

**The unique features
of the Portuguese Constitutional Review¹**

St. Petersburg, May, 2017

1. In these few minutes I am entitled to, I chose not to meet the tradition usually respected in such circumstances. I will not offer you a few “jumping” paragraphs of a much larger paper. Nonetheless, I will include in the paper a few references to other papers concerning the Portuguese system of constitutional control written in English, for those of you who may be interested in further details. For your relief, these few pages is all I have.

Having made this choice, I believe it makes sense to present you a brief summary of the Portuguese system of constitutional compliance. It would be an impossible task to say something vaguely useful and not too elementary to you about the Portuguese constitutional doctrine and practice in ten minutes. I did watch the play “The complete works of William Shakespeare in 97 minutes” in my country, but I lack the talent to perform something of the kind.

Therefore, what I will do is to emphasize the most relevant peculiarities of my country’s system. I have the nerve of expecting from you all a friendly indulgence.

2. Like in many other countries, judicial review is the major tool for constitutional compliance in Portugal.

Our type of judicial review uses a diffused system: besides the Constitutional Court each and every one of the Portuguese courts (i. e.

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ordinary courts and administrative and fiscal courts), is, in a way, a “constitutional court”, deciding matters of constitutionality raised in the cases that come before them.

According to Paragraph 204 of our Constitution, if a court believes that any legal rule contravenes the provisions of the Constitution, it must refuse to enforce it. However, the rulings in constitutional issues taken by any other court are not final: the parties may always challenge them before the Constitutional Court, which is the only authority invested with the ultimate jurisdiction to review the constitutionality.

This control is, as seen, an incidental one, using two main judicial remedies: those against decisions refusing to apply a legal rule on the grounds of unconstitutionality and those against decisions applying a legal rule whose constitutionality has been challenged during the proceedings.

There is also a different type of control, an abstract one. This one is performed regardless of the implementation of the rule in any case (it is not called on in order to settle a specific case or dispute).

3. According to Paragraph 277 of the CPR, the control of the Court is a normative one, implying that it does not rule cases as such. The Court’s task is that of monitoring whether legal rules – particularly those set out in laws and legislative decrees – comply with the Constitution.

Actually, in my country there is no such a thing as the German *Verfassungsbeschwerde* or the Spanish *amparo*. As above mentioned, the Portuguese Constitutional Court controls nothing but the constitutionality of legal rules (or an interpretation of them), not that of the decision *qua tale*, resulting in alleged violations of the CPR.

The Constitutional Court never settles the dispute that is the object of the proceedings; it only decides the question of constitutionality that has been raised in the case (it is a kind of *cassation*). Once the Constitutional Court passes its ruling, the case returns to the court from which it came, so that the latter can proceed in accordance with the Constitutional Court's ruling on the matter of constitutionality.

4. Another tool that is alien to the Portuguese system of constitutional control is what the French call *renvoi préjudiciel*, or reference for a preliminary ruling, which is, as you all know, popular in Europe, thanks to the Roma Treaty and the EU Court of Justice, and ordinary in many countries.

Since any Portuguese judge is indeed a constitutional judge, he has the power to rule disputes concerning the constitutional compliance of the laws – though this ruling is a provisional one, submitted to constitutional review, as said. He does not have to ask the Constitutional Court for any preliminary ruling: he simply rules the issue, enforcing the law claimed to be unconstitutional by one of the parties in the proceedings; or he agrees with the claim and refuses to enforce the law.

5. Which drives us to another major point.

The Constitutional Court does not review decisions taken by other courts or any other body; it reviews nothing but the constitutionality of rules, as they have been enforced (or as the court has refused to enforce them) in a case. Unlike what happens in abstract reviews, in case review the decision is valid only for that case. Having said this, once the Constitutional Court has judged a rule unconstitutional in three different cases, it may declare that unconstitutionality with generally binding force.

6. That is not all. In Portugal the search for compliance with the Constitution, has two other tools: preventive abstract review and unconstitutionality by omission.

As its name suggests, preventive abstract review (of rules) can be prior to – i.e. *ex ante* – the publication and entry into force of the normative act comprising it. It makes possible to prevent unconstitutional rules (or rules whose constitutionality is controversial) from taking effect. This control is based upon Paragraph 278 of the Constitution, but it is only applicable to the more important rules in the legal system, such as those included in an international treaty or those included in a legislative act from the Assembly of the Republic (Law) or from the Government (Legislative Decree).

In prior review cases, besides decisions of a procedural nature (particularly as to receive or not a request), the Constitutional Court issues two types of ruling: it either declares the (total or partial) unconstitutionality; or does not declare the unconstitutionality of each rule that he had to assess. When the Court declares a rule unconstitutional, the President of the Republic (or the Representative of the Republic in an Autonomous Region) is compelled to veto the text and return it to the body that passed it. This body can either reformulate the act (eliminating or correcting the rule that has been held unconstitutional), or confirm its approval, in which case it must do so by a qualified majority of two thirds of its members [Paragraph 279 of the Constitution].

The President of the Republic or the Representative of the Republic has then to enact or sign it. On the one hand, this does not prevent the Constitutional Court from holding that such rules are unconstitutional later on, as part of other means of reviewing constitutionality; on the other hand, if the

text is redesigned the amendments are not limited to the removal of the rules that the Constitutional Court has declared unconstitutional.

Every law passed by the Assembly of the Republic and every legislative decree issued by the government must be enacted by the President of the Republic; rules included in international sources are sent to the President for ratification.

7. Review on the grounds of unconstitutionality by omission is also exclusively carried out by the Constitutional Court. The Court verifies whether there has been a breach of the Constitution, not because some legislative act is against its provisions, but due to the lack of enactment of legislative measures demanded by the Constitution. There is, therefore, a violation by inertia or failure to act.

In such case, the Constitutional Court is called upon to bring the omission to the attention of the relevant body, in order that it enacts the necessary legislative provisions. Given the great sensitivity surrounding both the problem of “legislative omissions” and the Constitutional Court’s fulfilment of this important duty, these proceedings can only be initiated by the President of the Republic or the Ombudsman, or, in cases in which the rights of an Autonomous Region are at stake, the President of the Legislative Assembly concerned.

Well, ladies and gentlemen, I told you a few minutes ago that I lacked the talent to perform something as briefly as the play I mentioned. Now I dare to remind you that the Great Russian writer Anton Chekhov wrote in a letter to Maksim Gorki, in 1899, commenting his short stories then freshly published, “Conciseness is the sister of the talent”.

Since I do lack the talent, I will be happy with the sister.

Further readings

Concrete Control of Constitutionality in Portugal: A means towards Effective Protection of Fundamental Rights, Comparing Constitutional Adjudication, 3rd Edition, 2008, organized by the Faculty of Law (Department of Legal Sciences) of the University of Trento, António Cortês and Teresa Violante, Advisers of the Constitutional Court of Portugal.

The Guarantee of the Constitution and the Enforcement of Constitutional Court Decisions, International Conference on the role and importance of Constitutional Court decisions in addressing legislative gaps and legal uncertainty (Experience of Different Countries), Yerevan, October 2016, João Caupers, Vice-President of the Constitutional Court of Portugal.

Judicial Review in Portugal, International conference celebrating the 7th Judicial Year of the Constitutional Court of Kosovo, Pristina, October 2016, Gonçalo Almeida Ribeiro, Judge of the Constitutional Court of Portugal.

Evolution of constitutional control in Europe: lessons learned and challenges, Independence of a Constitutional Court as the main prerequisite for the efficiency of its mission, International, Conference on the evolution of constitutional control in Europe: lessons learned and challenges, Constitutional Court of the Republic of Moldova, Chisinau, March 2017, Pedro Machete, Judge of the Constitutional Court of Portugal.