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The portuguese human rights constitutional law

The human rights law

In Portugal human rights are entrenched in the Constitution of the Portuguese Republic, approved on the 25th April 1976. Notwithstanding the fact that the Portuguese Constitution has been amended several times (the last one, being the seventh amendment, was approved in 2005) its deep commitment towards human rights has remained unchanged.

The measure of that commitment can be easily realised if one looks at the place of human rights in the systematisation of the Portuguese Constitution.

Human rights are the subject matter of Part I of the Constitution with the title "Fundamental Rights and Duties". Part I has three Sections: Section I, "General Principles" (Articles 12 to 23); Section II, "Rights, Freedoms and Guarantees" (with a Chapter I, concerning "Personal Rights, Freedoms and Guarantees" and covering Articles 23 to 47; a Chapter II, regarding "Rights, Freedoms and Guarantees of Political Participation and covering Articles 48 to 52; and a Chapter III, related to "Rights, Freedoms and Guarantees of Worker", including Articles 53 to 57); Section III, "Economic, Social and Cultural Rights and Duties" (with three chapters concerning economic, social and cultural rights and duties respectively, from Articles 58 to 62, 63 to 72 and 73 to 79).

Two important and peculiar features of the human rights portuguese law, as specified by the Constitution, should be noted from the outset. The first one is the so called "open clause": according to Article 16, paragraph 1, of the Constitution, the fundamental rights contained in it shall not exclude any other fundamental rights provided for in the laws or resulting from applicable rules of international law; furthermore, according to paragraph 2 of the same article, the constitutional and legal provisions relating to fundamental rights shall be construed and interpreted in harmony with the Universal Declaration of Human Rights.

The second important feature of the portuguese human rights constitutional law is the applicableness of the constitutional rules expressly related to "rights, liberties and guarantees" to fundamental rights of a similar kind, as foreseen in Article 17. According to this article the rules that apply to human rights contained in Section II of Part I can be extended to those constitutional rights that may be considered analogous to them. One of most important

provisions that on the basis of Article 17 applies not only to human rights contained in Section II of Part I, but to fundamental rights of a similar kind is Article 18, which concerns the issue of the restraint of "rights, liberties and guarantees" and their direct applicableness.

Portugal is a part to the European Convention of Human Rights since the 22nd November 1976. If one compares the catalogue and shaping of human rights in the Portuguese Constitution with the European Convention one must conclude that the first is generally more extensive and more detailed than the second. On the other hand, as was mentioned, the "open clause" of Article 16, paragraph 1, acknowledges rights conferred to the individual by international law, including, of course, the European Convention of Human Rights.

As a consequence there are a number of human rights which are essentially contemplated in the Portuguese Constitution and not (or, at least, not so completely) in the European Convention. As examples the following ones can be pointed out:

(i) in the domain of personal, political and workers rights, liberties and guarantees, the right to resist (Article 21); the right to personal identity, personality development, civil capacity, citizenship, good name and reputation (Article 26); the rule establishing that no sentence shall involve, as an automatic consequence, the loss of any civil, occupational or political rights (Article 30, paragraph 4); the rules concerning *Habeas corpus* (Article 31); the rights related to the use of computerised data (Article 35); the special emphasis on the right to found a family and to marry (Article 36); the freedom to choose an occupation and enter the civil service (Article 47); the rules concerning the right to petition and the right of *actio popularis* (Article 52); the consecration of the principle of security of employment and prohibition of dismissals on political or ideological grounds (Article 53); the detailed ruling of trade union freedoms and rights of trade unions and collective agreements (Articles 54 and 56); the discipline of the right to strike and prohibition of lock-outs (Article 57);

(ii) in the domain of economic, social and cultural rights, the right to work and rights of workers (Articles 58 and 59); the consumer rights (Article 60); the safeguards of private enterprise, co-operatives and worker-management (Article 61); the rules concerning social security, health and housing (Articles 63 to 65); the environment and quality of life (Article 66); the rules concerning the family, fatherhood and motherhood and childhood (Articles 67 to 69); the rules related to youth, citizens with disabilities and old people (Articles 70 to 72); the rules regarding cultural enjoyment and creativity (Article 78), and physical education and sport (Article 79).

The number of rights contained in the European Convention of Human Rights without express equivalent in the Portuguese Constitution is much smaller: the prohibition of debt incarceration (Article 11 and Article 1 of the Fourth Additional Protocol to the European Convention of Human Rights) and the right to the knowledge of the language in criminal procedure [Article 14, paragraph 3, *a)* and *b)*, and Articles 5, paragraphs 2 and 6, paragraph 3, *a)* e *e)*], of the European Convention). However, according to Article 16 of the Portuguese Constitution, these rights are also acknowledged by our legal order.

As specified by Article 18, paragraph 1, of the Portuguese Constitution, the constitutional provisions relating to rights, freedoms and guarantees shall be directly applicable, and binding on, both public and private bodies. Article 18, which provides for the direct applicability and unconditionally binding force of the rights, liberties and guarantees enumerated in Part I, Section II, also applies to rights of a similar kind, as stated by Article 17.

Rights considered as of a "similar kind" include: access to law and effective judicial protection (Article 20); the right to resist (Article 21); the right to present complaints to the Ombudsman (Article 23); the right of workers to remuneration for their work, to a limit on the length of the working day, to a weekly rest day and regular holidays with pay, to assistance in case of involuntarily unemployment (Article 59); the right to private enterprise, co-operatives and worker-management (Article 61); the right to private property (Article 62); the right to a social minimum (Articles 1, 2 and 63); the right of women to an adequate period of leave from work without loss of remuneration and other privileges (Article 68); the right to free basic education [Article 74, paragraph 2 *a)*]; the right of owners of estates that are compulsory acquired to appropriate compensation and to retain an area that is sufficiently large to enable the land to be utilised in a rational and viable way (Article 94, paragraph 1); the right to registration of electors (Article 113, paragraph 2); the right to present nominations (Articles 124); the rights and guarantees of citizens towards the Public Service (Article 268); the right of public officials to be heard and to present a defence in disciplinary proceedings (Article 269, paragraph 3).

It should be noted that in Portugal, as in several other countries, it is not quite accurate to envisage the problem of the range of human rights' applicableness simply along the lines of the distinction between *erga omnes* relevance or enforcement only against the state. Leaving aside some more theoretically discussions, there seems to be in Portugal a practical consensus around the following points:

a) Some human rights are foreseen by the Constitution in such a way as to be operative only against the State: for example the guarantees concerning *Habeas corpus* and criminal procedure (Articles 31 and 32) and the right to asylum (Article 33);

b) Some other fundamental rights only apply in the relations among private persons: the right to reply and to make corrections (Article 37, paragraph 4), the right of journalists to elect editorial councils, in accordance with the law [Article 38, paragraph 2, *b)*], the right not to join an association or be compelled to remain in it (Article 46, paragraph 3), the right to strike (Article 57), and some cases in which the right to *actio popularis* applies (Article 52, paragraph 3);

c) Provisions relating to rights, liberties and guarantees are immediately binding on the legislative body whenever it makes private law norms and on judges when they enforce them; this binding effect of human rights in the activity of the legislator and of the courts is specially relevant in matters concerning the principle of equality (Article 13);

d) The applicableness of all human rights in relations between private persons should be admitted in cases in which one of those persons disposes of a disproportionate power in such a way as to enable her to take the traditional place of the state or public bodies as the addressees of human rights;

e) A central core of personal autonomy must be acknowledged in the actions of every individual as an irreducible limit to the direct relevance of human rights among private persons.

Enforcement of the human rights law

In Portugal only the judicial institutions (courts) are trusted with jurisdiction (in the sense of the latin word *juris dictio*, meaning "to say the law" or to decide on legal matters) to review complaints involving violations of human rights and vested with jurisdiction to adjudicate upon the existence of the necessity or need for limitation.

As specified by Article 202 of Portuguese Constitution "1**.** The courts are the organs with supreme authority that have the power to administer justice in the name of the people.

2. In administering justice, the courts are under a duty to safeguard the rights and interests of citizens that are legally protected, to punish breaches of democratic legality and to resolve public and private disputes.

3. In performing their functions, the courts are entitled to the assistance of other authorities.

4. The law may provide for alternative methods of dispute resolution that do not involve the courts."

The most important aspect of Portuguese system is the fact that, according to Article 204 of Portuguese Constitution, “in matters brought before them for decision, the courts shall not apply any rules that contravene the provisions of this Constitution or the principles contained there”.

Every court (judicial, administrative and fiscal) is vested with jurisdiction to review complaints involving violation of human rights. Moreover, every single judge is, in itself, a sort of “constitutional court”, since he must control the constitutionality of the rules that are applicable to the matters that are brought before him. If he thinks that those rules contravene the provisions of the Constitution he must refuse to apply them. However, the decisions in constitutional issues of other courts are not definitive, since there is always the possibility to appeal to the Constitutional Court.

The Constitutional Court is the only authority vested with ultimate jurisdiction to review of constitutionality, so that Article 221 of Portuguese Constitution states “The Constitutional Court is the court that has the specific power to administer justice in matters involving questions of legal and constitutional nature.”

It is need to be mentioned that Portugal does not have mechanisms like the German *Verfassunsgsbeschwerde* or the Spanish *recurso de amparo*. Thus, the Portuguese Constitutional Court – as well as all the other Portuguese courts, which are vested with the power of judicial review of legislation, being their decisions subject to appeal to the Constitutional Court – only controls the constitutionality of legal norms, not the concrete decisions involving violations of human rights. For instance, it does not control the constitutionality of decisions of other courts *qua tale*, but only the constitutionality of the legal norms applied – or in which the application is denied on the grounds of its unconstitutionality – in those decisions, nor does it control political decisions as such, or administrative acts. The Portuguese system of judicial review is based on a pure control of legal norms, even if the Court has a very broad concept of «legal norm» when it defines its own competence of control.

It must also be emphasised that there are two main mechanisms of control: the concrete control and the abstract one. The concrete control is based in two main types of appeals: those against decisions refusing to apply a legal rule on the ground of unconstitutionality; and those against decisions applying a legal rule, the constitutionality of which was challenged during the proceedings. The abstract control, on the other hand, includes the anticipatory review of constitutionality and the general (or *ex post*) review of constitutionality, in which the requests can be submitted to the Court by several entities, such as The President of the Republic, the President of the Assembly of the Republic, the Prime Minister, the Ombudsman, the Attorney-General or one-tenth of the Deputies of the Assembly of the Republic.

We can say that the Constitutional Court is the only authority of the country vested with ultimate jurisdiction to adjudicate upon the existence of the necessity for the limitation of a right, liberty or guarantee contained in Section II Part I of the Constitution, or a right of a similar kind, as previously defined.

A limitation is only justifiable in terms of constitutional law if it is necessary in order to safeguard other rights or interests protected by the Constitution. This necessity is evaluated in terms of the principle of proportionality.

According to the Constitutional Court the principle of proportionality can be unfolded in three more specific principles: (i) the principle of adequacy, according to which limitations to rights, liberties and guarantees must be recognised as a mean to the pursuit of the ends envisaged, with the safeguard of other constitutional rights or goods involved; (ii) the principle of exigency, which requires that restrictive measures must be demanded in order to obtain the ends envisaged, as there are no other restrictive means available for achieving the same end; (iii) the principle of just measure, or proportionality in the strict sense, according to which no excessive measures can be adopted in order to obtain the ends envisaged.

Other substantial limits to restrictive laws of rights, liberties and guarantees are the general and abstract character of the legislative measure, the prohibition of retroactive effect and the safeguard of the essential core of the restricted right, as mentioned above.

It must be taken in account that in Portugal the system of human rights (or fundamental rights, considered by commentators as the rights that are explicitly or implicitly protected by the Constitution) is based on a fundamental distinction between the «classical» fundamental rights («rights, freedoms and guarantees», to use the precise language of Portuguese Constitution), like the right to life or the right to personal integrity, and the so-called «second generation rights» («economic, social and cultural rights» as the Constitution call them), like the rights of people with disabilities or the right to public health care. The strict regime described above applies only to «rights, freedoms and guarantees». In a certain way, the social rights have a less rigid protection by the Portuguese Constitution.

There are, notwithstanding, some rules that in a certain way «soften» the sharpness of that distinction between «classical» and «second generation» rights. According to Article 17 of the Constitution, «the general system of rights, freedoms and guarantees comprises those set out in Section II and fundamental rights of a similar kind». Therefore, if a «social right» has a «similar kind» of rights, freedoms and guarantees it will have the high level of protection granted to these rights, namely the protection granted by Article 18, which rules, as we have seen, that

limitations to fundamental rights must be imposed only by law of the Parliament or by a decree-law of the Government following an authorisation of Assembly of the Republic. In any case, it is absolutely forbidden to restrict fundamental rights through other means, such as administrative regulations or decisions taken by administrative bodies.

The preemptive control

The Portuguese Constitution has, indeed, a special provision for preemptive control of any laws, with no exception. Thus, including laws importing limitations to human rights. According to Article 278, paragraph 1, of the Constitution of Portuguese Republic, the President of the Republic may request the Constitutional Court to undertake an anticipatory review of the constitutionality of any provision of an international treaty that has been submitted to the President for ratification, or of an instrument sent to the President for promulgation as a law (from the Parliament) or a decree-law (from the Government), or of an international agreement where the decree giving approval has been presented for the signature of the President. And, according to Article 279, paragraph 1, if the Constitutional Court rules that a provision of a decree or international agreement is unconstitutional, the instrument must be vetoed by the President of the Republic or the Minister for the Republic, as the case may be, and shall be returned to the organ that approved it. The decree may not be signed or promulgated unless the organ that approved it deletes the provision ruled to be unconstitutional or, as appropriate, confirms it by a majority of two-thirds of the Deputies present, provided that the majority exceeds an absolute majority of the Deputies entitled to vote.

The abstract review and the concrete review of legislation

The main instrument of control of the constitutionality of laws importing limitations to human rights is the sequential or remedial one, which covers either the abstract review or the concrete review of legislation. From a statistic point of view, the concrete control is, far large, the main instrument of control of the constitutionality of legal limits to human rights. In this field, the Constitutional Court has jurisdiction to hear appeals against any of the following court decisions:

(a) Decisions refusing to apply a legal rule on the ground of unconstitutionality;

(b) Decisions applying a legal rule, the constitutionality of which was challenged during the proceedings. The guarantee of human rights is assured through the mechanism of the appeal, since the Portuguese Constitution doesn't have instruments similar to the German *Verfassungsbeschwerde* or the Spanish *recurso the amparo*.

The impact of the jurisprudence of the European Court of Human Rights

There is quite a considerable impact of the jurisprudence of international and supranational courts, namely of the ECHR, on Portuguese constitutional case-law. However, ECHR decisions' are usually followed only in specific matters, such as guaranties of defence during criminal procedure and limitations on fundamental rights (especially on the right to freedom, right to privacy and to respect for family life).

In what concerns the guaranties of defence during criminal procedure, the Portuguese Constitutional Court shares the ECHR's views on the importance of the impartiality of the courts and of the due process of law. The Portuguese constitutional jurisprudence defends the need of equality of arms and of respect for the right of the accused to make full answer and defence, in accordance not only to the Portuguese Constitution (Article 20, paragraph 4), but also to the European Convention of Human Rights (Article 6, paragraph 1).

The right to face an independent and impartial court, established by law, is one of the guaranties attached to the right to due process, as the ECHR has ruled in many cases.

The Portuguese Constitutional Court has also adopted this position, underlining the importance given to appearances and the increased sensitivity of the public to the fair administration of justice, following the decisions in ECHR's cases.

Moreover, both jurisprudences (Portuguese and European) share the understanding that the concept of impartial court implies the existence of both an objective and a subjective dimension, as it has been stated in ECHR's cases Golder *v.* United Kingdom (1975) and Saraiva de Carvalho *v.* Portugal (1994).

Furthermore, the Portuguese Constitutional Court has highlighted, after ECHR's decisions, the fact that the right to due process necessarily implies the right to make full answer and defence. The connection between the former and the need to ensure equality of arms and an adequate participation of the accused in the criminal process was also underlined by our constitutional case-law, reaffirming what the ECHR had already stated.

Still regarding the problem of the guaranties of defence, the Portuguese Constitutional Court has followed the ECHR's decisions in matters such as the need of providing the accused, for him to have the benefit of a fair trial, free assistance of an interpreter for the translation or interpretation of all the documents or statements in the proceedings against him.

Moreover, the Portuguese case-law also reaffirms, after ECHR's decisions the right of an individual deprived of his liberty to be informed promptly of the reasons for his being taken into custody, which constitutes a safeguard of personal liberty, of great importance in any democratic system founded on the rule of law.

Other than the guaranties of defence during criminal procedure, and as we have said before, the Portuguese Constitutional Court has closely followed the ECHR's jurisprudence on limitations on fundamental rights. A good example of this is our national case-law on the restrictions on the right to family life due to the expulsion of foreigners. On this matter, the Constitutional Court has frequently invoked Article 8 of the European Convention of Human Rights to limit the application of the Portuguese legislation on the expulsion of foreigners. Following ECHR's decisions in cases Moustaquim *v.* Belgium (1991) and Beldjoudi *v.* France (1992) – among many others – it has been stated that the expulsion of foreigners cannot cause, either in a direct or indirect manner, the separation of parents and children or the subsequent expulsion of the children (minors and at the parents' charge), in order to follow the expelled parent.

Another matter in which the impact of the ECHR's jurisprudence on Portuguese case-law is quite remarkable is the right to privacy. In fact, the Constitutional Court has imposed several demands in order to consider legal the interception of telephone calls during a criminal investigation, namely authorisation and following by a judicial authority. To justify his position, the Court mentioned, among other arguments, the ECHR's decisions in cases Valenzuela Contreras *v.* Spain (1998), Klass and others *v.* Germany (1978), Malone *v.* United Kingdom (1984), PG and JH *v.* United Kingdom (2001), Prado Bugallo *v.* Spain (2003), Kruslin *v.* France (1990) and Huvig *v.* France (1990).

Regarding the right to liberty, the Constitutional Court has closely followed the ECHR's jurisprudence to establish a distinction between deprivation of liberty, within the meaning of Article 5 of the European Convention, and restrictions on liberty of movement and freedom to choose one's residence. It has been said that there is a difference of intensity between the two, to be evaluated having in mind all the factors of a concrete case, taken cumulatively.

The Portuguese Constitutional Court has also invoked the ECHR's jurisprudence on forced or compulsory labour. Resorting to the European Court's decisions in the case Van der Mussele *v.* Belgium (1983), our national case-law has underlined the fact that one has to regard to all the circumstances of a case in order to determine whether a service required of an individual falls within the prohibition of compulsory labour. Furthermore, it is important to bear in mind that the person's prior consent is not, in itself, sufficient to consider that the required work is not

compulsory, because it can have been determined by the menace of a penalty or comparable risks. Therefore, and as it has been stated, a broader evaluation has to be done.

The enforceability and implementation of decisions of the constitutional court on issues bearing on human rights

The enforceability of the Constitutional Court's decisions must be considered in a different way in concrete and in abstract control.

a) As far as the concrete control is concerned, the implementation of the decisions of the Court depends solely – but totally – on the attitude adopted by the courts that have taken the decisions submitted to Constitutional Court. The Court does not have the power to assure *ex officio* that its decisions are well applied by other courts. This includes all the decisions of the Constitutional Court, including those who deal with human or fundamental rights. And the citizens, it must be said again, do not have direct access to the Court in order to protect their own rights. A citizen must previously file a complaint in other courts and then, through the mechanism of the appeal, obtain access to the Constitutional Court.

It must be said that there is a very high level of general compliance to the Constitutional Court decisions by the other courts. It is very difficult to measure this level of compliance, but some empirical studies have shown that it's very high.

b) Considering the abstract control the effect of constitutional decisions are much more effective.

In prior review cases, when the Court pronounces a rule unconstitutional, the President of the Republic is obliged to veto the text in question and return it to the body that passed it, whereupon the latter must abide by the Court's decision.

If the text is altered by the body that passed it and the rule or rules that were deemed unconstitutional are removed, or, in the case of the Assembly of the Republic, despite the ruling that it is unconstitutional the text is confirmed by a qualified two-thirds majority (Article 279 of the Constitution), the President of the Republic is then able to enact or sign it. This does not prevent the Constitutional Court from holding that such rules are unconstitutional later on, as part of other forms of reviewing constitutionality.

At the same time, if the text is reformulated and the alterations are not just limited to the removal of the rules that the Constitutional Court has judged unconstitutional, the President of

the Republic, as appropriate, can request a new prior review of any of the rules it contains [Article 279(3) of the Constitution].

In successive abstract review cases the Constitutional Court decides whether each rule that is submitted to it is (totally or partially) unconstitutional, or is not unconstitutional.

In the event that the Constitutional Court concludes that one or more rules which it has been asked to review are unconstitutional, its decision possesses generally binding force. This means that the rule is eliminated from the legal system and can no longer be applied, be it by the courts, the public administration, or private individuals. Some of the specific problems raised by this system are addressed and resolved by Article 282 of the Constitution.