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"RELATIONS BETWEEN THE THE CONSTITUTIONAL AND ORDINARY JURISDICTIONS: EVOLUTION SINCE THE 2005 MEETING IN SEVILLE"

Portuguese Report[1]

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Panel One

Functional Structure of the Constitutional and Ordinary Jurisdictions.

1. How do the constitutional and ordinary jurisdictions function in each of the Ibero-American countries?

2. What effects do rulings handed down by the Constitutional Court have on the ordinary and special jurisdictions.

3. What degree of efficacy do constitutional rulings have in the ordinary and special jurisdictions. Highlight any individual aspects that require improvement.

1. The Portuguese concrete judicial review system is a mixed one implemented by both the ordinary courts (incidental or diffuse review) and the Constitutional Court (concentrated review). It exists alongside an abstract system under which the Constitutional Court has the sole competence to review normative acts and the sole power to declare the unconstitutionality or illegality of any norm with generally binding force (Article 281, CRP). There are three abstract review formats: the successive abstract review (Article 281, CRP), the preventive review (Article 278, CRP), and the control of (un)constitutionality by omission (Article 283, CRP).

In addition to the system for reviewing the constitutionality of norms, the Portuguese model also provides for a system for controlling the legality of laws. The legislator has created a 'block of legality' with superior legal force [Articles 112(3) and 281(1)(b), CRP), which is a standard against which to control the validity of simple ordinary laws that may violate laws which are either procedurally granted superior force, or are materially parametric.

The concrete judicial review procedure refers to norms that are applied to judicial cases and represents a guarantee of constitutionality within the day-to-day space of the legal community. The abstract review forms part of the overall balance between the various organs of the state and can be directed at either behaviours on the part of organs that wield public power, or norms in their own right, in terms of the significance they possess in the legal order and regardless of how or whether they affect actual life relations or situations.

Its specialised nature and the fact that it is in a privileged position to resolve constitutional-law conflicts mean that the Constitutional Court plays a preponderant role in the legal order, as both the supreme guardian of the Constitution and the court of courts. However, unlike the European model in which the Constitutional Court has the sole competence to consider questions of constitutionality, under the Portuguese mixed model every court is competent to decide questions of constitutionality in concrete judicial review situations.

Access to the Constitutional Court only becomes possible once the question of constitutionality has already been considered and decided by the ordinary courts, and must take the form of an appeal lodged by one or more of the parties or the Public Prosecutors' Office. Indeed, this circumstance – that the question of constitutionality has been discussed

and considered by the court *a quo* during the proceedings – is one of the preconditions for the admission of appeals on the grounds of (un)constitutionality [Article 72(2), LTC] and impacts the appellant's legitimacy to bring an appeal on those grounds.

The Constitution also gives the ordinary courts the power to refuse to apply norms on the grounds that they deem them unconstitutional or illegal, without the need to refer the question to a specialised jurisdiction. In such cases the Public Prosecutors' Office is then legally required to appeal to the Constitutional Court [Article 280(3), CRP], which considers the question and decides whether the norm or normative dimension the ordinary court refused to apply is or is not in fact unconstitutional, whereupon it sends its decision to the lower court, which must then judge the concrete case in the light of the Constitutional Court's decision on the question of constitutionality.

The concrete judicial review system is not purely subjectivist, but contains objective elements, such as the assumption of the cognizance of the unconstitutionality, the unrenounceable nature of the right of appeal, and the mandatory appeal to the Constitutional Court by the Public Prosecutors' Office in both cases of a refusal to apply a norm contained in an international convention, a legislative act or a regulatory decree [Article 280(3), CRP], and the cases in which Article 280(5) of the CRP requires such an appeal against decisions in which an ordinary court applies a norm that the Constitutional Court itself has already held unconstitutional or illegal.

Within the scope of Article 204 of the CRP, as guardian of the Constitution, the Constitutional Court also performs a controlling role that is not included in its competences as an appellate instance. In this respect, it can incidentally consider the possible unconstitutionality of norms when it exercises any of the jurisdictional competences attributed to it in the Constitution and the Organic Law governing the Constitutional Court (hereinafter LTC) – namely those linked to electoral proceedings [Article 223(2)(c), CRP; Articles 92 et seq., LTC], or to disputes regarding political parties [Article 223(2)(e), CRP; Articles 103 et seq., LTC].

2. There are various possible types of Constitutional Court decisions in concrete judicial review cases: unconstitutionality (the appeal is upheld or denied); non-unconstitutionality (the appeal is rejected or denied); and interpretative decisions.

On the effects of Constitutional Court decisions, Article 80 of the LTC reads as follows: "1. The decision on the appeal shall constitute res judicata in the proceedings with regard to the question of unconstitutionality or illegality that was raised. 2. If the Court upholds the appeal, even if only partially, the case file shall return to the court from whence it came, for the latter to reformulate its decision or order its reformulation in conformity with the finding on the question of unconstitutionality, as appropriate. 3. In cases in which the finding with regard to the constitutionality or legality of the norm that was applied by the appealed decision, or

whose application that decision denied, is based on a given interpretation of the same norm, the latter must be applied with that interpretation in the proceedings in question".

This precept means that the Constitutional Court's decision is only valid in the case in which it was handed down, where it counts as res judicata in formal but not material terms; and there is nothing to prevent the same parties from raising an identical question in another case when the applicable instances or the Constitutional Court itself reach a different decision on that question. The res judicata only concerns the question of the unconstitutionality of a norm, and the Constitutional Court cannot pronounce itself on the essence of the question, or even on the way in which the court *a quo* should execute its decision (see ANTÓNIO ROCHA MARQUES, "O Tribunal Constitucional e os outros tribunais: a execução das decisões do TC", in *Estudos sobre a jurisprudência do Tribunal Constitucional,* Lisbon, 1993, p. 463). The Constitutional Court does not possess an unlimited power to control the way in which other courts execute its decisions regarding findings on matters of constitutionality (see Rulings nos. 94/90, 318/93, and 108/95).

In the field of the concrete judicial review of the constitutional conformity of norms, the Portuguese legislator has chosen not to opt for a system in which the Constitutional Court substitutes itself for the court *a quo*, instead preferring a mitigated cassation system in which the Constitutional Court definitively decides the question of constitutionality, but limits itself to revoking the appealed decision, which the court *a quo* is then left to reformulate. As such, the ordinary courts are obliged to comply with the Constitutional Court's ruling and reformulate their own decisions in accordance with the orientation the Constitutional Court has followed with regard to the question of constitutionality – an arrangement that can potentially lead to conflicts between the ordinary and constitutional jurisdictions.

The effects of Constitutional Court decisions in concrete judicial review situations are not erga omnes, only apply in the concrete case in question, and do not even constitute real precedent, with their influence instead restricted to the nature of a jurisprudential line of thought within the overall body of interpretations made in line with the Constitution.

There are two dimensions to the concrete judicial review system: 1. Subjective: the appellant is seeking to satisfy a subjective right in a concrete case which is underway before an ordinary court, in which he/she is a party and in which the latter court has applied a norm or normative interpretation that harms his/her interests and violates one or more constitutional norms or principles; 2. Objective: it contributes to the elimination of jurisprudential lines of thought that violate constitutional norms or principles, and may influence the legislator in such a way as to lead it to revoke or amend norms that have been found unconstitutional.

The general opinion has been that, notwithstanding its wrinkles and potential conflicts, the system has worked in a satisfactory manner and, thanks to role played by the Constitutional Court, has had the effect of radiating the fundamental rights out through the whole of the legal system.

Having said this, the fact that the Constitutional Court hands down a ruling in the concrete judicial review domain in which it finds a given norm unconstitutional does not eliminate

that norm from the Law. The unconstitutional norm only disappears from the legal system if it is held unconstitutional in three concrete cases. It then becomes the object of an abstract review, but this does not happen automatically as the result of a Constitutional Court decision. Under Article 82 of the LTC, the initiative to commence the proceedings that may lead to a declaration of unconstitutionality with generally binding force pertains to the Public Prosecutors' Office or any individual Constitutional Court Justice. The three concrete cases that have resulted in findings of unconstitutionality can have been based on different constitutional norms: it is the norm that has been deemed unconstitutional which must be the same, not the parametric norm(s) which led to that unconstitutionality (see JORGE MIRANDA, *Curso de Direito Constitucional,* Vol. 2, Universidade Católica Editora, 2016, p. 284).

Declarations of unconstitutionality in abstract review cases have both erga omnes and retroactive effects, although the decision's retroactivity is restricted by the fact that res judicata are excepted from its scope unless the unconstitutional norm concerns criminal, disciplinary or mere administrative offence matters and its content is less favourable to the accused person.

Two specific rules apply to declarations of originary unconstitutionality or illegality:

1) The declaration has effect from the moment at which the norm that is declared unconstitutional or illegal entered into force.

2) Any norm which was revoked by the norm that is declared unconstitutional or illegal must be revalidated.

Two other rules specifically apply to declarations of supervening unconstitutionality or illegality:

1) The declaration has effect from the moment at which the new constitutional or legal norm entered into force;

2) There is no revalidation.

In certain circumstances, for reasons of legal certainty, fairness or an exceptionally important public interest, the Constitutional Court can restrict the scope of the effects of the unconstitutionality or illegality [Article 282(4), CRP]. This power presupposes that the Court must first both consider the norm(s) before it in the light of the constitutional reality, and assess the effects of its decision, given the concrete facts and life situations in play. If the Court chooses to impose such a restriction, it must do so in the decision of unconstitutionality itself – it cannot do this in a complementary decision at a later date.

In abstract reviews of unconstitutionality by omission, if the Constitutional Court does determine that this form of unconstitutionality exists, it must notify the competent legislative organ accordingly [Article 283(2), CRP]. This legal effect does not amend the law in its own right, nor does it declare any norm invalid or ineffective – it only constitutes a 'stimulus to

legislate' (see JORGE MIRANDA, op. cit., p. 295) that may lead the country's legislative bodies to behave positively. There have been very few reviews of unconstitutionality by omission in Portugal, and there can be no concrete judicial reviews of this type at all.

3. The fact that the Portuguese model is mixed, with a diffuse review system at the base, a concentrated one at the top and a court that is specialised but does not possess the sole competence to hear constitutional questions, raises problems in terms of the relationship between the two jurisdictions.

The Portuguese system creates a potential conflict between those jurisdictions, above all in cases involving appeals by parties or the Public Prosecutors' Office. There is thus a superimposition of decisions, in which, when the Constitutional Court deems the normative interpretation applied by the court *a quo* contrary to constitutional norms or principles, its decision prevails over that of the ordinary court.

This possibility of disputes between the two jurisdictions is derived from the fact that the Portuguese model enables any court to decide questions of constitutionality, without providing for an instance-suspension mechanism that would give just one court the competence to decide with erga omnes effects.

As scholars have pointed out (see CARLOS BLANCO DE MORAIS, Justiça Constitucional, Tomo II, O contencioso constitucional português entre o modelo misto e a tentação do sistema de reenvio, Coimbra, Coimbra Editora, 2005, p. 952), the Portuguese mixed model can set the scene for clashes between the competences of the two jurisdictions: autonomous interpretations by the Constitutional Court as to the relative weight that should be attached the ordinary law applied to the primary case, compared to that of a possible violation of the applicable constitutional law; Constitutional Court decisions that effectively add a somewhat more creative content to the law; solutions derived from an interpretation in accordance with the Constitution made by the supreme judicial body in the constitutional field; something of an '*amparo remedy'* aspect of certain Constitutional Court decisions which, under the pretext of a norm unconstitutional, end up effectively striking down that sentence because it violated one or more fundamental rights; and occasional attempts by a court *a quo* to use normative parameters that are not always reasonable or sustainable, in order to avoid abiding by the Constitutional Court's decision and thus maintain its own original sentence.

The current concrete judicial review system requires judges to spend a lot of time and energy gauging the fulfilment of requisites to which the admissibility of appeals is subject – a web which is so complex that, in practice, appeals of this kind are rare. Inasmuch as the question of the admissibility of an appeal is not centred on any serious violation of fundamental rights by judicial (or other – political or executive) acts, on the one hand there are inevitably situations which deserve constitutional-law protection and don't receive it because the requisites for an appeal are not met, while on the other there are sometimes appeals which formally fulfil those requisites, but are in fact merely delaying tactics intended to promote interests whose nature is not that of fundamental rights. The concrete judicial review system

possesses a technical complexity which makes it relatively inaccessible for appellants with less economic resources, while permitting a larger number of dilatory appeals by appellants with greater economic power. From the point of view of both legal certainty and equality between citizens, it would be appropriate for there to be an in-depth review of the system and the introduction of a subsidiary *amparo* remedy designed to protect the fundamental rights, not just from norms, but also from political acts and judicial decisions. This solution would be the most coherent with Article 3(3) of the Constitution, under which the validity of any legal or public act is dependent on its conformity with the Constitution. The constitutional system must not be afraid of tensions with the legislator or the ordinary courts: the dignity of the human person and his/her fundamental rights must be at the heart of the system. The *amparo* remedy, which focuses on the violation of rights and not the breach of norms, would thus offer the advantage of helping to democratise constitutional justice and contributing to a culture of fundamental rights in both the ordinary justice system and citizens' social awareness (see CATARINA BOTELHO, A Tutela Directa dos Direitos Fundamentais, Almedina, Coimbra, 2010, p. 161).

Proposals for improving the efficacy of the system:

1 – Make appeals on the grounds of (un)constitutionality non-suspensive, in order to discourage their use as merely dilatory devices and help reduce the number of unnecessary appeals.

2 – Place the Public Prosecutors' Office under a duty to automatically appeal to the Constitutional Court whenever it sees that the same norm has been declared unconstitutional in three concrete judicial review cases.

3 – Enable all the courts to review the constitutionality of any act undertaken by the public power, and not just normative acts. The constitutionality of both executive acts and judicial acts themselves would thus be subject to review.

4 – Create an *amparo* remedy designed to protect fundamental rights, whereby citizens would be able to resort to the Constitutional Court on the grounds that a fundamental right had been violated by the action of the executive or judicial powers. This mechanism for gaining direct access to the Constitutional Court would be ultima ratio, and the violation would have to have been discussed by the ordinary courts beforehand.

5 – Simplify the requisites for appeals to be admissible, which should primarily entail assessing whether one or more fundamental rights have been seriously violated, with the system based on trust in the discretionary power of the Justices of the Constitutional Court to make this assessment correctly. Decisions that appeals are not admissible should not be subject to any form of recourse or appeal, thereby allowing the Justices to focus on the cases that are admitted.

6 – Adopt a model under which it is possible to refer questions to the Constitutional Court for a preliminary ruling, thereby more clearly delimiting the scope of the Court's competences on the one hand and of those of the other judicial instances on the other, favouring the drawing of a boundary between the two areas of responsibility (that of the

Constitutional Court and that of the ordinary courts) and thus soothing the relations between the two types of jurisdiction. Unlike the existing system, this model would not imply the revocation by the Constitutional Court of sentences that have already been issued by the ordinary jurisdiction, but rather the suspension of the primary proceedings, a referral for a preliminary ruling, and the taking of a decision on the question of constitutionality before the court *a quo* hands down the sentence in which it rules on the essential question in the primary case.

7 – Introduce a concrete judicial review of unconstitutionality by omission, using a mechanism whereby the ordinary courts can refer applicable situations to the Constitutional Court for a preliminary ruling.

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Panel Two

Relationship between Constitutional Protection and the Administration of Justice.

1. What type of actions on the part of the ordinary jurisdiction can be reviewed by the constitutional jurisdiction, and who/what has the competence to do so?

2. Limits or scopes of the constitutional jurisdiction with regard to the cases that are submitted to it.

3. What effects (civil, penal and/or disciplinary) can adverse judgements of the constitutional jurisdiction have on public servants?

1. The key feature that characterises the concrete dimension of our constitutional review system lies in its normative nature, which is to say that Portuguese Constitutional Justice does not address the (un)constitutionality or (il)legality of judicial decisions in their own right.

The concept of 'norm' possesses a functional sense and encompasses both norms and normative interpretations. The Constitutional Court has said that "[… the Court's] assessment and decision do not necessarily have to concern the letter of the norm, but very often can (and must) restrict themselves to a certain interpretation – and it is only that interpretation (the one established by the court a quo) which the Court will uphold or refute, as it sees fit in relation thereto" (see CARDOSO DA COSTA, "Justiça Constitucional e Jurisdição Comum (Cooperação ou Antagonismo)", in Estudos em Homenagem ao Prof. Doutor José Joaquim Gomes Canotilho, Vol. II, Coimbra, 2012, p. 203). The fact is that, unlike other systems which enshrine the possibility of a jurisdictional control aimed directly at the decisions of the other courts – examples include the Spanish (via the amparo remedy) and German (via the 'constitutional complaint' or 'grievance' lodged before the Constitutional Court) systems – in the Portuguese system, the concrete judicial review only addresses norms and the Constitutional Court is unable to hear appeals that question the concrete acts of judgment expressed in other courts' decisions, even when appellants base their arguments on a lack of conformity with constitutional rules and principles. As such, in the final phase of the concentrated review process entrusted to it, the Constitutional Court judges whether legal norms applied by an ordinary court – the court a quo – are or are not in conformity with the Constitution.

This central assumption underlying appeals on the grounds of (un)constitutionality is accompanied by the following cumulative conditions: (a) the question of normative constitutionality must have already been raised "during the proceedings" and "in a procedurally appropriate manner before the court which handed down the decision that is now the object of appeal, in such a way that the aforesaid court is obliged to have knowledge of it" [Article 72(2), LTC]; and finally, (b) the contested decision must have applied the norm which the appellant deems unconstitutional, as its ratio decidendi, in the concrete interpretation that corresponds to the normative dimension delimited in the appeal request, and that interpretation must have constituted the legal criterion for the decision, inasmuch as "[…] only thus would it be possible for a finding of unconstitutionality to determine a reformulation of that decision" (Ruling n.º 372/15).

In the concrete judicial review appeal process, the competence to consider the constitutionality of norms or normative interpretations applied by ordinary courts pertains to the Constitutional Court sitting in chamber (in this respect, the Court comprises three non-specialised chambers [Articles 40 and 41, LTC]), albeit an appeal can be mandated to the Plenary in the event of any relevant divergences in the Court's own case law.

2. In the words of Article 221 of the Constitution of the Portuguese Republic (CRP), the Constitutional Court is the court "with the specific competence to administer justice in matters of a constitutional-law nature". The provisions of Articles 210(1) and 212(1) of the CRP mean that the Court exercises this competence definitively, which in turn signifies that, both constitutionally and legally, only the Constitutional Court can define the scope of its own competence; no other court can censure it or question the judgements it makes within the scope of its own specific competence.

However, in appeals on the grounds of (un)constitutionality, there is no place for subsumptive operations in relation to the interpretation or application of infra-constitutional law, the competence for which pertains exclusively to the instances concerned. Nor is the Constitutional Court competent to substitute itself for the legislator and write a norm it thinks should take the place in the legal system of the one it has declared unconstitutional. Any remarks the Constitutional Court may make on the level of the interpretation of infra-constitutional law do not imply any obligation on the part of the court a quo to accept them. It is not the Constitutional Court's job to define the best law applicable at the ordinary-law level.

3. In the concrete judicial review domain – an area that involves the relationship between the Constitutional Court and the ordinary courts –the Constitutional Court is the last appellate instance for questions of the constitutionality and legality of norms. Having said this, and as we have seen, Constitutional Court decisions only have effects in relation to the concrete case that is brought before it in a given set of proceedings. A decision in which the Court hands down a finding of unconstitutionality only has the effect of causing a norm or normative interpretation not to be applicable in that concrete case, and does not possess generally binding force. Consequently, the Constitutional Court's decision in a concrete judicial review case only has penal, civil or disciplinary effects in relation to public servants if the latter are parties to the aforementioned appeal on the grounds of (un)constitutionality lodged against a decision of an ordinary court. Despite the restricted nature of this effect, the concrete judicial review has been an effective procedural means of bringing the Constitution closer to the legal sphere of the natural and legal persons who resort to the review process in order to seek protection for their rights and interests. For example, decisions on the constitutionality of norms in the Code of Criminal Procedure (CPP) have contributed to both the fact that this area of the Law has been tempered and sculpted by Constitutional Court rulings, such that the judicial practice of the ordinary courts does more to respect the rights of accused persons, and the way in which the Law is taught at university level.

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Panel Three

Constitutional justice and persons in vulnerable conditions.

1. What formulas or mechanisms have the Ibero-American countries implemented in order to facilitate access to constitutional justice, as an essential human right?

2. What challenges are constitutional courts facing with regard to access to constitutional justice by persons in vulnerable conditions?

3. What measures have been adopted in order to ensure access to constitutional justice, in the face of the excessive degree of litigiousness?

1. The Portuguese system has adopted a diffuse judicial review model. This means that when they resolve disputes that are brought before them under the concrete review heading, the courts, from the first instance to the Supreme Court of Justice, have the competence to refuse to apply infra-constitutional norms on the grounds that they are not in conformity with the Constitution. Cases in which a court takes this position are immediately suspended and the Public Prosecutors' Office is required to bring a mandatory appeal before the Constitutional Court, which has the final say in the matter. In other situations, in which a party argues that a norm which has been applied does not comply with Constitution, it is only at the end – i.e. when all the ordinary appeals have been exhausted – that it is possible to appeal to the Constitutional Court.

Access to the Constitutional Court is not subject to conditions in terms of the value of the suit and there is no minimum amount below which it is impossible to appeal against another court's decision, although the parties to appeal on the grounds of (un)constitutionality must obligatorily be represented by a lawyer during the proceedings [Article 83(1), LTC]. The general rule is that appeals to the Constitutional Court are exempt from court costs, but these are imposed on losing parties, to the proportional extent of the loss, in case dismissal of the appeal, in cases of a refusal to hear the appeal because it does not fulfil any of the necessary conditions, and of claims against such refusals.

Appellants to the Constitutional Court can receive legal aid in order to be able to litigate, under the general rules applicable to such aid (Article 85, LTC). In other words, there is no specific legal aid regime for the Constitutional Court, which is subject to the general regime that covers the other courts. Where people with economic difficulties are concerned, the Portuguese system includes a unitary regime designed to enable everyone to gain access to justice, including the possibility of the appointment of legal counsel and/or dispensation from payment of court fees. Legal aid can encompass the following formats: dispensation from court fees and other costs related to the proceedings; appointment of counsel and payment of his/her fees; payment of the fees of a public defender; the ability to pay court fees and other costs related to the proceedings in instalments; appointment of counsel and payment of his/her fees in instalments; payment of the fees of a public defender in

instalments; and appointment of an execution agent (bailiff). Economic protection in one of these formats is attributed to natural persons who are Portuguese and/or European Union citizens and show that they do not have enough economic resources to pay the fees of legal professionals and to bear (wholly or partially) the normal costs of a lawsuit. The law employs the concept of 'economic insufficiency', defining persons in that situation as those who, taking into account factors of an economic nature (income assets, and permanent expenses of their household) and the person's capacity to contribute to the costs of the action, are objectively not in a position to bear the costs of a suit at a given moment in time.

The law governing legal aid currently says that neither for-profit legal persons, nor commercial establishments with limited liability, are entitled to any such form of legal protection, while not-for-profit legal persons are only entitled to legal aid in the strict sense of the term. In an initial phase, the Constitutional Court decided that the norm which excluded for-profit legal persons from the right to this economic legal protection was constitutionally acceptable, both because it posed no danger to human dignity, and because public funds should not be spent on enterprises that are not economically viable. However, more recently, the Court has taken the position that this fundamental right is not incompatible with the nature of for-profit legal persons, albeit that compatibility does not mean that the grant of legal aid should be applicable under the same terms and to the same extent as in the case of natural persons. As such, in concrete judicial review cases, the Constitutional Court has reached findings of unconstitutionality in relation to the norm that refuses economic legal protection to for-profit legal persons, without considering their concrete economic situation. The Court reached this conclusion on the grounds that, in these circumstances, the norm violates the right of access to justice (Ruling no. 591/2016). Successive abstract review proceedings brought by the Public Prosecutors' Office because the norm has already been held unconstitutional in three cases (Article 82, LTC) are currently pending.

2. In practice, the legal aid that is granted in Portugal is insufficient to respond to the real needs of economically vulnerable persons. This situation is particularly serious, because appeals to the Constitutional Court demand a high level of technical preparation on the part of the lawyers involved, and this factor creates an inequality in access to constitutional justice: economically disadvantaged persons have less access to that justice, and are more likely to see their appeals rejected because they do not fulfil all the necessary criteria, whereas economically more powerful appellants with the means to hire lawyers with more experience and technical expertise enjoy a greater certainty of being able to gain access to constitutional justice. In Portugal, there is no specific legal aid designed to help economically more disadvantaged persons access the Constitutional Court in the concrete judicial review domain.

3. In jurisdictions where the legislator has identified an excessive volume of pending cases, we have been witnessing a phenomenon of a dejudicialisation of disputes – i.e. the legislator has been transferring the competence to resolve disputes to so-called alternative dispute

resolution methods. One example of this is tax-related matters, with the intervention of the Administrative Arbitration Centres (CAADs). However, here too the law also makes provision for the possibility of appeal to the Constitutional Court under the concrete judicial review regime.

Panel Four. Constitutional Jurisdiction: judicial protection of Social, Economic, Environmental and Cultural Rights.

1.How has constitutional justice developed with regard to the social, economic, environmental and cultural rights with constitutional standing, since the Seville Conference?

Part I of the Constitution of the Portuguese Republic (CRP) enshrines a particularly long and comprehensive catalogue of fundamental rights, which is divided into two major categories: 'rights, freedoms and guarantees', which are provided for in Articles 24 to 57 and are included in Title II of Part I; and economic, social and cultural rights, for which provision is made in Articles 58 to 79 and which are incorporated in Title III of the same Part. Title III is in turn divided into three chapters: Chapter I deals with economic rights and duties, Chapter II with social rights and duties, and Chapter III with cultural rights and duties. The fundamental right to the environment is not enshrined in an autonomous chapter but is instead provided for as a fundamental social right in Article 66 of the CRP.

Since 2005 – the date of the Seville Conference – the Portuguese Constitutional Court has been handing down a range of important decisions on the fundamental economic and social rights. This was especially visible in 2011-2014 – a period marked by an intense output of case law regarding the constitutionality or otherwise of a variety of austerity measures imposed by budgetary constraints during the Financial Assistance Programme for Portugal (decisions commonly known as the "crisis rulings"). Cultural and environmental rights, on the other hand, have not been at the forefront of constitutional case law in the same way, and we will therefore focus on the decisions in relation to the economic and social rights.

In this respect, an initial aspect it seems crucial to us to highlight lies in the central importance of the role the various constitutional principles have been playing in the cases in which the Court is called on to consider the possible violation of fundamental economic or social rights. The fact is that in the relevant decisions during the time period referred to above, when gauging constitutionality, the Constitutional Court tended to focus its gaze more intensely on the constitutional principles affected by the aforesaid austerity measures (first and foremost the principles of equality, the prohibition of excess, and the protection of legitimate expectations), rather than on the actual economic and social rights that were concretely restricted by the measures [e.g. the right of workers to be paid, provided for in Article 59(1)(a), or the right to social security established in Article 63, both CRP]. This means that findings of unconstitutionality (or of constitutional conformity) with regard to norms that provided for the restrictive measures in question were primarily formulated with reference

to the constitutional principles they might potentially affect, which served as autonomous parameters for gauging the norms' compatibility with the Constitution. The Court did not place the emphasis on the fundamental economic or social right that was concretely affected in each situation. One of the possible reasons for this tendency lies in the fact that, at least in principle, the economic, social and cultural rights do not enjoy the same guarantee regime which the Constitution grants to the 'rights, freedoms and guarantees'. The CRP lays down an especially protective regime for the latter type of fundamental right, some of the key points of which are their direct applicability, the fact that they are binding on public and private entities, the provision for a special regime governing any restrictions on them, the fact that they can only be regulated by a parliamentary law, and their inclusion within the material limits to which constitutional revisions are subject [see Articles 18, 165(1)(b), and 288(d), CRP]. The economic, social and cultural rights, on the other hand, do not as a rule benefit from this regime and the especially strong guarantees it provides, inasmuch as it is only applicable to rights that can be considered analogous to the 'rights, freedoms and guarantees' (see Article 17, CRP). Here, we will limit ourselves to offering two examples which appear to us to illustrate this point.

In Ruling n.º 396/2011, the Constitutional Court was asked to consider the constitutionality of a norm included in the State Budget Law for 2011, which had ordered significant Public Service pay cuts ranging from 3.5% to 10% for salaries over 1,500 euros/month. The petitioners took the standpoint that, among other aspects, this normative solution would be capable of violating an alleged "fundamental right [on the part of Public Administration staff] not to see their salary reduced". The Court held that the constitutional text made no autonomous provision for the existence of a fundamental right of this nature, and that one could only say that there is a (more generic) right to be paid for one's work, which Article 59(1)(a) enshrines in the form of a fundamental economic right. Taking this as its starting point, the Court argued that this right did not give rise to any fundamental right to the non-reducibility of wages, such as to preclude the legislator from adjusting their amount in the light of specific economic and financial circumstances that justified doing so. In the words of the Ruling: "(…) the right to be paid for one's work is one thing; a right whereby that pay must be a concrete amount that cannot be reduced by law, whatever the circumstances and the economic/financial variables that concretely condition it, is something completely different. As such, one cannot take the view that the untouchability of wages is a guarantee-oriented dimension included within the scope of the protection afforded by the right to be paid for one's work, or that a reduction in the remuneratory quantum constitutes an effect on or restriction of that right. Inasmuch as there is no rule with constitutional standing that directly prohibits reducing pay and given that no such guarantee can be inferred from the fundamental right to be paid for work, we must conclude that the only way to gauge the constitutional conformity of the norms at stake here is by using valuation parameters derived from constitutional principles, particularly those of legitimate expectations and equality". As a result, the Court thenceforth assessed the constitutional compatibility of the solutions provided for in the norms before it solely and directly with reference to the latter two principles. In the concrete case in question, it concluded that these principles had not been breached.

The decision in Ruling n.º 862/2013 went in a different direction. Here, the Constitutional Court was called on to consider the constitutionality of a norm that provided for a cut of up to 10% in the pensions of more than 600 euros/month paid by «Caixa Geral de Aposentações» (the Public Service Retirement Fund). The Court began by saying that the reduction in the amount of the pensions required by the norm before it was capable of undermining the right to social security, which Article 63 of the Constitution enshrines as a fundamental social right. With regard to the challenged norm, the Court noted that: "Its content is a matter that is undeniably included within the right to social security: the amount of both public-service and other retirement pensions and invalidity and survivors' pensions is reduced – all realities that Article 63(3) of the CRP incorporate in social security. An intervention that restricts the 'quantum' of a pension thus affects rights of a social nature that are part of the set of legal 'institutes' that form social security, and it is consequently on the basis of this domain that the norms must be qualified". Taking this position as its starting point, the Court acknowledged that the legislator would not a priori be prohibited from amending the way in which the right to a pension is materialised and, taking any variation in economic or social circumstances into account, could change or even reduce its amount. Having said this, the Court then immediately went on to add that the legislator could not model pensions in an entirely discretionary way, in that it would always be bound by the content of the various constitutional principles and norms. Again quoting the Ruling: "(…) in the way in which it shapes the right to a pension at any given moment in time, the legislator is legally bound by constitutional norms and principles. As such, and despite an unequivocal acknowledgement that the legislator possesses the freedom to change the conditions and requisites for enjoying and calculating pensions, even [if it does this] in a more demanding direction, it must respect various limits imposed by the Constitution, namely those derived from the 'Estado de Direito' (state based on the rule of law) principle. In this way, the amendments the legislator wants to make must be based on justified reasons – particularly the system's financial sustainability – and cannot affect the social minimum and the principles of equality, the dignity of the human person, and the protection of legitimate expectations. Taking all this into consideration, the Court concluded that the cut in the amount of pensions provided for in the norm before it was capable of undermining the principle of the protection of legitimate expectations. After confirming the existence of both a situation of legitimate expectations for which the state could be said to be responsible and an investment based on those expectations by pensioners, the Court held that the fact that the measures were one-offs and only sacrificed the rights of pensioners affiliated to «Caixa Geral de Aposentações» (as opposed to those of all pensioners) weakened the argument that they were needed to pursue the public interest in the sustainability, inter-generational balance and convergence of the various social protection regimes. The Court therefore decided to declare the norm in question unconstitutional, on the grounds that it disproportionately affected the constitutional principle of the protection of legitimate expectations.

Notwithstanding this trend in its case law, we can also mention examples of decisions in which the Constitutional Court has played a preponderant role in affirming and operationalising fundamental rights with an economic or social nature. One paradigmatic case of this is the fundamental right to the minimum needed to ensure a decent standard of

living. This fundamental social right, which the Court has been developing from the principle of human dignity, has been taking on a key importance in the Court's case law in various fields – namely its decisions on whether or not income can be attached in order to satisfy third-party credit rights, and those on who is entitled to survivor's pensions. A good example of the latter type of decision is to be found in Ruling no. 296/2015, in which the Court deemed a legal norm under which foreign citizens had to have lawfully resided in Portugal for three years before they could be eligible for the right to the Social Inclusion Income (RSI) to be unconstitutional. Basing itself on the view that "(…) the RSI is a benefit that effectively implements the guarantee of a decent standard of living, which is in turn directly imposed by the need to respect human dignity", the Court held that the right to a benefit that safeguards a minimally decent life could be seen as an autonomous fundamental right constructed by conjugating the principle of respect for human dignity with the right to social security. Having arrived at this point, the Court went on to say that the principle whereby Portuguese and foreign citizens must be considered equivalent in terms of eligibility for the RSI could only be waived if there were a strong reason which justified differentiated treatment, and any restriction on foreigners should be limited to that needed to safeguard other constitutionally protected rights or interests. The Court found that these requisites were not met in the concrete case before it: "In short, after weighing everything up, we conclude that the imposition of a 3-year waiting period – which results in the denial of the grant of means of subsistence to a foreign citizen [who finds him/herself] in a situation of social risk before that period is up – is excessive, and intolerably conflicts with the right to a benefit that ensures the basic means of subsistence. With such a length, the defined waiting period constitutes a sacrifice that is disproportionate or overly burdensome compared to the advantage associated with the public-interest goals that establishing it seeks to achieve".

Analysis of the broadly diverse constitutional case law on the economic and social rights enables us to conclude that the Constitutional Court has consistently been proving that it does not advocate a judicially activist stance on the part of the constitutional jurisdiction. The fact is that it has displayed a special concern for the boundaries that separate the legislative and judiciary powers, accepting that the ordinary legislator enjoys a particular margin for manoeuvre when it comes to operationalising economic and social rights. In addition, the Court has been acknowledging that it may be possible for the extent of those rights to go backwards, on condition that the retrograde movement does not go below the minimum limits on the content of the right in question and does not undermine certain constitutional principles that may have consequences for the domain in which the rights apply – particularly the principles of proportionality, the protection of legitimate expectations, and equality.

2. How have the individual fundamental rights and political rights been developing on the basis of constitutional justice, since the Seville Conference?

As we discussed in the answer to the previous question, Title II of Part I of the Constitution of the Portuguese Republic enshrines a particularly comprehensive catalogue of 'rights,

freedoms and guarantees' (Articles 24 to 57). This Title is divided into three distinct Chapters: Chapter I covers personal rights, freedoms and guarantees; Chapter II addresses rights, freedoms and guarantees linked to participation in politics; and Chapter III deals with workers' rights, freedoms and guarantees. Since 2005 – the year of the Seville Conference – the Portuguese Constitutional Court has handed down a series of important decisions on these three categories of fundamental right.

Where the personal rights, freedoms and guarantees are concerned, paradigmatic examples include Ruling no. 101/2009 (in which the Court was asked to pronounce itself on the constitutional compatibility of a substantial number of solutions provided for in the Law governing Medically Assisted Procreation (MAP), including whether it is admissible to use MAP techniques in cases where there is a risk of transmitting non-genetic or non-infectious diseases, the absence of any age limit on recipients, the possibility of using MAP techniques to treat illnesses in third parties, the use of embryos in scientific research, the admissibility of heterologous procreation, the rule that donors should be anonymous, the regime governing filiation in heterologous reproduction, the absence of limits on creating embryos, pre-implant genetic diagnosis, the absence of any punishment for reproductive cloning, the admissibility of the nucleus transfer technique, and finally, the non-punishability of surrogate motherhood in cases in which no payment is made), Ruling no. 121/2010 (in which the Court confirmed the constitutional compatibility of the legal solution that allowed same-sex marriage for the first time), and Ruling no. 403/2015 (in which the Court said that a normative solution under which the State Intelligence Service was able to access the traffic data linked to private communications was unconstitutional, because it was in breach of the fundamental right to the inviolability of communications).

Turning to the rights, freedoms and guarantees related to political participation, illustrative examples include Ruling no. 287/2012 (in which, in line with its case law in previous decisions, the Court said that the legal solution whereby public officeholders convicted of a particular type of crime that entails special liability, such as treason, must lose their office does not violate the principle that criminal penalties cannot include automatic effects), and Ruling no. 480/2013 (in which, in an electoral case, the Court resolved a number of questions regarding the interpretation of the limit on the length of the terms of office of the chairs of the executive organs of local authorities, finding that the maximum of three terms provided for in the law was only applicable to holding office in the same local authority, inasmuch as this was the interpretation that best suited the exercise of the fundamental rights of access to elected public office, to participate in public life, and to a passive dimension of the right to vote).

Finally, with regard to workers' rights, freedoms and guarantees, we can again offer a number of paradigmatic examples in the shape of Ruling no. 632/2008 (in which the Court found a normative solution that lengthened the trial period in indefinite labour contracts unconstitutional on the grounds that it was in breach of the principle of proportionality), Ruling no. 474/2013 (in which the Court declared the unconstitutionality of a set of norms that generalised dismissals from the Public Service, because they violated both the principle of the protection of legitimate expectations and the guarantee of job security), and Ruling

no. 602/2013 (in which the Court considered an in-depth revision of the Labour Code and concluded that norms which made the requisites for abolishing jobs more flexible were unconstitutional, because they violated the prohibition on dismissals without just cause).

3. Advances made and challenges fulfilled in strengthening democratic states on the basis of constitutional justice, since the Seville Conference.

The Democratic 'Estado de Direito' (State based on the Rule of Law) is perfectly consolidated and stabilised in Portugal. The current Constitution of the Portuguese Republic has been in force since 1976 and is thus almost forty-two years old, while the Constitutional Court was created in 1983 and will celebrate its thirty-fifth birthday this year. As such, the principle of a Democratic 'Estado de Direito' which, in the light of the present Constitution (see Article 2, CRP), possesses the nature of a key constitutional principle, is today a completely entrenched and mature element of the Portuguese constitutional-law system.

To our mind, constitutional case law has not contributed to any backwards movements in the process of strengthening the Democratic 'Estado de Direito' in Portugal. On the contrary, the Court's role has been essential to the promotion and protection of this state model – a role that has fundamentally been fulfilled by means of the mechanism for reviewing the constitutionality of the norms that exist in the legal system. In this way, the Court has made a significant contribution to ensuring respect for the norms and principles enshrined in the Constitution and to defending and safeguarding citizens' fundamental rights.

Panel Five

Means of Communication, Internet and Social Networks / Media seen in the light of Constitutional Law.

1. Should the Ibero-American countries include access to the internet and social networks/media among the social rights enshrined in the Constitution?

2. Do the Ibero-American countries have adequate legislation for protecting human privacy and dignity with regard to the use of the internet and social networks/media and to the right to be forgotten?

3. How is the principle of the neutrality of social networks/media (net neutrality) relevant to constitutional justice and what is its relationship with the fundamental rights in Ibero-America?

1. Should access to the internet and social networks/media be included among the social rights enshrined in the Constitution of the Portuguese Republic (CRP)?

The guarantee of free access to public-use IT networks is enshrined in Article 35(6) of the CRP. Under the heading "Use of information technology", this norm is included in the Title on "Rights, freedoms and guarantees". This norm has been the object of substantial amendments, due to both the changeable nature of the matter and the need to adapt the content of these regulations to the Community norms and directives that have progressively entered into force in this field. Particularly relevant in this respect is Directive n.º 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (the 'Data Protection Directive'). In Portugal, recognition of the right of access to the internet in Article 35(6) was enacted under the 1997 constitutional revision.

As we know, in 2016, 'Resolution L.20' of the UN Human Rights Council required countries to ensure that "…the same rights that people have offline [are also] protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one's choice…". In addition, the Resolution calls on countries to create "…Internet-related public policies that have the objective of universal access and enjoyment of human rights at their core…" – i.e. as a fundamental right (accessible at http://www.un.org/ga/search/view_doc.asp?symbol=A/HRC/32/L.20).

The fact that internet access possesses the nature of a constitutional right, freedom and guarantee does not mean that it cannot also have the nature of a social right. To begin with, the Portuguese Constitution has never established a rigorous dichotomy between 'rights, freedoms and guarantees' and 'social rights'. It is possible to say that while "…there were rights that were truly 'rights of freedom' in both Title III ('Economic, social and cultural rights') and other parts of the Constitution […] Title II also implicitly contained rights that [did not possess that nature], inasmuch as when they were broken down they presented the typical nature and structure of social rights" (see Reis Novais, *Direitos de liberdade e direitos sociais na Constituição Portuguesa,* accessible at www.fd.unl.pt/docentes_docs/ma/jrn_ma_8782.doc).

Although we are in the presence of a fundamental right that is not expressly enshrined in Title III (now called "Economic, cultural and social rights and duties"), we should see it as a fundamental right with a dual nature: negative, as a 'right-freedom', and positive, as a right to see the state make due provision for a fact. When Article 35(6) of the CRP says that "Everyone is guaranteed free access to public-use information technology networks", it permits an expansive interpretation whereby the right of access to the internet must also be considered a social right. This is because the fact that internet access requires users to possess both knowledge and economic resources means the state must be under a duty to ensure that access to such services tends to become free for every citizen, and to establish public policies which reduce or do away with the digital exclusion that marginalises the poorest members of the population. The truth is that today, participating in social networks and accessing the internet form part of a person's identity and his/her insertion into society and community and relational life. The internet has also become an important tool for every citizen's personal, intellectual and vocational training, as well as a means of accessing certain services. The state is thus under a positive duty to allocate economic resources to achieving

the goal of generalising internet use. The right of access to the internet is both a right-freedom, in its role as a guarantee of the inviolability of a space for individual self-determination that enjoys direct, immediate applicability and is binding on public and private entities, and a social right, to the extent that it places the state under duties to provide material conditions needed to access social goods (which in turn makes this a right that is conditioned by that which is actually possible).

2. Is there adequate legislation for protecting the privacy and dignity of the human person with regard to use of the internet and social networks/media and to the right to be forgotten?

The internet is an important democratic instrument, in that it is a means of communication in which information is produced on a massive scale. However, it is also a source of forms of power, and is linked to both invasions of privacy and the abusive use of personal data. In these online transmissions of information contents, the freedom of expression does not always appear to remain within the boundaries that apply to it, and collisions with personality rights are commonplace.

Unlike most EU countries, in its constitutional text Portugal has chosen to expressly enshrine an autonomous fundamental right – the right to the protection of personal data, or to informational self-determination – rather than to opt for a model that incorporates protecting such data within the overall protection afforded to the privacy of personal life or to human dignity and the free development of personality. In Spain, the material grounds for the protection of personal data lie in Article 18 of the Constitution, whose first three paragraphs enshrine the right to honour, personal and family privacy and one's image, the inviolability of the domicile, and the right to the confidentiality of communications. Article 18(4) mandates the legislator to regulate IT use autonomously of the rights provided for in paragraphs (1) to (3). The Spanish Constitutional Court has stated that the fundamental right to the protection of personal data does not expressly result from the constitutional text, but is instead derived from Article 18(4) and possesses a content which differs from that of the right to personal privacy.

In Portuguese Law, the protection of private life is guaranteed by both constitutional and infra-constitutional protection, with the latter drawn largely from sources linked to European Union Law. One can identify various different protection-related guarantees in the Portuguese Constitution: under the heading "Other personal rights", Article 26 expressly recognises the right to the privacy of personal and family life; where criminal procedural guarantees are concerned, any evidence obtained by abusive intrusions into a person's private life, domicile, correspondence or telecommunications is also null and void.

Looking specifically at the use of the internet and social networks / media, here too the Constitution affords its protection, inasmuch as Article 35: enshrines the right of access to the subject's computerised data, the right to have such data corrected and updated, and the right to know what purpose they are intended to serve; prohibits the use of IT to treat data

regarding private life except with the data subject's express consent; and also forbids access to the personal data of third parties, except in exceptional circumstances laid down by law.

Article 35(1) of the Constitution guarantees that citizens must be protected in terms of the use of information technology. It does this by imposing a duty to legislate on the state, which is required to take legislative measures to ensure the complete fulfilment of each person's self-determination with regard to IT use. As such, it enshrines the right of access to and the rectification or cancellation of certain personal data, the right to the confidentiality of such data, and the right whereby certain data must not be treated. Each individual is entitled to decide by whom, when and under what conditions information linked to him/her can be used or made public, regardless of whether or not the facts in question concern the most essential core of the person's private life, are innocuous from that point of view, or are even held in high regard by public opinion.

On the infra-constitutional level, Directive n.º 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data has also been transposed into Portuguese Law, where it gave rise to Law n.º 67/98 of 26 October 1998.

25 May 2018 will see the entry into force of the so-called General Data Protection Regulation, which will replace the current directive and law. The new Regulation is designed to increase people's security in relation to the ways in which data are treated, as well as to impose more demanding requirements on enterprises when they handle and treat those data.

In Portuguese Law, undue access to personal data, the violation or destruction of personal data and the insertion of false personal data are criminally illicit acts punishable by a fine or imprisonment.

The Assembly of the Republic (Parliament) is currently discussing draft legislation that would criminalise the so-called practice of 'netshaming', albeit the crime would be associated with that of domestic violence, as is already the case in Brazil with its 'Maria da Penha Law'. All around the world, it has been felt necessary to criminalise the practice of 'porn revenge' – the use of intimate images of another person without his/her consent – whose victims are generally women and which constitutes a form of misogyny and gender violence that goes beyond the boundaries of the crime of domestic violence.

The Constitution of the Portuguese Republic does not make express provision for a right to be forgotten in the virtual world, but this fundamental right can be deduced from the constitutional norms that enshrine the right to personal identity, the free development of personality and the protection of personal and family life [Article 26(1), CRP], and the right to the protection of personal data [Article 35(4), CRP]. The Court of Justice of the European Union (CJEU) has already recognised the right to be forgotten in its Judgment of 13 May 2014, in the shape of a data subject's right to see information about his/her person cease to be associated with his/her name via a list of results displayed in the wake of a search based on that name, irrespective of whether or not the inclusion of the information in question in

the list of results harms the person concerned. The CJEU took the view that "(…) Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 are to be interpreted as meaning that, when appraising the conditions for the application of those provisions, it should inter alia be examined whether the data subject has a right that the information in question relating to him personally should, at this point in time, no longer be linked to his name by a list of results displayed following a search made on the basis of his name, without it being necessary in order to find such a right that the inclusion of the information in question in that list causes prejudice to the data subject. As the data subject may, in the light of his fundamental rights under Articles 7 and 8 of the Charter, request that the information in question no longer be made available to the general public on account of its inclusion in such a list of results, those rights override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in having access to that information upon a search relating to the data subject's name. However, that would not be the case if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of its inclusion in the list of results, access to the information in question".

3. What is the relevance of the principle of the neutrality of social networks (net neutrality) and what is its relationship with the Fundamental Rights?

Net neutrality is the principle which ensures that telecommunications operators which offer an internet access service cannot discriminate in terms of access to contents, and must treat all online traffic as equal, without discrimination, restriction or interference and without regard to its issuer/transmitter or receiver, content, application, service or attached equipment. Internet-access service providers cannot slow or block a web connection in accordance with the type of content, application or service the client is using or generating. This is the open internet principle. The latest European legislation seeks to defend both consumers and enterprises, above all those that are not large or important enough to impose themselves (e.g. SMEs).

In Portugal, this subject is governed by Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015, laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, and Regulation (EU) 531/2012 on roaming on public mobile communications networks within the Union. The stated aims of Regulation 2015/2120 are to establish common rules to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and related end-users' rights, and simultaneously to guarantee the continued functioning of the internet ecosystem as an engine of innovation.

The Regulation establishes the principle of neutrality, which it sees as the non-imposition of the use of a specific type of technology or the establishment of any discrimination that would favour it.

On the question of the compression of these rights, point (13) of the Regulation says that providers of internet access services may be subject to Union legislative acts, national legislation or judicial decisions (for example, related to the lawfulness of content, applications or services, or to public safety), including criminal law, requiring, for example, blocking of specific content, applications or services. However, any measures liable to restrict fundamental rights or freedoms can only be imposed if they are appropriate, proportionate and necessary within the context of a democratic society. This is the case of blocking or suppressing internet pages intended to disseminate child pornography – a measure the EU Member States are required to take under Directive 93/2011/EU of the European Parliament and of the Council of 13 December 2011.

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