CENTRO
DE ESTUDOS
JUDICIÁRIOS

Themis 2022

Judicial Ethics and Professional Conduct

In the judge we trust:
the role of reasoning in judicial decisions

Case of Maria Ivone Carvalho Pinto de Sousa Morais

A critical analysis

Centro de Estudos Judiciários – Portugal

Team members

Carlos Madureira Rodrigues

Eliana Silva Pereira

Raquel Feijó Delgado

Tutor

Ana Carla Palma

“WE DON’T SEE THINGS AS THEY ARE, WE SEE THEM AS WE ARE”

Anaïs Nin

1. Introduction

The judge, as the representative of the people in the administration of justice, assumes an important role in settling conflicts within society, taking decisions in light of current law regarding the positions of each of the parties, and deciding on the legal solution that should prevail. The judge's decision is imposed on the parties and society in general, binding public and private entities.

The reasoning of judicial decisions is required by the Constitution of the Portuguese Republic (hereinafter “CPR”). This assumes special relevance, insofar as it allows the judges to self-control their work and the reasons that factored into their decisions, and it enables the parties and society in general to perceive and control the judge’s cognitive *iter* underlying the decision and the justice thereof. The reasoning also facilitates the control of judicial decisions by higher courts - through the appeal process - and makes it possible to confirm that the limits imposed on the judge's discretion were respected, particularly when deciding based on equity. To this extent, the reasoning of the decision is a source of legitimation for the decision and its binding force.

This paper is aimed at demonstrating, through the analyse of the case of Carvalho Pinto de Sousa Morais, the importance of judicial reasoning in the control of the discretionary powers of the judge. It will critically examine the methodology used by the Portuguese Supreme Administrative Court (hereinafter “SAC”) in its decision and assesses whether its arguments demonstrate prejudice and bias against women in society, contrary to the Bangalore principles of independence and impartiality, and the principles of equality and of the prohibition of discrimination, enshrined in the CPR and the European Convention on Human Rights (hereinafter “ECHR”).

2. Judicial reasoning

The fundamental idea of public reason was developed early on by Thomas Hobbes, Kant and Rousseu and it became increasingly significant with John Rawls and

Dworking's conception of constitutional democracy[1]. Nowadays, reason-giving is a well-established paradigm in modern societies and an instrument for legitimacy including regarding judicial decisions.

Judicial reason-given is mostly justified for participation, accountability and accuracy reasons[2]. Private parties are autonomous agents in the judicial process, as they are entitled to present their claims, to provide evidence and to participate in the debate within the scope of the dispute. Judicial reasoning also plays a key role in ensuring transparency and accountability of judicial decisions, even in civil law systems where the precedent rule does not apply[3]. The reasoned decision accounts to the general public, enhancing public confidence in the judiciary.

The obligation to explain a decision is also found to improve its quality. The need to account for the decision embraces a process of self-control and self-discipline of the judge in order to consider and reconsider all relevant facts, factors, arguments as well as the applicable law and its interpretation. It also ensures that the decision is not based on irrelevant considerations or speculations. The reasoning of the judicial decision makes it possible to control the judge's cognitive *iter* and, from that point of view, to identify eventual errors of judgment or the violation of certain limits to which the judge is bound. These limits assume special relevance in spaces where the exercise of discretionary powers by the judge are foreseen, as in cases of fixing compensation through equity. The control of the judicial decision's compliance with these limits involves, in the first place, the analysis of the respective reasoning, within the scope of which factors that contradict these limits and that have contributed to the creation of the judge's conviction will eventually be identifiable.

As a result, judicial reasoning is fundamental to the legitimacy of the court decisions, since it provides parties and the public in general with an independent basis for understanding the law in action and the fairness of the decision, as well as creating the standards for judicial review by a superior court.

---

[1] For more information see Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, Washington and Lee Law Review Volume 72, Issue 2, Article 3, Spring 3-1-2015, page 483 to 571.

[2] In continental Europe, this obligation dates back to 1790 revolutionary statute on judicial organizations, Title V, article 15, which impose a general obligation for courts for provide reasons for their decisions - see Mathilde Cohen, *When Judges Have op. cit*., p. 558.

[3] In any case, judicial decisions are followed very often, particularly as a method for filling gaps in legislation, as well as a mean of interpretation vague and unclear statutory provisions.

In Portugal, legal reasoning is imposed by the CPR[4] on all judicial decisions, which are not merely administrative in nature. From this constitutional command and in accordance with the civil code procedures, judges are under an affirmative reason giving requirement when deciding on a case, relying on a methodology that brings together the articulation of the factual and the legal basis for the decision. This obligation is a sentencing requirement rule that needs to be observed by all courts and tribunals. Failure to observe these rules makes the award null and void[5].

3. Limits of the judicial decision and of the discretionary powers of the judge

3.1 The Bangalore principles of independence and impartiality

Independence and impartiality of the judiciary are widely recognized worldwide in several international treaties[6] and soft law instruments, including the 1998 European Charter on Statute for the Judges[7] as well as in the Bangalore principles. The Bangalore principles of Judicial Conduct embrace a universally acceptable statement of judicial standard and were developed by the United Nations in 2003 to guide the ethical conduct of judges, as well as to invite Member States to adopt measures to guarantee independence, impartiality and integrity of judges[8].

As provided for in the Bangalore Principles, "[j]*udicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects*"[9]. The independence is a necessary precondition for impartiality, which in turn "*is essential to the proper discharge of the judicial office. It applies not only to the*

[4]Article 205(1) CPR, available at: https://www.parlamento.pt/legislacao/documents/constitution7threv2010en.pdf.

[5]Article 615 (1)(b) Portuguese Civil Code Procedures, available at: https://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=1959&tabela=leis.

[6] For instance, Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights, opened for signature in Rome on 4 November 1950 and came into force on 3 September 1953. The full text is available at: https://www.echr.coe.int/documents/convention_eng.pdf; Article 14(1) of the International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations on 19 December 1966, available at: https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf.

[7] The European Charter on the Statute for the Judges developed in 1998 of the Council of Europe, available at: https://rm.coe.int/090000168092934f.

[8] Bangalore principles are annexed to the report presented to the fifty-ninth session of the United Nations Commission on Human Rights in April 2003 by the United Nations Special Rapporteur on the Independence of Judges and Lawyers, Dato Param Cumaraswamy, and adopted by the Commission unanimously on the Resolution No. 2003/42, available at: https://www.unodc.org/documents/corruption/Resolutions/E-CN_4-RES-2003-43.pdf. Bangalore Principles of Judicial Conduct are available at: https://www.unodc.org/documents/ji/training/bangaloreprinciples.pdf.

[9] Bangalore Principles, op. cit., value 1 – Independence.

decision itself but also to the process by which the decision is made"[10]. The United Nations Basic Principles establishes that "*the judiciary shall decide matters before them impartially, 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*"[11].

Independence and impartiality of the judiciary are intertwined. Yet, they are separate concepts. Independence requires that cases before a court are decided based on the facts proved and in accordance with the law, without any type of restrictions and without any type of bias, animosity or pathos. Consequently, it can be argued that «*"impartiality" refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "impartial" connotes absence of bias, actual or perceived*»[12]. This idea also stems from point 2.1 of the Bangalore principles which sets forth that "*a judge shall perform his or her judicial duties without favour, bias or prejudice*." Both bias and prejudice are conditions or a state of mind, attitudes or points of view that are likely to influence the decision in a certain way. Bias is defined in the Commentary on the Bangalore Principles of Judicial Conduct as "*a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to judicial proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction*".[13] Bias and prejudice may manifest in stereotypes[14] and need to be examined from a subjective perspective.

As the European Court of Human Rights (hereinafter "ECtHR") has noted, impartiality of the judicial decisions can be analysed from a subjective and an objective perspective under Article 6 of the ECHR, which establishes the right to a fair trial. The former "*is endeavouring to ascertain the personal conviction of a given judge in a given case*"[15] while the latter aims at *"determining whether he offered guarantees*

---

[10] Bangalore Principles, *op. cit*., value 2 – Independence.
[11] United Nations Office on Drugs and Crime - Commentary on the Bangalore Principles of Judicial Conduct, September 2007, page 59, point 57, available at: https://www.unodc.org/documents/nigeria/publications/Otherpublications/Commentry_on_the_Bangalore_principles_of_Judicial_Conduct.pdf.
[12] Bangalore Principles, Commentary, *op. cit*., page 40, point 24.
[13] Bangalore Principles, Commentary, *op. cit.,* page 59, point 57.
[14] A stereotype is a generalized view or preconception of attributes or characteristics possessed by, or the roles that are or should be performed by, members of a particular group" - Rebecca Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives*, 2010.
[15]ECtHR Case *Piersack v. Belgium* of 1 October 1982, para. 30. available at https://hudoc.echr.coe.int/eng?i=001-57557.

sufficient to exclude any legitimate doubt in this respect". The ECtHR argued that personal impartiality of the judge is presumed unless there is evidence to the contrary[16].

In order to benefit from this assumption, it can be argued that "*judges must refrain from any behaviour, action or expression of a kind effectively to affect confidence in their impartiality and their independence*"[17]. Therefore, a decision will not be impartial not only if the judge is not impartial but also if she or he is not perceived to be impartial as a result of expressions and considerations provided for in the decision's reasoning that might be linked to bias, prejudice or stereotypes. This requires judges to be aware and to combat their own subjectivity by adopting an intellectual exercise of self-critical thinking that does not jeopardize the judge's margin of appreciation but rather strengthens the ability to limit biases and prejudice through self-awareness. Having said that, it seems clear that personal bias of a judge and the subjective test of impartiality can be perceived and measured in the judicial reasoning laid down in the award. Thus, as enshrined in the Bangalore commentary "*a judge must be alert to avoid behaviour that may be perceived as an expression of bias or prejudice*" which includes "*statements evidencing prejudgments*"[18].

3.2 The principle of equality in the CPR

Article 13 of the CPR sets forth the principle of equality, determining the right of all citizens to be treated with the same social dignity and equality before the law, establishing that no one can be privileged, favoured, prejudiced, deprived of any rights or exempted from any duty for reasons of ancestry, sex, race, territory of origin, religion, political or ideological beliefs, education, economic situation, social circumstances or sexual orientation. The principle of equality finds its roots in the aristotelic principle of distributed justice, according to which one should give to each individual what is owed. It is a structuring principle of the democratic state based on the rule of the law and of the Portuguese constitutional system[19], binding on all public powers, including the legislative, administrative and judicial branches.

---

[16] ECtHR Case *Daktaras v. Lithuania*, of 10 October 2000, para. 30, available at https://hudoc.echr.coe.int/eng?i=001-58855.

[17] See the European Charter on the Statute for the Judges, *op. cit.* point 4.3.

[18] Bangalore Commentary, *op. cit*., page 61 point 62.

[19] See, for instance, Portuguese Constitutional Court judgments of 17th October 2000, No. 436/2000, available at: http://www.tribunalconstitucional.pt/tc/acordaos/20000436.html, and

As it has been developed, the principle of equality postulates three dimensions: the prohibition against arbitrariness, the prohibition against discrimination and the imposition of differentiation[20].

The prohibition against arbitrariness is an external limit to the judicial decision and determines that is not acceptable to give similar treatment to different situations or to differentiate similar situations, without a reasonable justification, based on objective and constitutionally admissible criteria. The prohibition against arbitrariness does not provide a subjective right to a similar treatment in any given circumstance, and it will only be considered breached if there is a violation of a specific fundamental right to equality foreseen in the CPR or when an arbitrary law is applied by the public powers to a case in which rights and interests that are protected by the CPR are being harmed.

The second dimension of the principle of equality is the prohibition against discrimination. This means that is not legitimate to treat subjective categories of individuals differently without substantial justification. Article 13 (2) of the CPR refers to some exemplificative subjective categories of individual, which have been historically more subject to discrimination - ancestry, sex, race, territory of origin, religion, political or ideological beliefs, education, economic situation, social circumstances or sexual orientation[21]. The prohibition against discrimination operates as a presumption, meaning that any discrimination based thereon is unconstitutional unless it's proven to be substantially justified[22].

The prohibition against discrimination refers not only to the abovementioned categories, but also to any discrimination based on other factors in contradiction of the principles of dignity of the human person, democratic state based on the rule of law or when arbitrary or impertinent[23]. It should be pointed out that, the prohibition against discrimination in general does not preclude any kind of different treatments, but only that which is not substantially justified – unfair discrimination - and based on unconstitutional grounds, regarding its purpose and criteria[24]. It only forbids discrimination not based on substantial grounds, *i.e.*, one which is arbitrary or

---

and of 2nd June 2004, No. 403/2004, available at: http://www.tribunalconstitucional.pt/tc/acordaos/20040403.html.

[20] See Gomes Canotilho, Vital Moreira, Constituição da República Portuguesa Anotada, Volum I, 4th revised edition, 2007, page 339.

[21]See Portuguese Constitutional Court judgment of 7 June 2018, No. 308/2018, available at: TC > Jurisprudência > Acordãos > Acórdão 308/2018 (tribunalconstitucional.pt).

[22] See José de Melo Alexandrino, *Direitos Fundamentais: introdução geral*, 2007, pages 75 and 76.

[23] *Vide* Gomes Canotilho, Vital Moreira*, op. cit.,* page 340.

[24] *Vide* José de Melo Alexandrino, *Direitos Fundamentais: introdução geral*, 2007, pages 75 ss.

unreasonable[25]. Therefore, different treatment is legitimate if: (i) based on objectively different situations; (ii) not based on any of the suspicion factors foreseen in article 13(2) of the CPR; (iii) has a legitimate purpose according to the CPR; (iv) is proportional to the purpose it is meant to achieve[26]. The differential treatment will be considered justified if it is based on substantial grounds and its purpose and means do not contradict the CPR. The criteria on which the different treatment is based must be fair, either in regard to the principle of equality itself or other constitutional provisions like the principle of the dignity of the human person[27].

The third dimension of the principle of equality is the imposition of differentiation. According to this dimension of the principle, some social, economic and political inequalities should be eliminated or diminished by the public powers in order to compensate the lack of equal opportunities, which imposes positive discrimination in given cases.

As pointed out, the principle of equality binds all public powers, including the judiciary. Regarding the powers of the judiciary, this principle establishes that all citizens shall have access to justice under equal terms, which means that access to the courts cannot be denied to any citizen based on a lack of financial means. On the other hand, this principle implies that the courts must apply the law equally to all citizens, so judges are obliged to apply the law equally to similar cases and must use criteria based on equality in areas where discretionary power operates – *e.g.* when establishing the amount of the award. Although there is no such thing as a right to equal judicial treatment, the judge must pursue the same legal solutions to similar cases and the legislator can approve measures to assure judicial standardization[28].

3.3 The principle of prohibition against non-discrimination in the ECHR

Article 14 of the ECHR states that the enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. This is not a closed

[25] See, for instance, Portuguese Constitutional Court judgment of 22 May 1984, No. 44/84, available at: http://www.tribunalconstitucional.pt/tc/acordaos/19840044.html.
[26] See Gomes Canotilho, Vital Moreira, *op. cit.,* page 340.
[27] *Vide* Gomes Canotilho, Vital Moreira, *op. cit.,* page 341.
[28] See Portuguese Constitutional Court judgment of 13 May 1999, No. 574/98, available at: http://www.tribunalconstitucional.pt/tc/acordaos/19980574.html.

list of grounds of discrimination[29], which can function separately or may interact with each other. The ECtHR has consistently referred to the ancillary nature of article 14, meaning that it is a provision that is used in conjunction with others foreseen in the Convention, considering that it establishes the equal enjoyment of rights and freedoms set forth in the Convention[30]. In order for article 14 to apply, complaints of discrimination must fall within the general scope of protection of one of the substantial rights guaranteed in the Convention. Nonetheless, article 14 also enjoys some degree of autonomy since its application does not depend on the violation of substantive rights[31]. As in, when an issue of discrimination in relation to one of the areas covered by a right foreseen in the Convention is alleged, the ECtHR may address it as a violation of article 14[32].

The ECHR mainly covers civil and political rights, but some economic and social rights also fall within its scope. For instance, the right to respect for private and family life, foreseen in article 8, determines that everyone has the right to see his private and family life, his home and his correspondence respected and there shall be no interference by public authorities with the exercise of this right, except in certain particular and well-founded circumstances. The discrimination can be direct or indirect, irrespective of whether the provision establishes a different treatment for analogous situations or not. In the latter case, the provision does not cause general discrimination itself, but its application causes discriminatory effects on certain groups. In this case, the policy or measure foreseen may not have been intended to discriminate a certain group, however this discrimination occurs when the regime is applied. The ECHR also admits the violation of article 14 in cases of discrimination by association, which is considered to occur when a certain individual is treated in a less favourable way on the grounds of his relation to a person belonging to a particular group. It has also considered that Member States in some cases are obliged to treat

---

[29] See ECtHR, *Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention*, Updated on 31st August 2021, page 14, available at: https://www.echr.coe.int/Documents/Guide_Art_14_Art_1_Protocol_12_ENG.pdf

[30] *Vide* ECtHR, *Guide on., op. cit.,* page 6.

[31] See, for instance, ECtHR Case Sommerfeld v. Germany of 8 July 2003, available at: https://www.legal-tools.org/doc/bd5014/pdf/ and ECtH Case Zarb Adami v. Malta of 20 June 2006, available at: https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Zarb%20Adami%22],%22itemid%22:[%22001-75934%22]}.

[32] See European Union Agency for Fundamental Rights / Council of Europe / European Court of Human Rights, Handbook on European non-discrimination law, 2018 edition, page 29, available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-handbook-non-discrimination-law-2018_en.pdf.

particular groups in a more favourable way in order to correct inequalities, and the failure to do so, is also found to be in breach of article 14[33].

In order to decide on a complaint of alleged discrimination, firstly you need to identify if it relates to a situation where different treatment has been given to analogous situations or if different situations were treated in a similar way. Once this has been established, it is for the Government to demonstrate that the difference in treatment is justified.

4. The background to the case of Carvalho Pinto de Sousa Morais

In December 1993, Mrs. Pinto de Sousa was diagnosed with a bartholinitis on the left side of her vagina, a gynaecological disease. Thereafter, she became a patient of the gynaecology department of the Alfredo da Costa Maternity Hospital[34]. Over the course of a year, she carried out medical treatment performed by a gynaecologist, which included, among others, drainages on her vagina. After each treatment, the bartholing gland would swell, causing her pain and suffering and requiring additional treatment with painkillers. The seven drainages that she was subjected to did not yield any results. For this reason, at the beginning of 1995, she was offered a surgery that would remove the Bartholin gland and consequently fix the problem definitely.

On 22 May 1995, Mrs. Pinto de Sousa was admitted to the Alfredo da Costa Maternity Hospital and had both glands, on the left and on the right side of her vagina, permanently removed. However, shortly after being discharged from the hospital, she began to experience a loss of sensation in the vagina, which had become swollen, as well as intense pain in the area. She started suffering from sphincter and genital disorders, including urinary incontinence and fecal retention. Moreover, she had difficulty sitting and walking, she had sleeping disorders, anxiety and could not have sexual relations. Overall, she was found to have a permanent disability of 73%. Mrs. Pinto de Sousa felt frustrated, diminished as a woman and began to experience psychological problems, including depression, and considered suicide. After carrying out several exams and being examined at a private clinic, Mrs. Pinto de Sousa was informed that during the surgery, her left pudendal nerve had been permanently injured due to medical malpractice.

---

[33] See, for instance, ECtHR Case Taddeucci and McCall v. Italy, of 30 June 2016, available at: https://hudoc.echr.coe.int/fre#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-164715%22]}.

[34] Alfredo da Costa Maternity is a public hospital that is currently part of Central Lisbon Hospital Center (*Centro Hospitalar Lisboa Central, E.P.E*), which integrates the National Health System.

On 26 April 2000, Mrs. Pinto de Sousa brought an action against the Alfredo da Costa Maternity Hospital in the Lisbon Administrative Court[35], under the State Liability Act[36]. She claimed a compensation to cover both pecuniary and non-pecuniary damages arising from the inadequate medical treatment provided by the hospital and the physical disability caused by the poorly performed surgical procedure.

Ruling on the merits of the case, on 4 October 2013, the Lisbon Administrative Court found that the civil liability requirements were verified, considering the operation was poorly performed, and the surgeon had acted recklessly, clearly in violation of the medical *legis artis* and the duty of care. The court also found a causal link between the medical negligent conduct and the permanent damages caused by the injury to the left pudendal nerve. The court ordered the Portuguese State to pay an amount of €80.000 in compensation for non-pecuniary damage and an amount of €92.000 for pecuniary damages to Mrs. Pinto de Sousa, of which €16.000 was for the service of a maid that she had to pay to support her with the household tasks.

The case went on appeal before the SAC, which, confirming the verification of the aforementioned requirements upheld the first-instance judgement on the merits, but reduced the global amount that had been awarded. In accordance with the SAC, the compensation for non-pecuniary damages awarded by the Lisbon Administrative Court exceeded what was reasonable and corrected the amount to €50.000. This reduction was justified by the court based on two arguments: Mrs. Pinto de Sousa had a gynaecological condition before the surgery and also at the time of the operation she already had two children and was 50 years old, an age where sexual relations are not as important as in younger years, since its significance decreases with age. With regard to pecuniary damages, the total amount was reduced to €61.000.[37] Regarding the latter damages, the high court considered that the amount awarded to pay the future services of a maid should be reduced from €16.000 to €6.000, considering that it was not proven that Mrs. Pinto de Sousa lost her capacity to take care of domestic tasks and also considering the fact that she probably only needed to take care of her husband, taking into account the age of her children.

---

[35] Lisbon Administrative Court (Tribunal Adminsitrativo de Lisboa) is a first instance court.

[36] In 1995 was in force the Decree-Law No. 48 051, of 21 November, available at: https://dre.pt/dre/detalhe/lei/67-2007-628004. At the present, the State Liability Act is regulated by the Decree-Law 67/2007, of 31 December.

[37] SAC case No. 0279/14 of 09.10.2014, available at: http://www.dgsi.pt/jsta.nsf/35fbbbf22e1bb1e680256f8e003ea931/683aef3e81f7522480257d70004aee6f?OpenDocument.

Mrs. Pinto de Sousa considered that the decision of the SAC that reduced the amount initially awarded with regard to non-pecuniary damages was discriminatory on the grounds of sex and age and presented the case before the ECtHR[38]. The ECtHR declared the application admissible and held, by five votes to two, that the Portuguese State violated Article 14 read together with article 8 of the European Convention on Human Rights.

5. A critical perspective of methodology used by the SAC

Considering what has been argued in this paper regarding judicial reasoning, the principles concerning judicial conduct and the limits on judicial decisions, there are two main points in the SAC's decision that shall be analysed from a methodological point of view, particularly in the light of the principle of equality enshrined in the CPR and the prohibition against discrimination set forth in the ECHR: *first*, the reference to Mrs. Pinto de Sousa's age and the existence of children to depreciate the importance of an active and satisfactory sexual activity; *second*, the reduction in the amount awarded for the services of a maid along with the reference that Mrs. Pinto de Sousa only needed to take care of her husband.

5.1 The reference to the plaintiff's age and the existence of children to depreciate the importance of an active and satisfactory sexual life

As mentioned above, the SAC reduced the amount of compensation awarded in the first instance, with regard to non- pecuniary damages, from €80,000 to €50,000. From the reasoning found in this part of the decision, it appears that the reduction was due to two factors: one, that Mrs. Pinto de Sousa suffered gynaecological disorders before the surgery and "*it was impossible to determine how much weight was accorded to each factor*"[39]; and two, that when the medical operation occurred, Mrs. Pinto de Sousa already had two children and was 50 years old, an age at which sexual life seems not to be so important as it is in younger years, since it decreases with age.

The first of the arguments put forward by the court — that Mrs. Pinto de Sousa suffered from a disease that caused her pain and discomfort prior to the operation and it would not be possible to reliably determine the percentage of increase in pain caused by the

[38] ECtHR Case *Carvalho Pinto de Sousa Morais v. Portugal*, of 25 July 2017, available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-175659%22]}.
[39] See ECtHR Case Carvalho Pinto de Sousa, *op. cit.*, page 22.

procedure — seems to be a reasonable and achievable criterion.

The second argument presented in the reasoning of the decision — that Mrs. Pinto de Sousa, at the time of the operation, was already a mother of two children and was 50 years old, an age at which one’s sex life is not that relevant when compared to younger ages — is more controversial.

The judicial reasoning behind this argument is not clear about the impact that this last factor had on the reduction of the amount of the compensation. It is understood, however, that it plays a relevant role in the reasoning of the judge in making the final decision. In these terms, sex and age seem to play a key role in the judicial reasoning, serving as the basis for a different treatment in relation to what would presumably happen if it were a man of the same age, or a younger woman.

It is therefore important to understand whether or not the court's arguments evidence aspects of discrimination based on sex and age or if the differentiation in treatment is grounded on reasonable criteria compatible with the principles of equality and the prohibition against discrimination as provided for in the CPR and the ECHR.

As was highlighted above, the principle of equality, as foreseen in the CPR, insofar as the prohibition against arbitrariness is concerned, limits the judicial decision, determining that it shall not give different treatment to similar situations, without a reasonable justification, based on objective and constitutionally admissible criteria. On the other hand, the prohibition against discrimination dimension, which was specifically invoked by Mrs. Pinto de Sousa before the ECtHR, states that different treatment must not be given to subjective categories of individuals without substantial justification, namely regarding sex — a suspect category foreseen in article 13(2) of the CPR - or age — if seen as a factor based on which a subjective category is created without any other relevant and justified criteria to lead to differentiation in treatment. A differentiated treatment can be justified if based on substantial grounds and its purpose and means do not contradict the CPR, considering a fair criterion in regard to the principle of equality itself or other constitutional provisions.

In similar terms, article 14 of the ECHR states that the enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. This list of grounds of discrimination mentioned is not a closed one.

From these principles stems a prohibition against less favourable treatment to individuals categorised generically according to certain qualities or characteristics, excluding the possibility of treating certain individuals differently solely because of their inclusion in a certain group, according to preconceived or stereotyped ideas.

In addition, in light of the Bangalore principles of independence and impartiality, the judge, when deciding, must consider only the facts concretely demonstrated in court, the rules of experience and the applicable law in force, refraining from considering irrelevant external factors in his decision, which will be the case of preconceived ideas that he or she has about society or a certain group of individuals.

Having said that, it seems that the reasoning behind the decision is not accurate.

Firstly, it is important to note that the conclusion reached by the court that the sex life for a 50-year-old woman with two children does not have the same relevance as it would for a younger woman does not stem from any concretely proven facts in court. Indeed, it does not follow from the proven facts that evidence was put forward — for example, scientific studies — that proves, in general terms, that the relevance of women's sexual lives decreases with age. Even if this evidence had been submitted in court, this would not automatically lead to the conclusion that, in the specific case of Mrs. Pinto de Sousa, this corresponded to the truth, and could eventually function as an evidentiary factor.

Furthermore, it has not been demonstrated in court that the relevance of sex for Mrs. Pinto de Sousa had decreased with advancing age or because she already had two children. It should be noted that, even though the defendant sought to prove that, one would always wonder whether this evidence would not amount to a disproportionate intrusion into Mrs. Pinto de Sousa's personal life, likely to violate the principle of human dignity.

From the above, it follows that the conclusion reached by the court resulted solely from the generalisation of the preconceived idea — not based on concrete facts — that the sexual life of a woman after a certain age and having experienced motherhood would have less relevance. It is, as such, a differentiation based on factors that should not be considered, insofar as they imply the different treatment of a person — in this case resulting in a reduction in the value of the compensation awarded to her — not because of her intrinsic characteristics, but because she fits into a certain subjective category of individuals, established according to their gender and age.

Although the considerations of age, *per se*, are normally accepted and used by courts to determine compensation for non-pecuniary damages, in this case, the consideration of

the plaintiff's age was not taken into consideration to reduce the compensation due to the fewer number of years that she was expected to live with the new health condition, but to establish that this condition was not so relevant at her age, based only on a generalization and no concrete facts. As the ECtHR concluded, the generalisation done by the court reflects the "*traditional idea of female sexuality as being essentially linked to child-bearing purposes and thus ignores its physical and psychological relevance for the self-fulfilment of women as people. Apart from being, in a way, judgmental, it omitted to take into consideration other dimensions of women's sexuality"*[40].

The assessment that the SAC undertook to determine the compensation awarded was more than an "*unfortunate use of terms"* as was argued by the Portuguese government in the case before the ECtHR. It applied an outdated gender stereotype and reflected an archaic idea of female sexuality, considering it as being essentially geared towards procreation and ignoring the relevance that it may have for Mrs. Pinto de Sousa as a human being.

The reasoning of a judicial decision and the different treatment of people based on stereotypical ideas about a certain subjective category in which a certain individual belongs constitutes, in itself, a source of inadmissible discrimination in light of the principles of equality and the prohibition against discrimination and infringement of the dignity of the human person. The reasoning under the terms that have been exposed poses the risk of facilitating the perpetuation of traditional views of society and the role of certain categories of individuals therein, in this case women or women of a certain age.

The consideration of these factors in the decision, without considering the applicant's specific situation, also compromises the judge's duties of independence and impartiality, insofar as factors external to the case that are objectively irrelevant must not interfere in the decision. The mere use of stereotypes and prejudices based on Mrs. Pinto de Sousa's age and sex to support a court decision constitutes, in itself, an inadmissible discrimination, irrespective of whether it turns out that, in particular, there is a difference in treatment between the present case and similar cases.

As stated by the concurring opinion of Judge Yudkivska, there is no place for harmful stereotypes and antiquated perceptions of gender roles in rational judicial assessments, since "*judges fail in their role if they facilitate the perpetuation of*

[40] See ECtHR Case Carvalho Pinto de Sousa, *op. cit.*, page 17.

stereotypes by failing to challenges stereotyping"[41]. This seems to be what happened in the Mrs. Pinto de Sousa case: wrongful gender and age stereotype caused judges to reach a view of the case based on preconceived beliefs, compromising their independence.

It is also important to note that before the ECtHR, Mrs. Pinto de Sousa claimed that the discrimination by the SAC could be illustrated by comparison to similar cases in which the compensation awarded to men of a similar age to hers who, as a result of medical negligence, were left with similar sequelae. Similar cases were at issue involving people who did not belong to *suspicious categories*, the comparison being useful to ascertain the possible difference in treatment or simply verifying whether the language reflects stereotypes that are discriminatory.

In fact, in her pleadings before the ECtHR, Mrs. Pinto de Sousa presented two cases to support her claim that the decision was discriminatory. In 2008, the Supreme Court of Justice (hereinafter "SCJ")[42] awarded compensation for non-pecuniary damages in the amount of € 224,459.05 as a result of medical malpractice, which left a 59-year-old man who was subject to a full prostatectomy where his prostate gland had been removed, impotent and incontinent. The SCJ psychologist argued that, "*he is now a person whose life is physically painful, and has therefore suffered irreversible consequences"*[43]. Later in 2014, the same court[44] granted compensation for non-pecuniary damages in the amount of € 100,000 to a 55-year-old man, who had been wrongly diagnosed with cancer and had a prostatectomy, which caused him physical suffering and had a permanent impact on his sexual life and mental health. Both situations are similar to the case presented by Mrs. Pinto de Sousa not only regarding the medical malpractice but also in terms of long-term consequences that affected the plaintiffs. Nevertheless, the compensation awarded to Mrs. Pinto de Sousa was significantly lower. These cases illustrate the unfavourable treatment suffered by Mrs. Pinto de Sousa in the face of objectively similar cases, with the award of compensation for similar damages manifestly lower than those in the two comparable cases, with no significant differentiating factors beyond the plaintiff's gender. The

[41] See ECtHR Case Carvalho Pinto de Sousa, *op. cit.*, pages 22 and 23.
[42] Both the SAC and the SCJ are superior courts in accordance with article 209 of CPR.
[43] SCJ Case No. 08A183 of 04 March 2008, available at: http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/46ae68362fd8d6148025740200424479?OpenDocument.
[44] SCJ Case No. 1333/11.6TVKSB.L1.S1 of 26 June 2014, available at: http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/2f0a1ebc63bbf87a80257d09003df71c?OpenDocument.

discrimination envisaged through the reasoning of the decision thus appears to be confirmed in the two cases presented.

In the Carvalho Pinto de Sousa Morais case, the ECtHR concluded that there were no valid reasons to justify the difference in treatment among the Portuguese high court decisions, finding the decision of the SAC discriminatory on grounds of age and sex,[45] which is clearly prohibited under article 13(2) of the CPR. As mentioned above regarding article 14 of the ECHR, in order to decide on a complaint of alleged discrimination, as was the case with Mrs. Pinto de Sousa, it is decisive to firstly identify if it relates to a situation where a different treatment to analogous situations has been given or if different situations were treated in a similar way. Once this has been established, it is for the government to demonstrate that the difference in treatment is justified, which did not occur in this case. Indeed, before the ECtHR, the Portuguese government was not able to justify the reason why, in 2008 and 2014, the SCJ "*took into consideration the fact that the men could not have sexual relations and how that had affected them, regardless of their age. Contrary to the applicant's case, the Supreme Court of Justice did not take account of whether the plaintiffs already had children or not, or look at any other factors*".

5.2 The reduction in the amount awarded for the services of a maid

To determine the compensation to address the services of a maid, the SAC also decided on the basis of considerations of equity "*ex aequo et bono"*, as set forth in article 566(3) of the Portuguese Civil Code. From a legal normative approach, equity enables the court to go beyond strict legality in order to attain justice. However, it requires the development of the grounds for the decision, which requires judges to explain the reasons, the rationale and the path taken to achieve a certain order.

In the present case, the SAC decided to reduce the compensation to pay the services of a maid, but did not clearly explain its *ratio decidendi*, and the few reasons given can also be criticised. The court stated that considering the age of her children, Mrs. Pinto de Sousa only needed to take care of her husband, therefore, she would not need to hire a full-time maid. Based on this assumption, the SAC considered that it was reasonable to conclude that she would not spend more than € 100 a month. Yet, no

[45]For more information of judicial failures to deal with discrimination see, S. Hannett, "*Equality at the intersections: the legislative and judicial failure to tackle multiple discrimination"* Oxford Journal of Legal Studies 31.1(2003); 65-86.

calculations were presented nor any reasonable justification, namely a reference to the rules of experience, in justifying that amount.

From a methodological point of view, the SCA's decision to reduce the compensation can be analysed from two different perspectives: on the one hand there is poor judicial reasoning, and on the other hand, the reasoning provided is clearly associated with a gender stereotype.

As already mentioned, judicial reasoning should act, first and foremost, as a tool for judge self-control, as it serves as a critical analysis of the evidence and its consideration must be carried out in accordance with the facts and rules of experience. To generate his or her judgment, even when deciding on the basis of equity, the judge cannot rely on arbitrary, irrational or illogical criteria, but — based exactly on facts or the rules of experience — those that can be explained and understood through reasoning. As the Portuguese Constitutional Court stated "*the assessment of evidence according to the free conviction of the judge does not mean an assessment against the evidence or an assessment that was detached from the legality of the evidence or from the general rules of production of evidence, that is, an arbitrary assessment of the evidence is not admissible*"[46]. Despite being made in connection with the assessment of evidence, the Constitutional Court rational can be equally applicable to a decision based on equity, since it requires a rationality of choice. In the same token, as explained by Amartya Sen "*Rationality of choice, in this view, is primarily a matter of basing our choices — explicitly or by implication — on reasoning that we can reflectively sustain if we subject them to critical scrutiny. The discipline of rational choice, in this view, is foundationally connected with bringing our choices into conformity with critical investigation of the reasons for that choice. The essential demands of rational choice relate to subjecting one's choices — of actions as well as objectives, values and priorities — to reasoned scrutiny*"[47].

The SAC decision twice failed in its mission. It did not explain the rationale for the reduction in the amount of compensation, which is clearly beyond what is legally required under the Portuguese legal framework, and the reason used for such reduction is based on the assumptions that Mrs. Pinto de Sousa only needed to take care of her husband. This

[46] See Portuguese Constitutional Court judgment No. 401/02, of 9 October 2002 available at: https://www.tribunalconstitucional.pt/tc/agredaos/20020401.html.

[47] *Vide* Amartya Sen, *The Idea of Justice*, The Belknap Press of Harvard University Press, Cambridge, Massachusetts, 2009, page 209.

part of the judicial decision seems to make a clear allusion to the role and behaviour of females in society, strictly related to housework, children and husband caring.

Bearing in mind the reasoning behind the SAC's decision, these factors seem to have been decisive in reducing the amount awarded as compensation for expenses related to the maid. As with the reduction in compensation for non-pecuniary damages — referring to the loss of ability to have sexual relations — one is faced with a differentiation based on factors that do not result from proven facts or rules of common experience, but from a stereotyped idea of women as an individual belonging to a subjective category, associated with a role in society of procreating and caring for the husband and children. The reasoning in these terms translates to a sexist and archaic vision of a patriarchal society.

When deciding and substantiating the decision in the terms that have been exposed, the judge does not act in accordance with the duties of independence and impartiality to which he is bound, weighing factors that are not objectively relevant to the decision. This conduct of the judge is in direct contradiction with what is enshrined in the Bangalore commentary when it is mentioned that, "*a judge must be to avoid behaviour that may be perceived as an expression of bias or prejudice*" (…) which includes "*statements evidencing prejudgments*".[48] In addition, as the ECtHR mentioned, "*in the Court's view, those considerations show the prejudices prevailing amongst the judiciary in Portugal, as pointed out in the report of 29 June 2015 by the UN Human Rights Council's Special Rapporteur on the Independence of Judges and Lawyers (see paragraph 28 above) and in the CEDAW's Concluding Observations on the need for the respondent State to address the problem of gender-based discriminatory stereotypes (see paragraph 26 above). They also confirm the observations and concerns expressed by the Permanent Observatory on Portuguese Justice regarding the prevailing sexism within judicial institutions in its report of November 2006 on domestic violence*"[49].

As highlighted early on, the reasoning of a judicial decision based on stereotypical ideas about a certain subjective category of people constitutes a source of discrimination, implying the violation of the principles of equality and the prohibition against discrimination and goes against the respect for the dignity of the human person. As mentioned above, the reasoning in these terms perpetuates a traditionalist view of

[48] See Bangalore Principles, Commentary, *op. cit.,* page 61, point 62.
[49] See ECtHR Case Carvalho Pinto de Sousa, *op. cit.*, page 17.

society and the role played by women. The use of stereotypes — in this case relating to gender — to support a court decision, implies unacceptable discrimination in light of the principles of equality and the prohibition against discrimination enshrined in the CPR and the ECHR, respectively. Also using this reasoning, the ECtHR found that the SAC's decision violated article 8 (that foresees that, "*everyone has the right to respect for his private and family life, his home and his correspondence*") taken together with article 14 of the ECHR.[50]

6. Conclusions

"*No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land*." - Article 39, Magna Carta (1215).

Since ancient times, the concept of due process demands that a judgement against a person shall be made in accordance with the law. This idea of due process also means that everyone is entitled to a fair and impartial hearing to determine their legal rights and obligations. This requires courts to give reasons for their decisions, which is imposed, from an external point of view, among others, for transparency, accountability and accuracy reasons.

From an internal point of view of the adjudicative process, judicial reasoning plays a key role in the participation of the parties, accountability, and mostly as an instrument for the judge's self-control. Although "*we have a tendency to believe that somehow the process of becoming a judge effects a substantial transformation, and that judges become different from the rest of us*"[51], the fact is that judges are human beings. So, in order to ensure independence and impartiality of decisions, judicial reasoning needs to be embraced as an intellectual exercise, which enables the judge to decide a case based on facts proven and in accordance with the law, refraining from any type of bias, prejudice, animosity or pathos, as well as the use of expressions that reflect stereotypes.

---

[50] *V*. ECHR cases Khamtokhu and Aksenchik v. Russia of 24 January 2017, available at: https://www.conjur.com.br/dl/russia-prisao-perpetua-homens.pdf.

[51] Chad M. Oldfather, *Judges as humans: interdisciplinary research and the problems of institutional design*, Hofstra Law Review, Vol. 36:125 2007, page 127.

From an external point of view, as it constitutes a source of judicial decisional control, the reasoning behind the decision makes it possible to confirm that the limits imposed on the judicial decision and on the judge's discretion were respected. Among other limitations, within the scope of the decisions, judges must, in light of the Bangalore Principles, be independent and impartial, basing their decision solely on the facts and their framework in the face of current legislation — without the interference of any external irrelevant influences — as well as respecting constitutional principles and principles agreed under international treaties and agreements such as the ECHR.

The case presented by Mrs. Pinto de Sousa before the ECtHR illustrates the importance of the reasoning of judicial decisions, in the sense that a well-grounded and accurate decision would have led to greater self-control by the judge, namely in the sense of the use of "*unfortunate terms*". In fact, "[j]*ustice must not only be done it must be seen to be done*" so before finalizing the award, judges and courts need to carry out tests for bias in order to determine whether or not a decision shall be revised and consequently to better promote public confidence in judicial decisions. On the other hand, reasoning makes it possible to control the *ratio decidendi* underlying the judicial decision and, to that extent, identify the points where legal application was not perfect and irrelevant factors to the decision of the case were considered – such as bias and stereotypes - when they should have been ignored.

Therefore, the reasoning behind judicial decisions makes it possible to control the judge's cognitive *iter* and, from that point of view, to identify eventual errors in judgment or the violation of aforementioned limits to which the judge is bound. The possibility that, by means of reasoning, the judge himself or herself, the addressee of the decision, the public in general and the higher courts can control the reasoning underlying the decision, functions as a guarantee of constant monitoring and improvement of the legal technique used. Monitoring judicial decisions in these terms enables the quality of these decisions to improve, as well as allowing legal thinking to evolve, since it is exposed to learning from the merits and demerits of previous judicial decisions.

As future judges, this is the lesson we take with us going forward!