International Conference

"Justice, Future Generations, and the Environment"

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Preliminary Survey

Participating court: The Portuguese Constitutional Court

INTRODUCTION

The environment as the object of a fundamental right – the right to the environment – is enshrined in Article 66 of the Constitution of the Portuguese Republic, titled "Environment and quality of life". This provision establishes in paragraph 1 that "everyone has the right to a living environment that is humane, healthy and ecologically balanced and the right to defend it", and mentions "sustainable development" in paragraph 2. Subparagraph d) of paragraph 2 states that the State is responsible for "promoting the rational use of natural resources, safeguarding their renewability and ecological stability, in respect for the principle of solidarity between generations". This allows us to conclude that the Portuguese constitutional legislator considered the rights of future generations, expressing the need for them to be taken into account in the present.

The right to the environment is thus constitutionally protected and the "right to avoid, either preventively or successively, the degradation of the environment is accorded to everyone"[1].

It should be referred, as noted by Miranda and Medeiros[2], that the Portuguese Constitution was a pioneer in treating the environment as a fundamental right, inspiring other fundamental laws (such as those of other Portuguese-speaking countries and even that of

[1] *Ibidem*

[2] Miranda, Jorge and Rui Medeiros, Constituição Portuguesa anotada, Universidade Católica Portuguesa, Volume I, 2nd revised edition, 2017, p. 970.

Spain). The relevance of the constitutional affirmation of the right to the environment is reflected also in in the "expansive force of this provision":

> "[the] rule of law finds in the way in which the fundamental right to the environment is enshrined in the Constitution (a *right/duty* or *circular right*), interwoven as a fundamental task of the State, a new strength to reinvent itself, internally or externally, as a new modernity, allowing new creative instruments for exercising and consolidating power"[3].

The central role of the concept of sustainable development in the constitutional provision in question (paragraph 2) should also be highlighted, with related duties for both the State and the public. The principle of solidarity between generations [paragraph 2, subparagraph d)] is also central. As stressed by academic literature, those concepts clearly imply that the legislator's attention should be focused on the idea of responsibility regarding future generations and on the duty to anticipate any negative impact on the environment (principle of prevention), as well as on the awareness of the need for a "rational use of natural resources, safeguarding their renewability and ecological stability" [paragraph 2, subparagraph d)].

Article 9(e) of the Constitution also makes reference to environmental concerns that go beyond the present moment. This provision states that "[p]rotecting and enhancing the cultural heritage of the Portuguese people, defending nature and the environment, preserving natural resources and ensuring a proper land-use planning" are fundamental tasks of the State.

Another constitutional provision that should be mentioned is subparagraph a) of Article 81, which entrusts the State with

> "promoting an increase in the social and economic well-being and quality of life of everyone, especially the disadvantaged, in the context of a strategy of sustainable development";

and in Article 90, when it states that

> "the goal of economic and social development plans is […] the preservation of ecological balance, the defence of the environment, and the quality of life of the Portuguese people".

[3] *Ibidem,* pp. 972 and 973.

Article 52 of the Constitution guarantees the constitutional right to popular action. Paragraph 3 states that

> "[it] is accorded to everyone, either personally or though associations dedicated to defending the interests in question, the right to popular action in the cases and as established by law, including the right to request for the injured party or parties the corresponding compensation, notably to: a) [p]romote the prevention, cessation or judicial prosecution of infractions against public health, consumer rights, the quality of life, the preservation of the environment and cultural heritage; and b) [e]nsuring the defence of the assets of the State, the autonomous regions and local authorities".

As for infraconstitutional references to future generations, Article 3 of Law no. 19/2014, of 14 April (Framework Law on the Environment), lists the principles guiding public action in environmental matters: sustainable development, entailing the duty to "satisfy present-day needs without compromising future generations"; intra and intergenerational responsibility; prevention and precaution; the polluter pays principle; the user pays principle; and liability and restoration, "which places the one that has caused the environmental damage under the obligation to restore the environment to its state prior to the damaging fact".

Also, the Framework Law on Climate, Law no. 98/2021, of 31 December, lists the principles guiding climate policy, among which those of

> "[s]ustainable development, using natural and human resources in a balanced manner, taking into consideration the duties of solidarity and respect for future generations and the other species who inhabit the planet" [Article 4(a)]; "[p]articipation, including citizens and environmental associations in the planning, decision-making and evaluation of public policies" [Article 4(i)]; and "[l]iability, restoration e reparation, with each participating agent answering for its direct or indirect acts or omissions, and being under the obligation to correct or recover the losses and damages it may have given rise to, and bearing the costs resulting therefrom and the compensations applicable to any third parties" [Article 4(k)].

It also defines its subjects: not only the State, but also public institutes and public companies, local authorities and public associations, environmental non-governmental organizations (ENGOs) and the public, companies and other private parties.

This legal framework allows us to conclude that there is an intent to entrust the State not only with the duty to protect the environment, but also to actively promote its improvement. Also, the State is not alone in its responsibility to protect the environment, but rather shares this responsibility with each individual or collective member of the political community.

Questions:

1. ***What are the conditions of access to a court in environmental litigation in your country or jurisdiction?***

- categories of applicants with standing (individuals, NGO, public organisms, popular action, etc);
- judge(s) competent in environmental law*;
- special procedural rules;
- possible difficulties of access to justice in the interest of Future Generations, in particular to take urgent legal action.
**** If there are different orders of jurisdiction in your legal system, you can mention general elements concerning these different types of courts (constitutional, civil, criminal, administrative courts), of all degrees (first-degree courts, courts of appeal, courts of cassation/supreme courts).***

The right to effective judicial protection is enshrined in the Constitution, notably in Articles 20 and 268(4) and (5), which grant every citizen the right to resort to courts as a guarantee of protection of their rights. In Portugal, Article 9(2), of the Code of Procedure in Administrative Courts - Law no. 15/2002, of 22 February - ensures, in Article 9(2), that

> "[r]egardless of having a personal stake in the action, any person, as well as associations and foundations dedicated to defending the rights in question, local authorities and the Public Prosecution Service have standing to bring an action or to intervene in an action, in accordance with the law, whether a main action or interim injunction proceedings aimed at defending constitutionally protected values and goods, such as public health, the environment, urbanism, land-use planning, quality of life, cultural heritage and the assets of the State, the Autonomous Regions and local authorities, as well as to promote the execution of the corresponding judicial decisions".

The law, therefore, grants individuals and legal persons standing to bring an action in defence of the environment.

The above-mentioned paragraph 3 of Article 52 of the Constitution is also relevant, because it grants

> "everyone, either personally or through associations dedicated to defending the interests in question, the right to popular action in the cases and as provided for by law, including the right to request for the injured party or parties the corresponding compensation, notably to […] [p]romote the prevention, cessation or the judicial prosecution of infractions against public health, the quality of life, and the preservation of the environment and cultural heritage".

Law no. 83/95, of 31 August, also known as the Law on Popular Action, allowed the execution of that constitutional provision, by establishing a legal framework that gives private parties legal standing to bring an action in court. Article 2 establishes that any citizen in full enjoyment of his civil and political rights, as well as associations and foundations dedicated to defending environmental interests, have the right to popular action, regardless of having a direct interest or not in the action. According to Article 12, popular action may be in the form of an administrative action, to which the rules of the Code of Procedure in Administrative Courts apply, or in the form of a civil action, to which the rules of the Code of Civil Procedure apply. As stated by José Eduardo Figueiredo Dias and Joana Maria Pereira Mendes, «[n]otably in terms of administrative litigation, a door has been opened to allow any citizen to become a sort of "private agent of the Public Prosecution Service", enhancing the role of civil society in environmental areas»[4].

Resorting to the Law on Popular Action, in November 2023, an environmental association brought an action against the Portuguese State grounded on the failure to implement the Framework Law on Climate[5].

In this respect, we should refer the controversy on environmental judicial protection resulting from Article 45 of the first version of the Framework Law on the Environment (Law no. 11/87, of 7 April), which established the jurisdiction of ordinary courts in

[4] Dias, José Eduardo Figueiredo; and Mendes, Joana Maria Pereira, *Legislação Ambiental Sistematizada e Comentada*, 3rd edition, 2022, Coimbra Editora, p. 70.

[5] https://www.jn.pt/4537602794/associacoes-poem-estado-portugues-em-tribunal-por-inacao-climatica/0

environmental matters. That article was amended by Law no. 13/2022, of 19 February, which approved the Statute of Administrative and Fiscal Courts. In reality, the Framework Law on the Environment – now Law no. 19/2014, of 14 April – is omissive in this regard. However, some academic literature has been arguing that "the competent court should be chosen based on the criterion of the "administrative legal relationship", in according with Articles 212(3) and 4(1)(o) of the Statute of Administrative and Tax Courts»[6].

In Portugal, there are no special courts for environmental matters. However, since the Law on Popular Action

> «defines the cases and terms on which the right to popular participation in administrative proceedings and the right to popular action may be exercised for the prevention, cessation or criminal prosecution of the infractions provided for in Article 52(3) of the Constitution» (Article 1(1)) and defines as «interests protected by this law public health, the environment, and quality of life» (Article 1(2)),

judges have broad jurisdiction and powers, conferred by that law, such as the possibility of gathering evidence (Article 17). This is also the law that enshrines, in Articles 22 and 23, civil liability and the duty to compensate those injured by any damages that may have been caused, "regardless of fault, whenever the actions or omissions of the agent resulted in an injury to any rights or interests protected under the present law" (Article 23).

The Law on Popular Action, read together with the Code of Procedure of Administrative Courts and the Statute of Administrative and Fiscal Courts, allows us to conclude that administrative courts are competent to decide on environmental matters, except for carrying out criminal enquiries, deciding criminal cases and executing the corresponding decisions (ordinary courts have jurisdiction in these matters).

In brief, any court in Portugal may decide cases on environmental matters, depending on whether what is at stake is a fundamental right enshrined in the Constitution, or environmental crimes, civil actions, or environmental damages resulting from the direct action or from an omission by the State.

2. *If your court or the courts in your country have made significant decisions in environmental law, what types of litigation and areas are concerned? What are their*

[6] Gomes, Carla Amado, Introdução ao Direito do Ambiente, AAFDL EDITORA, 3rd edition, 2018, p. 333.

legal basis: what types of norms (constitutional, legislative, regulatory, supranational, etc.) and legal principles are invoked and applied by judges? Do the judicial decisions refer in particular to the notion of "Future Generations"? What standard of review do(es) the judge(s) exercise (limited control, maximum control, specific powers of the judge in environmental field, etc.)?
Please attach the landmark judicial decisions made by your court (or more generally in your country) in environmental law and relating to the protection of future generations.

The Constitutional Court is competent to scrutinize the constitutionality of norms. It does so through abstract review – either anticipatory, successive or by omission – o concrete review. Until today, the Court has not issued any emblematic ruling on environmental issues or on the rights of future generations.

There are some cases that mention the right to the environment, all of them cases of concrete review of constitutionality, in which the Constitutional Court acts as a court of appeal. In concrete review, the Court may only decide on a question of constitutionality within the scope of an appeal on a constitutional point filed by one of the parties in an action pending in an ordinary court. The Court may not review the constitutionality of a norm on its own initiative. According to Articles 204 and 280 of the Constitution, the Constitutional Court's concrete review happens via appeals of decisions by courts explicitly or implicitly refusing to apply provisions based on their unconstitutionality; appeals of court decisions that apply to the case norms that a party in a litigation claims are unconstitutional; and appeals of court decisions that apply to the specific case a norm that has previously been deemed unconstitutional by the Constitutional Court itself.

If the Court decides to uphold the appeal, the file is returned to the competent court to revise the decision in light of the Constitutional Court's decision. If the decision is not revised, the affected party may file a new appeal to the Constitutional Court.

As an example, we should refer Ruling no. 136/2005[7] on the existence of a right to environmental information. An environmental organization invoked the right to have access to copies of an agreement entered into between the Portuguese State and a company to

[7] https://www.tribunalconstitucional.pt/tc/acordaos/20050136.html

analyse the environmental impact of installing a given industrial unit in the north of the country. Although the Constitutional Court rejected the appeal and confirmed the appealed decision, it should be highlighted that already in 2005 the appellant referred in its pleadings the issue of environmental protection and also the importance of preventive action, "to the extent that environmental damages are often irreversible and serious".

Rulings nos. 133/2018 and 397/2019, regarding the application of fines for very serious environmental administrative offences foreseen and punishable in accordance with the established in Articles 81(3)(a) of Government Decree no. 226-A/2007, of 31 May – which establishes the legal framework for the use of water resources -, and 22(4)(b) of Law no. 50/2006, of 29 August – the framework law on environmental administrative offences - are also worthy of mention. Even though the Constitutional Court rejected the appeals, the reference to the right to the environmental as a fundamental right should be highlighted:

> «9. On the merits of the case
> 9.1. The punishment as a crime or as an administrative offence of acts that damage the environment is constitutionally grounded on the fundamental right to the environment, enshrined in Article 66(1) of the Portuguese Constitution. As mentioned in Ruling no. 591/2015:
>
> «the right to the environment requires from the State positive actions of protection, "i.e. concrete activities promoting a healthy and ecologically balanced environment or controlling actions that may degrade it" (cf. MARIA DA GLÓRIA GARCIA, "Comentário ao artigo 66.º", in JORGE MIRANDA/RUI MEDEIROS, Constituição da República Portuguesa Anotada, Vol I, 2nd ed., p. 1345).
> (…)
> And the protection of the environment as a legal good discussed here is connected to the idea of prevention of a danger that may affect the environment (on the prevention of danger, cf., for example, MIGUEL NOGUEIRA DE BRITO, "Direito Administrativo de Polícia", in PAULO OTERO/PEDRO COSTA GONÇALVES (Ed.), Tratado de Direito Administrativo Especial, Vol. I, Coimbra: Almedina, 2009, p. 306 ff.; JORGE SILVA SAMPAIO, O dever de proteção policial de direitos, liberdades e garantias, Coimbra: Coimbra Editora, 2012, pp. 61 ff.)».
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> As regards environmental administrative offences, these are preventative measures aimed at protecting a constitutionally protected fundamental right of great value, as is the case of the right to a healthy and ecologically balanced right to a human life environment (Article 66(1) of the Portuguese Constitution). This task of the State results, first of all, from the established in Article 66(2)(a), which deals specifically with the prevention and control of pollution and its effects.»[8]

[8] https://www.tribunalconstitucional.pt/tc/acordaos/20180133.html

The Court thus highlights the importance of prevention in environmental matters and leaves the door open for future decisions that may take a preventive and anticipatory stance regarding environmental damages that may be hard to reverse.

The action referred above (see answer to question 1), recently filed at the Lisbon Civil Courts against the State by an environmental organization claiming the lack of application of the framework law on climate, reminds us of a famous decision by the German Federal Constitutional Court in 2021– BVerfGE, 157, 30-177[9]. We do not know whether the case will reach the Constitutional Court. If it does, we might be faced with a case of unconstitutionality by omission.

As noted by Canotilho and Moreira[10],

> "the right to the environment entails for the State an obligation to perform certain actions, and failure to do so represents, notably, an unconstitutional omission, which might trigger the mechanism of review of unconstitutionality by omission (cf. Article 283)."

This type of review may be requested by the President of the Republic, the Ombudsperson and by the Presidents of the Legislative Assemblies of the Autonomous Regions (if rights of the regions are at stake). Should the Constitutional Court deem that there are principles, rights or guarantees ensured by the Constitution that need to be made concrete and enforceable by means of legislative measures that have not been adopted, impairing the enforceability of constitutional provisions, it shall inform the competent legislative body of the fact, so that the latter may approve any necessary measures. Unconstitutionality by omission is very rare – in the forty years of the Court, only eight such decisions have been issued.

3. ***Do mechanisms and procedures of execution of judicial decisions exist in your country and/or under your jurisdiction? Can your court(s) impose measures to ensure the enforcement and effectiveness of judicial decisions in environmental law***

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9 https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2021/03/rs20210324_1bvr265618.html;jsessionid=5DFA68E550CB7F54D47B7A2D89965F0E.internet992

10 Canotilho, J.J. Gomes e Moreira, Vital, Constituição da República Portuguesa anotada, Articles 1 to 107, Coimbra Editora, volume I, 4th revised edition, 2007, p. 847.

in the interest of future generations (power of injunction and to pronounce penalties, specific enforcement/execution procedure, emergency proceedings, etc)?

Part IV of the Portuguese Constitution is dedicated to the guarantee and amendment of the Constitution. The Constitutional Court's main task is to review legal norms. This means that the Constitutional Court may determine the elimination from the Portuguese legal system of norms contrary to the Constitution or prevent the entry into force of provisions approved by the legislative bodies of the State or the Autonomous Regions. There is no specificity as regards court decisions on environmental matters.

The execution of court decisions, notably on environmental matters, shall be carried out by either ordinary or administrative courts, depending on the case. The Portuguese Constitutional Court, by virtue of its powers described in the answers above, plays no part in that stage of court actions. However, not only are there mechanisms – similarly to other branches of the law – to execute court decisions involving environmental law, but there is also the possibility of issuing interim injunctions to avoid damages that might occur while the main legal action is pending.

There are references to the rights of future generations in Article 3 of the Framework Law on the Environment, which lists the principles guiding public action in environmental matters.