

Judicial integrity: ethics, society and adjudication (jurisdiction)

In this presentation, we intend to demonstrate the growing relevance that ethics and integrity assume for the jurisdiction, here assimilated to the definition of adjudication, judicial activity or the application or realization of law. This relevance is transmitted to the structure of the judicial system as a whole.

We will try to contextualize this topic to the comparative and Portuguese reality, as seems natural. Without forgetting the “risk and emergency society” in which we live, in a post-pandemic scenario and with the outbreak of an aggressive war in Eastern Europe, in a worsening of crises ranging from the economic to the climate, through the rule of law, in its various aspects, in a clear erosion of democracy, human rights and the principles of law at international level.

I. Ethics and integrity

Thinking about increasing judicial integrity implies, in our opinion, looking for the origins and path of its influence in the different judicial systems.

We can take as a reference the Aristotelian argumentation triangle.

As you know, **Ethos** is a word of Greek origin, which means "moral character".

It is used to describe the set of habits or beliefs that define a community or country, although it can assume several other definitions according to its original approach (e.g., sociology, anthropology, arts, rhetoric). The ethos is generally linked to truth, moral authority, and credibility.

It opposes **Logos** (rationality, logic, scientific discourse) and **Pathos** (emotions and feelings).

The distinction that must be made between ethics, moral and law, in its nature and in its many normative intersections, is a matter of great debate. The difference to be established between *hard law* and *soft law* can be illustrative of this different thickness.

As practical knowledge, the ethics associated with the exercise of a certain professional activity – deontology – has an essential effort to link to the practical reality of that professional experience, to the reality of life (individual, social, economic, cultural) and to the concrete of things.

Integrity, in turn, will be the coincidence obtained between the behaviors and personal attitudes with the normative dictates or the principles sedimented by ethics. Duly integrated in a system healthily built, based on these assumptions and on the guarantees of its effectiveness. This contextualization must also be elucidated in its multiple dimensions and structures, therefore according to the notion of system.

II. Judicial integrity and jurisdiction

In a 2009 book, an Utrecht University researcher, Jonathan Soeharno, develops an in-depth (he calls it “philosophical”) reflection on judicial integrity, the subject of this conference.

He asks whether the increase in importance the issue of judicial integrity has gained at all levels should not fail to be accompanied by an adequate theory. From a theory of judicial integrity as a concept, from its normative dimension to the jurisdictional level (application of the law), passing through the dimension of deontology and the various levels in which the guarantee and safeguard of judicial integrity can be developed, with theoretical and practical parameters.

Judicial integrity always has these two essential inseparable aspects: actor and system.

The issue of professional ethics is particularly critical in its connection with the judge and the judicial system.

The existence of upstanding judges and upstanding judicial systems is an imperative for all democracies.

The jurisdictional function is based on assumptions of great professional demand. It is based on assumptions of ethical authority that is essential for the realization of law. The trust and legitimacy of the judge's authority is based on his profile of impartiality and exemption in decision-making (independence), which accompanies his public image and the assumption of the respective professional responsibilities.

It is not just the exercise of an activity in which professional knowledge is demonstrated (logos) but also a performance that is legitimized by the ethics of action (conduct) assumed to be judicial.

A professional ethics that is designed in the dimensions that traverses the judicial activity and the functioning of the judicial system in its various planes: - in the plane of the individuality of each magistrate; - in the connection of this same magistrate with the procedural triad, and, finally, - in the relationship of the magistrate with the judicial institutions and, through them, with society as a whole.

Political and social responsibility for the functioning, government, and organization of the jurisdictional function, as a synonym for judicial independence that is nonetheless the result of a phenomenon under construction and a culture increasingly experienced by judges.

The constraints of the “risk and emergency society” in which we live are having a strong impact on the performance of law and, therefore, on the jurisdictional function.

A complexification and uncertainty of reality that is also of the law: evidence (rules of experience and science), facts qualification, definition of law and statute law interpretation, procedural law, court and case management and governance and court administration. And that exerts pressure on judicial institutions towards their renewal, management and innovation (e.g. digitization, teleworking and artificial intelligence).

We are all witnessing an accelerated revolution in the structure and meaning of judicial decisions.

We believe that this change in the decision-making paradigm cannot fail to correspond to a strengthening of the ethos in the judicial function, given the pressure that is exerted on justice in the sense of changing its procedures, strengthening its structures, training, and capacitation and, even the mechanisms of international cooperation.

In the demand for a professional performance that is considered correct, that responds to the social needs that are associated with the jurisdictional function and that is integrated into a wider structure of regulation and governance of society.

III. Context and international standards: independence and *accountability*

When talking about judicial ethics and judicial integrity in a comparative context, it makes perfect sense to think about judicial integrity in the light of your reinforcement at an international level and its growing relevance. In the particular international situation in which we live characterized as a “risk and emergency society”, a definition so well worked out by Ulrick Beck.

The importance of the ethical question in public life and, especially, in the professional activity of those who are called to manage public interests and resources, has been a reason for growing reflection in all its domains.

When revisiting the last three decades, since the 1990s, we know that the strengthening of mechanisms of transparency and trust in courts and judges goes hand in hand with the growing affirmation of instruments to guarantee independence. It is in the balance between independence and accountability

that these mechanisms have been assumed by the institutions and by the different international forums of reference: United Nations, Council of Europe, European Union, Organization for Economic Co-operation and Development.

The ethical issue has also been central in the judiciary with the growing and developed statement, in the last three decades, of codes of conduct and ethics commitments that from the *common law* world, with its professional profile as a judge, has also influenced the legal territory of civil law. A set of common principles and rules concerning judicial ethics has been defined, especially in the development of the Bangalore principles, with important radiations to some domains that go beyond the individualized view of the judge, his status and his function.

Thus, the more traditional values of judicial independence, impartiality and reserve are then linked to the social standards of humanism and equality and the ethical reason of integrity. Subsequently, as a result of this evolution, these values are reflected in a framework of the generic duty of cooperation (both institutional and international) and in the system of court administration and judicial governance. The ethical link to the defense of their judicial guarantees and the status of judges, in this way, cannot be dispensed with reference to the judiciary function, that is, to the exercise, by judges, of positions in the administration and governance of courts, and, finally, in support of the judges' own social and private sphere with the clash of information and communication technologies.

The approach to these codes of conduct has been carried out not only with the enunciation of these principles, but also with comments on practical issues and real situations, in a pragmatic and case-by-case logic, without disregarding the importance of training in this thematic area.

In Portugal, this movement was reflected in the approval, in 2008, of the Portuguese Judges' Pledge of Ethics - "principles for quality and responsibility", which was later developed (2018) in the context of Portuguese-speaking countries, by the Ethical Commitment of Portuguese-speaking judges, approved at a General Assembly of the International Association of Portuguese-Speaking Judges.

Likewise, the prolonged debate around the Portuguese Judicial Councils (there are two judicial councils in Portugal), with a view to the adoption of codes of conduct and other measures to guarantee judicial integrity, should be noted, largely as a result of the pressure raised by successive GRECO assessments of the degree of conformity of the Portuguese system with its recommendations and with the proposals presented, in this field, by the Portuguese association of judges (ASJP).

It is important to highlight the connection aspects between judicial independence and accountability:

- **judicial independence** – e.g. composition of Judicial Councils; training and recruitment of judges; selection and admission to higher courts; objective and transparent rules for the distribution of cases and the reassignment of judges; channels for reporting and denouncing illegitimate attempts on judicial activity; exercise of non-judicial functions and distinction between judicial commissions and prohibition of "revolving doors"

- **accountability** – e.g. standards of professional conduct; evaluation of judges and judicial conduct; distinction between ethical dilemmas and disciplinary aspects (Ethics Committee autonomous?); preventive mechanisms of the income, assets and interests of judges; publicity and accessibility of judicial decisions; reporting and denouncement channels, for the citizen, on the behavior of judges

The international dialogue on these topics must always be based on strong information, legislation and documents on each of the realities in question, namely the most important references of each of the national legal systems and orders.

V. Ethics and jurisdiction, in the balance between openness and conditioning

Among the central concerns of the theme of judicial integrity is, of course, the qualification of the jurisdictional function to respond to the demands of today's society and judicial system.

This qualification implies fundamental training for equity and the equitable treatment of cases, which we believe should be the hallmark of all judicial systems, and the impetus of judicial institutions to bet on good practices and soft law instruments, ethics and compliance.

A particular requirement for judicial institutions (especially Training Centers and Judicial Councils) in a civil law countries environment, which by nature have greater difficulty in freeing themselves from strictly legal regulatory solutions, disciplinary sanctions, administrative provision and normative instructions. Excessive regulatory norms and institutional conditioning can result in the suffocation of jurisdictional freedom (internal judicial independence) or in the anomie characteristic of adhocratic organizations such as the courts.

At this point there is a question that makes sense to ask. Could the implementation of codes of conduct ever result in this excess of normative regulation and even the formatting of judges according to a moralistic model of behavior, an attack on the cultural and social pluralism that must exist in the judicial system? Can ethics commissions be transformed into surveillance mechanisms for a particular ideology on the judge's profession? This risk was highlighted by Cunha Rodrigues, an eminent figure of the contemporary portuguese judicial history, in his book of memories, memories of a long experience of judicial life – “Memórias Improváveis”.

We have no doubts about the essential role of judicial integrity but the worst that could happen would be for it to be assumed as a surveillance mechanism because it is incorrectly applied.

There we will have to counter that the codes of conduct, ethics commissions and other instruments to be created to reinforce transparency and integrity will themselves have to be assumed as guarantees of judicial independence and autonomy of judicial action. A space of freedom and autonomy that must be understood as the intangible field of professional expression but also of citizenship and even the private life of judges. In an always healthy balance between judicial independence and accountability, two sides of the same coin.

The effectiveness of judicial integrity must guarantee this balance between openness and conditioning.

Another particularly sensitive area is the always difficult but necessary “separation of waters” between politics and justice. This separation cannot be absolute, much less dogmatic.

Politics and justice meet in the governance sector of the Republic. These are highlighted and deontologically differentiated but interdependent areas. Separation of powers is paramount to the functioning and the integrity of constitutional democracy, but it should not be understood as absolute.

But, on the other hand, the justice that is carried out in a public cause that is based on common principles of ordering, regulation and rule of law, demands an ethical line of action from judges that must be clear in the assessment, in the image and in the grounds of rendered decisions. Legality, independence, impartiality and strict attention to equitable and fair procedure are part of this essential line of jurisdiction (adjudication)

Luigi Ferrajoli, in a text from 2013, makes several warnings that it is necessary to retain and that seem to us to be summarized in the following idea: the judiciary must attend to the triple level of its activity (social, political and normative) but it can only be based on the neutrality of the law to recompose its essence of independence, impartiality, equity and fairness.

Ethics implies bringing responsibility, the recommended method and common sense to the options and decisions we make, according to our own identity and meaning. This is no different for the activity of judges.

Thank you for your attention!

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