

PORTUGAL

CONSTITUTIONAL COURTS AS "POSITIVE LEGISLATORS" *

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I. Brief description of the judicial review method applied in Portugal

The most important aspect of Portuguese system of control of the constitutionality of legal norms 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 the Constitution. 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."

* Report drafted for the XVIII International Congress of Comparative Law, organized by the International Academy of Comparative Law, Washington, July 25-31, 2010

It must be mentioned that Portugal does not have mechanisms like the German *Verfassungsbeschwerde* 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 – controls only the constitutionality of legal norms, not the concrete decisions involving alleged violations of the Constitution. For instance, it does not control the constitutionality of decisions of other courts *qua tale*, but only the constitutionality of the legal norms (or one interpretation of them) applied in those decisions, or in which the application is denied on the grounds of its unconstitutionality. The Portuguese system of judicial review is based on a pure control of legal norms, even if the Court has a 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 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.

The preemptive control

The Portuguese Constitution has, indeed, a special provision for preemptive control of any laws, with no exception. 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. 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 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 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 citizens 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 (on this case, the appeal is mandatory to the Attorney-General);
- (b) Decisions applying a legal rule, the constitutionality of which was challenged during the proceedings.

The enforceability and implementation of decisions of the Constitutional Court

The enforceability of the Constitutional Court's decisions must be considered in

a different way in concrete and in abstract control.

As far as the concrete control is concerned, the implementation of the decisions of the Court depends solely – but totally – on the conduct adopted by the courts that have taken the decisions submitted to Constitutional Court. This 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. The citizens, it must be said again, do not have direct access to the Court in order to protect their own rights. They must previously file a complaint in other courts and then, through the mechanism of the appeal, obtain access to the Constitutional Court.

Nevertheless, 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 is very high.

Considering the abstract control, the effect of constitutional decisions is quite 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.

The President of the Republic will be able to enact or sign it only if the body that passed it alters the text or if the Assembly of the Republic confirms the text by a qualified two-thirds majority (Article 279 of the Constitution). This does not prevent the Constitutional Court from holding that such rules are unconstitutional later on through abstract successive review or concrete review.

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 (total or partially) unconstitutional, or is not unconstitutional.

In the event that the Constitutional Court concludes that one or more rules 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 by the courts, the public administration or private individuals.

II.

1. Portuguese Constitutional Court as a *negative legislator*

The constitutionality review system established in the Portuguese Constitution is, as stated before, a mix of the concentrated method of judicial review (European model) and the decentralized or diffused method of judicial review (American model) ¹.

The starting point in explaining the role of Portuguese Constitutional Court is that it is entrusted with a control function with a *negative* nature, not participating in the active lawmaking decision nor ordering another authority to act. The Court's power is to ascertain and declare whether the norm is in accordance with, or in contravention of, the provisions and principles of the Constitution. That means it possesses a *cassatory* function and restricts it self to annul norms that do not comply with the Constitution.

But ahead of such premise, the Constitutional Court plays a role not entirely defensive, but also a role in the creation of the legal order, even if we cannot regard its decisions as constituting a genuine source of law. In its position of "supreme interpreter" of the Constitution, the Court, on the one hand makes explicit the principles and mandates implicit in the Constitution and specifies the meaning of broad constitutional principles such as *equality*, *proportionality* or *due process of law*, and, on the other hand, establishes a way by which to interpret and harmonise precepts in the Constitution which may appear to be in conflict or even unrelated to each other.

¹The Portuguese mixed system is pointed out as deviating significantly from the European model of concentrated judicial review – see ANDRÉ ALEN/ MICHEL MELCHIOR, "The relations between the Constitutional Courts and the other national courts, including the interference in this area of the action of European courts, General Report", *Conference of European Constitutional Courts, XIIth Congress*, Brussels, May 2002; MARIA LÚCIA AMARAL, "Problemas da *Judicial Review* em Portugal", *Themis, Revista da Faculdade de Direito da UNL*, Ano VI, 10,2005,67/90, 70.

Though the Court cannot act as substitute of the legislator or of the government on policymaking, the constitutional case law has a positive impact in providing general criteria and guidance for the acts of public powers and lower courts and an effective influence in the law making process.

In conclusion, the Portuguese constitutional system cannot be fully understood if it does not include the *acquis formed by the constitutional case law*².

2. Powers of the Court and effects of constitutional review decisions

As a court, the Constitutional Court shares the characteristics common to all courts, namely, its decisions are binding on every other authority. But unlike the other courts the Constitutional Court plays a specific role in the constitutional system and its composition and responsibilities are laid down directly by the Constitution itself (article 223). Besides its leading role as "guardian" or ultimate guarantor of the Constitution, the Court has unique powers in relation to the President of The Republic³, national and local referenda⁴, political parties⁵, political officeholders and elections.

All procedures concerning the constitutionality review begin with the submission of a request addressed to the Constitutional Court. Abstract control procedures must be laid down by a selected list of officials and entities mentioned above. Concrete control procedures have to be brought by the litigants in a pending judicial proceeding in which such norm was applied or refused to be applied on grounds of unconstitutionality (it should be noted that the procedure followed in the concrete control is different in most European countries. In the later, the judge halts the judicial

² Wording from MARIA LÚCIA AMARAL, "Problemas da *Judicial Review* em Portugal", *cit.*, 88.

³ In proceedings involving the death, permanent physical incapacity, temporary impediment, removal from office or dismissal of the President of the Republic.

⁴ The Court verifies the constitutionality and legality of draft referenda and hears appeals concerning alleged irregularities during the voting.

⁵ Such as registration of new parties or coalitions and application of fines to political parties.

proceedings *a quo* and raises the question of the law's possible unconstitutionality before the constitutional court).

The Court can only declare the unconstitutionality of rules in relation to which a review has been requested, but it can do so on the grounds of constitutional rules or principles other than those whose breach was alleged (articles 51(5) and 79-C of the Law Governing the Constitutional Court).

Along with decisions of a procedural nature (chiefly as to whether or not to admit a request), the Constitutional Court issues two types of ruling: it either pronounces the (total or partial) unconstitutionality of the rules submitted to it or does not pronounce such unconstitutionality. There are, however, some (infrequent) decisions that do not fit in with this dualism, namely, when the concrete norm under review is upheld by the Constitutional Court as compatible with the Constitution but only based on a certain interpretation, excluding other variants interpreting the norm as unconstitutional, as explained hereafter.

The effects of a decision pronouncing the unconstitutionality of a rule vary depending on the type of procedure⁶.

In *prior control of legislative drafts* the Court's decision declaring the unconstitutionality of a rule can be overcome by a special vote of the competent legislative organ, as pointed out before. However, until now there has been but one case in which the Court's decision was prevailed over⁷. As far as the Assembly of the Republic is concerned it has always deleted or changed the wording of those draft norms declared to be unconstitutional in order to meet the terms of the Court's decision. Still, this is *law in action* not imposed by written law.

⁶See on this subject Replies to the questionnaire on the execution of constitutional review decisions (Portugal) on www.venice.coe.int

⁷In Ruling n.º 190/1987 the Court upheld the unconstitutionality of all norms of a draft regional legislative decree, which was subsequently vetoed by the Representative of the Republic. However the Legislative Assembly of Azores confirmed it maintaining the exact same norms, voted by the majority establish in article 279(2) of the Constitution. After its entering in force, at the request of the Attorney-General, the Court held unconstitutional such regional legislative decree with general binding force (Ruling n.º 151/1993).

In *successive abstract review* of legislation if the norm is declared contrary to the Constitution it is considered null and void and ceases automatically to produce any effect and the other courts and public or private entities should act in conformity, meaning such norm shall no longer be applicable. In this regard, the Court's decisions are *self-executing*.

Such declaration of unconstitutionality with generally binding force shall take effects as of the moment at which the rule declared unconstitutional came into force (*ex tunc* effects), with the exception of the cases protected by *res judicata* principle (article 282 of the Constitution).

When required for the purposes of legal certainty, reasons of fairness or an exceptionally important public interest, the grounds for which shall be given, the Constitutional Court may rule safeguarding the effects that were produced by the norm until the decision of the Court (*ex nunc* effects) (article 282(4) of the Constitution). The Constitutional Court often limits the effects of the declaration of unconstitutionality with general binding force, namely establishing that it will only produce effects from that date on, which is from the date of the publishing of its decision in the official journal (*Diário da República*). The Court has never postponed the effects of its ruling by safeguarding effects produced after the declaration of unconstitutionality (and according to the prevailing opinion on this subject, the effects of annulment could not be postponed).

The declaration of unconstitutionality with general binding force has "negative" force of law, since it annul directly the unconstitutional rule. Furthermore, the legal provisions which had been amended or repealed by the norm declared unconstitutional are revived from the date on which the decision of the Constitutional Court becomes effective, unless the Constitutional Court determines otherwise (article 282 (1 and 4) of the Constitution).

The Portuguese review of constitutionality can be said to be one-step ahead of the "negative legislator" model given that it grants the Constitutional Court the power to limit *ex tunc* effects of unconstitutionality decisions and consequently to bound the

revalidation of prior legal provisions.

Decisions taken in the *concrete review of constitutionality* only have effects upon the case where the constitutionality issue was raised (*inter partes* effects). The decision on the appeal determines *res judicata* regarding the question of unconstitutionality. As a result the court whose decision was submitted to Constitutional Court must comply with the latest ruling (it must review the case taken in consideration the decision on the constitutional issue) but only in that specific case. In other similar cases, no court is submitted to such ruling. The Constitutional Court itself may decide differently when reviewing the same norm in a different procedure of concrete review of constitutionality (this type of appeal is heard in sections of five Justices, except when the President of the Constitutional Court decides that the case should be heard in plenary session because this is necessary in order to avoid conflicting jurisprudence, or when the nature of the issue at stake justifies it (Article 79-A of the Law Governing the Constitutional Court).

Still, when the same norm has been deemed unconstitutional in three different concrete cases, the Public Prosecutor's Office may initiate an abstract review procedure that allows the Constitutional Court to declare the unconstitutionality of such norm with *erga omnes* effects.

3. Interpretation of statute in harmony with the constitution

Article 80(3) of the Law Governing the Constitutional Court provides that the judgement of unconstitutionality in concrete review procedures can be founded on a particular interpretation of the rule alleged unconstitutional. In other words, the Constitutional Court can determine a *conform-interpretation* of the rule in order to avoid any unconstitutionality, and the court *a quo* will be bound by it, having to apply such interpretation of the norm in the case in question.

The Constitutional Court has set that *conform-interpretation* in rare cases. For

instance in Ruling n.º 35/2008⁸ the Court puts together a unique interpretation of several norms concerning the expenses of judicial proceedings and declares it to be the only one to comply with the Constitution. Also in Ruling n.º 651/2005 the Court avoids a judgement of unconstitutionality by determining a certain interpretation of a rule concerning secondary liability for payment of administrative penalties prescribed in the Highway Code (*Código da Estrada*).

In both those cases, the *conform-interpretation* set in the Court's decision is the only one applicable by the court *a quo*. Moreover, other courts may be inclined to carry out such *conform-interpretation* in similar cases.

Some legal doctrine argues that the Constitutional Court should not have the supremacy to issue interpretations that are binding to other courts and that the latter should maintain the power to interpret ordinary law by themselves⁹.

4. Manipulative and additive decisions

As mentioned before the Court has important powers in what concerns the temporal effects of the declaration of the unconstitutional character of norms and the revalidation of prior legal provisions. It is in the Court's power to modify the effects of such declarations by establishing *ex nunc* effects instead of *ex tunc* effects.

Furthermore, in some exceptional cases the Court's decisions are considered to have *normative* effects.

A special situation may arise under the Constitution's equal protection clause (principle of equality), when a norm is unconstitutional for granting favours to certain groups of persons while excluding (or omitting) others in violation of an equal protection clause, this exclusion (omission). The Court may then, as the case may be, declare de norm unconstitutional and declare that non-inclusion of the relevant group is unconstitutional.

⁸ All Courts decisions can be found on its web site: www.tribunalconstitucional.pt

⁹ GOMES CANOTILHO, *Direito Constitucional e Teoria da Constituição*, 7.³ ed., Coimbra, 2003, 1313; RUI MEDEIROS, *A decisão de inconstitucionalidade*, Lisboa, 1999, 381.

The Court has not the power to admonishing the legislator to bring about an equal solution for the excluded group. However, in some rare cases the Court's ruling by itself made possible the inclusion of certain groups under the scope of rules that omitted or excluded them. For instance in Ruling n.º 449/87, the Court held unconstitutional a norm that established different allowances for the widower and the widow in case of death caused by work accident. Furthermore, it stated that the only solution that would comply with the Constitution would be one that granted equal treatment to both, meaning that the favour granted to the widow should be extended to the widower.

In Ruling n.º 359/91 the Court considered and ruled on a request from the Ombudsman for not only a successive abstract review of the rules laid down by the Civil Code concerning the transmission of the position of the tenant in the event of divorce when interpreted as not applicable to *de facto* unions, even if the couple in question has underage children, but also a review of the "unconstitutionality by omission of a legislative measure which expressly states that those rules are applicable, with the necessary adaptations, to *de facto* unions of couples with underage children". In this decision the Court issued a declaration with generally binding force of the unconstitutionality of that interpretation for breaching the principle of non-discrimination against children born outside wedlock, but decided against the existence of unconstitutionality by omission. Because of the Court's decision, the said rules of the Civil Code were hereinafter understood as including such *de facto* unions.

The related above decisions can be considered *additive decisions*¹⁰, since its implementation changes the scope of legislative rules regardless of any amendment to the wording of such rules. It should be underlined, though, that the Court's ruling does not put up a norm *ex nihilo*. Those decisions only put forward a solution imposed by the Constitution provisions and principles by extending a rule already chosen by the legislator¹¹.

¹⁰Acknowledging the possibility of *additive decisions* under certain circumstances see CARLOS BLANCO DE MORAIS, "Sobre o conteúdo possível das sentenças aditivas constitucionalmente obrigatórias" on www.icjp.pt/estudos

¹¹ See, RUI MEDEIROS, *A decisão cit.*, 504

5. The *impact* of constitutional case law

In its twenty-five years of existence the Court's ruling has proved to have consequences other than those standard effects pointed out.

Even though the Constitutional Court does not play a part in the law making process, many amendments made to existing legislation are the result of its ruling, either to incorporate or to set aside the Court's ruling on the subject.

An example of the former, among many others, is Ruling n.º 23/2006, that held unconstitutional, with general binding force, a norm of the Portuguese Civil Code concerning the deadline for filing court cases on the investigation or paternity and maternity. Later such norm was modified to provide an extended time limit (Law 14/2009).

Sometimes the legislator acknowledges this influence by alluding to Constitutional Court's ruling while summarizing the intention of the legislature in passing the measure. An illustration is the preamble to Decree-Law 64-A/89 (regarding termination of labour contract) in which Ruling n.º 107/88 (taken in a prior review case) is referred to as giving *bounding guidelines*.

Even some *amendments to the Constitution* were a result of constitutional case law. That is the case of the wording of article 33(4) of the Constitutions concerning the extradition for crimes that are punishable under the applicant state's law by a sentence or security measure, which deprives or restricts freedom in perpetuity or for an undefined duration. The introduction of this provision (Constitution Amendment of 1997) reflects the ruling of the Constitutional Court on this subject. In Ruling n.º 474/95 the Court upheld that although the wording of article 33 of the Constitution only prohibited, at that time, the extradition for crimes for which the death penalty is legally possible, the Constitution principles also prohibited the extradition for a crime

publishable by life imprisonment. Furthermore the Court's ruling provides the keystone for the interpretation of the conditions that must be fulfilled in order to allow the extradition of persons charged with crimes for which a sentence of death sentence or life imprisonment is nominally prescribed (see Ruling n.º 384/05, which abstract can be found in *Bulletin on Constitutional Case-Law*, Venice Commission, Edition 2005, 2, 269/271).

In addition, the wording of constitutional provisions concerning the autonomous regions' legislative autonomy was changed in part because of the Constitutional Court's ruling on the subject, but this time the changes intended to reverse such ruling that was supposed to be a limiting view of the regional autonomies.

Some of the most impressive examples of a "silent dialogue" between Constitutional Court and legislator regard the control of breaches of the Constitution by means of *omission of legislative measures*.

The Court's decision in such procedure is known to have merely *declarative effects* as it only verifies or recognises the situation of lack of provision needed to make constitutional rules executable (article 283 of the Constitution). In this case, the legislative authorities are bound to legislate, but the Court cannot substitute itself for those authorities by creating the missing rules nor can it urge them to act by indicating the timing for or the content of such action.

As underlined by Portuguese legal doctrine, the decisions regarding unconstitutionality by omission have no binding effect, purely providing a sort of "formalised critical publicity" on breaches of the Constitution.

Despite all that, the pending of such a procedure in the Constitutional Court has been encouragement enough for the legislative authorities to overcome the omission of legislative measures in question.

So far the Constitutional Court has only handed down seven decisions involving a review of unconstitutionality by omission, all of them at the request of the

Ombudsman¹².

In the only two situations in which the Constitutional Court determined that unconstitutionality by omission existed, the legislative authorities comply with its judgment. In Ruling n.º 182/89 the Court held that article 35(4) of the Constitution (concerning the use of computers and prohibition of third party access to files containing personal data) was not being complied due to lack of legislative measure defining the concept of "personal data". This ruling was followed by immediate parliamentary initiatives and a law on the subject was passed (Law 10/91). In Ruling n.º 474/2002, the Court held that article 59(1-e) of the Constitution was not being complied with due to omission of legislative measures needed to provide for a social benefit for Public Administration workers who involuntarily found themselves in an unemployment situation. This ruling was published in December 2002 and some years later, after several unsuccessful initiatives intended to overcome the legislative gap and public justification for the delay, the Assembly of the Republic passed a law on the subject (Law 11/2008).

In other four cases presented to the Constitutional Court, the expectation of the Court's decision was effective by itself, given that the needed legislative measures were approved while the procedure was still and the Court had not yet ruled. The Court decided to hear the requests and ruled that no unconstitutionality by omission existed because at that time a legislative act had already overcome the omission in question - Rulings n.º 276/89 (omission of legislative act specifying the special crimes for which political officeholders may be held liable), 36/90 (local referenda), 638/95 (constitutional right of *actio popularis*) and 424/01 (nominations for election to local authority bodies submitted by groups of registered electors).

Regarding the relations between the Constitutional Court and other courts it should be underlined once more that in Portugal (unlike many European countries) the

¹²For further development on this subject see "Problems of legislative omission in constitutional jurisprudence", Portuguese Report, *XIVth Congress Of the Conference Of European Constitutional Court*, Reports 11, 704-743.

courts cannot refer a preliminary question to the Constitutional Court, given that all Portuguese courts are empowered to decide whether the rules they have to apply comply with the Constitution. It is up to the concerned parties to file an appeal in the Constitutional Court challenging the other court's decision on the constitutionality issue. In such concrete review procedure, the Constitutional Court's ruling will only apply in that specific case in which it is handed down.

However the impact of the Constitutional Court's decisions is not confined to its legal force (*inter partes* effect), namely because all other courts tend to follow closely the constitutional case law in concrete review (which represents about 90% of the Court's decisions) and very frequently carry on its *rationes decidendi* of past cases.

In Portugal as in most European countries, the influence of constitutional jurisdiction is considerable and extends to all legal disciplines, which are experiencing an ever-growing "constitutionalization" effect.