Portugueses*, 2009, pág. 13

restrictions should be limited to what is necessary to safeguard other constitutionally protected rights or interests.

Taking the above into account, there appears to be a contradiction between the interdictions that are imposed on judges to guarantee their independence and the freedom to have economic activities that is generically recognized for the general population.

As regards the international documents transcribed, judges cannot be partners in companies, regardless of their role in the organization of the company, the size of the company, or who the other partners are and what the activity of the company is.

It is understood that judges cannot be involved in commerce. However, the role of the partner isn't to represent the company to the general public, clients or providers. As such, most of the time the general public, the society in which the company acts, wouldn't know that the judge is a partner. Additionally, the obligation of the judge to disqualify himself in cases related to the field of his company activity would seem to ensure that impartiality is carried out.

Also, there is no consideration of the size of the company and, consequently, its relevance in the market. If there is a small company, a family company for example, the intervention of the company in the market is probably smaller and too insignificant to influence the market in which the activity of the company is developed.

Likewise, if the judge is simply one more partner in a big company with many partners, and has a small participation in the company, due to the large number of partners, regardless of the company position, the judge's capacity of influencing the market is extremely limited.

However, both in the case of small family companies with small market impact and large companies with a large number of partners, the judge's position would legally be considered to be biased.

Notwithstanding, judges can buy shares in the stock market, so it seems that here also is a contradiction between the possibility of the judge to be a partner or buy stocks, if such is done in a regulated market. And more relevant to this analysis is that in both examples the judge would have the same profits – he/she would earn dividends for his/her participation in the company.

Also, the reality today is very different and there are a lot of small companies and family businesses that are created solely for the administration of a family estate or inheritances. In other cases, the small company may have been incorporated for the best organization of a small business.

If there is a small company in the family of the judge, the depth of the relationship with the organization may be profound, regardless of whether he is a partner of the company. So, if the judge's relatives have

companies, is the relation of the judge only an issue if he is a partner and has a clear and formal relationship with the company?¹⁷

In addition, the activities of companies can be so disconnected to the field of the judge's intervention, even if it is involved in commerce, that it cannot be understood as having the potential to jeopardize the judge's impartiality.

For example, one judge may be partner in a family business that organizes funerals but is not able to decide about questions related to other companies with said object (because he/she is a judge in family courts, for example). In other cases, the matter of territorial competence may be sufficient to ensure that the judge may never have an intervention that could in any way benefit his/her family company.

The need to guarantee the impartiality of judges is unquestionable and necessary, but the exclusion from economic life may not be the best way to guarantee such impartiality. There are a lot of economic realities and activities that are excluded because of such inhibitions, despite the fact the participation of a judge could in no way affect the image of the jurisdiction. However, these economic realities and situations could make a difference to the judge in terms of financial independence or family relations. The possibility of participation would be better assessed on a case-by-case basis and should not be denied by a general prohibition.

Judges must maintain the legality, justice and security of society, and also know the obligations and rules by which they are bound. So, the intervention in companies in accordance with basic principles and rules would not be harmful to society or to the perception of impartiality or independence of judges.

A simple mechanism that could ensure this independence and impartiality would be to establish a set of rules that would force judges to declare themselves inhibited in certain cases where their impartiality could be questioned, combined with an obligation to publicly declare any situation that could potentially lead to a case where the judge would be forced to declare him or herself inhibited from deciding.

What we believe is that it is necessary to open mentalities to accept that judges can be part of many social and economic realities and that they could learn a lot from undertaking other activities, with professional benefits, as long as such undertakings do not come into conflict with their main activity: ensuring the correct application of the law and administering justice on behalf of citizens.

¹⁷ According to the Commentary on the Bangalore Principles of Judicial Conduct (169), judges must be allowed to participate in family companies.

We stress that we do not defend that the participation in companies should be totally free. This participation should be communicated and public. Therefore, there would be an inherent transparency in such situations, as should be the case in all the activities in which judges intervene.

5. CONCLUSIONS

Freedom of association and freedom of economic initiative are fundamental rights of all citizens, including judges.

On the other hand, the independence of the judiciary and, as a consequence, of judges is a pillar of the functioning of democratic societies, which are based on the principle of separation of powers.

Therefore, the defense of the independence and impartiality of the judges may justify restrictions, with a more or less limited scope, to those fundamental rights, to the extent strictly necessary.

This could be the case of participation in public political-partisan activities and in professional sports institutions, as well as in business management functions.

For the rest, namely participation in government or, in the cases mentioned below, the performance of elected public offices; the fulfilment of service commissions within the executive or legislative branches; and the ownership of shares, it is sufficient to establish a set of legal measures, to ensure the transparency of situations and to inhibit judges from judging causes, for a limited period of time, where there may be a conflict of interest.

On the other hand, there is nothing to prevent the judge from being affiliated to a political party, provided that he does not participate actively in it, namely by integrating the respective statutory bodies and taking part in their public actions. In addition, if they are not in office, either because they are on unpaid leave or because they are performing duties outside the jurisdiction of the courts, judges must be able to stand for parliamentary elections and local authority bodies, suspending their legal-functional bond during the term of office, in case of election.

At the same time, judges should be free to participate, without authorization, in non-profit associations of a humanitarian, cultural, recreational and sporting nature (which do not enter into professional competitions), as well as in trade union associations representing their professional interests.

So, considering the study carried out, which is based on the situation and legal framework in Portugal, but because we are dealing with matters that apply to other countries and cultures, since the impartiality

and exemption of the judge and consequent trust in justice are cross-cutting concerns throughout European law, we present the following proposals:

- To give the European Judges Advisory Board (EJAB) responsibilities, in terms of the ethics and deontology of judicial magistrates, to formulate recommendations that may lead to a common regulation for European countries, with a view to preserving the independence of judges, without exceeding the limits of the above restrictions on the exercise of their fundamental rights.

- To implement a repository of allowed and prohibited conduits at a European level and, make this repository available, namely by publishing it on the Internet, thus making it available to both judges - who will be aware of which procedures are admitted or prohibited in each country - and ordinary citizens – who will get a better sense of what justice and its rules are - thus contributing to the creation of a trustworthy framework for citizens in general.

- To establish a legal mechanism that makes it mandatory for a judge, when he initiates functions, to make a declaration of interests regarding situations of potential conflict, such as having stock actions in a company or being a member of an association bodies, making it public (for example on the website of its Judiciary's Superior Council), in order to give transparency to the administration of justice and to make the legal system of impediments, excuses and suspicions more effective.

- After exercising political functions and at the moment of returning to the exercise of the judicial duties, to establish a period of legal impediment, lasting for the same time in which the political functions were carried out, up to a maximum of five years, to try cases involving matters where the judge had prior intervention as politician, the political party that formed the Government in which he has participated, as well as the other members of the same governing team, the leaders of that political party and, in the cases of secondment in the Parliament, the members of the same group, including in all these cases companies which are owned or managed by them.

- In professional sports (especially in football), it is suggested that a common European rule be adopted that prevents judges from participating in bodies or entities involved in competitions, or as a minimum, to establish a mandatory declaration of interests regarding that participation.

- With regard to participation in commercial companies, to adopt, as a legal minimum, the obligation of the judge to request an excuse in cases related to the field of activity of the company in which he participates.

In fact, it should not even be necessary to legislate on this subject.

In the words of a judge, taken from the last scene of "The bonfire of vanities" (film made by BRIAN DE PALMA based on a novel by TOM WOLFE): *"Is that Justice? I don't hear you! I'll tell you what Justice is. Justice is the law, and the Law is man's feeble attempt to set down the principles of Decency. Decency! And Decency is not a deal; it isn't an angle, or a contract or a hustle. Decency! Decency is what your grandmother taught you! It is in your bones! Now, you go home! Go home and be decent people! Be Decent."* (MEIRIM, 2007).

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