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In Portugal, concrete control of constitutionality, approximately equivalent to the United States concept of judicial review, is one of the basic mechanisms available to individuals for the protection of their fundamental rights. It is exercised by *all Courts* since they all have a duty not to apply legal provisions which are in breach of the Constitution.[1] The *Constitutional Court* is the final instance of concrete constitutional control. The control of constitutionality by the Constitutional Court in judicial cases takes place in a proceeding designated "*constitutionality appeal.*" It is *not a procedural incident* and, accordingly, there is no staying of proceedings; it is a *proper appeal* and, as such, *presupposes a previous judicial decision* on the subject.

There is no specific mechanism that entitles an individual with direct access to the Constitutional Court when faced with a violation of his or her fundamental rights. There is no "individual constitutional complaint" in Portugal like there is in Germany, Austria or Switzerland, nor an appeal similar to the *recurso de amparo* that can be found in Spain and countries in Latin America. This assertion, however, does not imply that individuals are left without the possibility of judicially defending their fundamental rights against specific offensive acts. Firstly, all Courts are competent to check the constitutionality of a norm against fundamental-rights provisions and principles. Secondly, there are

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1. An updated English version of the *Constitution of the Portuguese Republic* (CPR [Constitutional Law 1/1976, seventh amendment, according to Constitutional Law 1/2005]) and of the *Law of the Constitutional Court* (LCC [Law 28/82, 15 November]) may be found at http://www.tribunalconstitucional.pt/tc/en/home/html. At the same address it is possible to find most of the decisions of the Constitutional Court mentioned in this article.

special mechanisms designed for the protection against judicial decisions depriving of liberty and administrative acts offending fundamental rights. Lastly, the case law of the Constitutional Court is based on a wide concept of norm, which allows for the consideration of the special typical circumstances of the case.

The development of the concept of "norm" in the case law of the Constitutional Court has been a matter of crucial importance. With the acceptance of the control of *normative interpretations*, the "norm" is not only a *legal provision* but tends to be the abstract result of the interpretation. We could refer to it as a "norm of the case" (*Fallnorm*) in the sense of Fikentscher[2] or a "rule" in the meaning of the *ratio decidendi* of a decision in the Common Law systems. However, it has not been a pacific phenomenon nor has it been immune to strong controversy both amongst the Justices themselves and within the legal doctrine. There are voices that label the results of this case law as the creation, by the Court, of a system that draws the same results of the individual constitutional complaint, even if these consequences exceed the logic that presided over the creation of an exclusive normative concrete control. Some even say that the "enlargement" of the concept of norm has deployed results that go beyond those of a typical *amparo* mechanism. This will be the object of this article.

A full understanding of the relative uniqueness of the Portuguese system presupposes a basic knowledge of the control of constitutionality as it has been established by the Constitution of 1976. Hence we will start with a brief description of this system.

I. THE PORTUGUESE SYSTEM OF CONCRETE CONTROL OF CONSTITUTIONALITY IN A NUTSHELL

It is possible to divide the Portuguese system into two basic types of constitutional control mechanisms:[3] (i) *concrete control of unconstitutionality by all the Courts, including the Constitutional Court* and (ii) *abstract control of unconstitutionality exclusively by the Constitutional Court*. The Portuguese system intertwines characteristics of both the American model of *judicial review* and the *kelsenien* model

2. *See* FIKENTSCHER, METHODEN DES RECHTS IN VERGLEICHEDENDER DARSTELLUNG: DOGMATISCHER TEIL, IV 202 (Tübingen 1977). *See also* Mota Pinto, "Reflexões sobre jurisdição constitucional e direitos fundamentais. . . .", *in* THEMIS, EDIÇÃO ESPECIAL: 30 ANOS DA CONSTITUIÇÃO PORTUGUESA 1976-2006 212 (2006).

3. *See* Cardoso da Costa, *A Jurisdição Constitucional em Portugal*, 2ª ed., *in* SEPARATA DO BOLETIM DA FACULDADE DE DIREITO 44 (Coimbra 1992) (considers this as the basic distinction in the Portuguese system).

of control of constitutionality.[4] This *mixed* character of the Portuguese system provides for its relative *uniqueness* within the European systems of control of constitutionality. There are similar mixed systems in other Portuguese-speaking countries such as Brazil.[5]

Concrete control was introduced in Portugal with its first republican Constitution in 1911.[6] Concrete control was maintained during the Constitution of the authoritarian dictatorship (1933-1974) and has lasted until today's Constitution of the Portuguese Republic ("CPR"). Since its first draft, concrete control has been, like the American model, *diffuse, incidental and concrete.*[7] We can add *decentralized* to these characteristics. Ordinary courts shall not apply rules that are inconsistent with the constitutional provisions or principles. This means that there is a duty on the judiciary not to enforce rules that are in opposition to the Constitution. Like the American model, developed from the judgment in *Marbury v. Madison*, the Portuguese system is typically characterized by its endorsement of the competence for the control of constitutionality to the judiciary as a whole. The issues on the concrete control of constitutionality of statutes are thus not reserved to a special jurisdiction. All the courts are—for this purpose—*constitutional courts*. This means that not only the Constitutional Court but also the Supreme Court of Justice and the Supreme Administrative Court, as well as the other higher and first instance courts, can refuse to enforce a legal rule on the grounds of its unconstitutionality. The role of the Portuguese courts, when it comes to concrete control, is not limited to allowing or refusing a constitutionality appeal as happens, for example, in Italy or Germany.

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4. *See* Vital Moreira, *A Fiscalização Concreta no Quadro do Sistema Misto de Justiça Constitucional*, *in* BOLETIM DA FACULDADE DE DIREITO DE COIMBRA. VOLUME COMEMORATIVO DO 75.º ANIVERSÁRIO,. 815 (2003), RUI MEDEIROS, A DECISÃO DE INCONSTITUCIONALIDADE: OS AUTORES, O CONTEÚDO E OS EFEITOS DA DECISÃO DE INCONSTITUCIONALIDADE DA LEI 17-18 & 54-57 (Lisboa 1999).

5. *See* BLANCO DE MORIAS, JUSTIÇA CONSTITUCIONAL II 992-1000 (Coimbra, 2005).

6. Portugal was the first country in Europe that formally admitted a system of judicial review of legislation in the text of the Constitution (1911). It was directly influenced by the Brazilian Constitution of 1891. *See* JORGE MIRANDA, CONTRIBUTO PARA UMA TEORIA DA INCONSTITUCIONALIDADE 107 (2007); and MEDEIROS, *supra* note 4, at 12.

7. These concepts are used in the sense given by large legal doctrine. *See* GOMES CANOTILHO, DIREITO CONSTITUCIONAL E TEORIA DA CONSTITUIÇÃO, 898-901 (Coimbra 7th ed. 2003). *Diffuse* because every judge is competent to assess the conformity of norms with the Fundamental Law. *Incidental* meaning that the problem of unconstitutionality may only be assessed within a concrete dispute and as long as the resolution of such problem is relevant to the settlement of the dispute. *Concrete*, in connection with the previous two concepts, because the unconstitutionality is asserted within a specific dispute and the judge has the duty to assess the consistency of the applicable norms with the Constitution.

Ordinary courts can rule on every constitutionality issue raised by the parties. And ordinary courts can also raise such issues *ex officio*. This means that, as a rule, when a dispute comes to the Constitutional Court, there has already been at least one decision on the constitutionality *quaestio*. And it may be the case that the parties have conformed themselves with such decision and have chosen not to bring the case to the Constitutional Court.[8]

When it comes to basic fundamental rights, even the Public Administration may autonomously appreciate the constitutionality of legal provisions. The possibility of the Public Administration accessing the constitutionality of legal provisions it enforces or applies is unanimously accepted as referring to basic rights, freedoms and guarantees, set forth in Article 19(6) CPR: right to life, personal integrity and identity, civil capacity and citizenship, the principle of non-retroactivity of criminal law, right of defence in sanctionary proceedings, and freedom of conscience and of religion.[9] It is also undisputed that the Administration may refuse to apply a provision that has already been declared unconstitutional by the Constitutional Court with general binding force. However, there is more controversy regarding this prerogative of the Administration when there is only one precedent (without general binding force) of the Constitutional Court or of any of the Supreme Courts, or when there is no previous judicial precedent at all.[10]

Despite having a diffuse system, Portugal has, since 1982, had a Constitutional Court, i.e., a judicial body specifically designed to deal with constitutional issues. Like in the *kelsenian* model, there is a court specially created to deal with the issues of constitutionality. The Constitutional Court constitutes a distinct category of courts within the judicial system. It occupies the higher position of the constitutional jurisdiction order, and its decisions cannot be appealed to any other Portuguese court. Only the Constitutional Court has competence for the abstract control of constitutionality, which means that it is within its exclusive jurisdiction to declare a provision is unconstitutional with general binding force.

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8. But if there has been a judicial decision refusing to apply a norm because of its unconstitutionality, there is an obligation for the Public Prosecutor's Office to lodge an appeal *per saltum* to the Constitutional Court.

9. *See* JORGE MIRANDA, MANUAL DE DIREITO CONSTITUCIONAL VI 203 (Coimbra 3d ed. 2008). Referring to all rights, liberties and guarantees, VIEIRA DE ANDRADE, OS DIREITOS FUNDAMENTAIS NA CONSTITUIÇÃO DE 1976 350 (Coimbra 3d ed. 2006).

10. *See* MEDEIROS, *supra* note 4, at 167 (sustaining that in these situations, the Administration may refuse to apply the legal provision).

Furthermore, the Constitutional Court plays a central role in the system of concrete control of constitutionality. In fact, there are certain procedural rules that tend to centralise these proceedings in the Constitutional Court.

First, it is up to the Constitutional Court to control the *process of selection* of the cases it admits. This selection takes place in two moments of admission: the decision of admission is first laid by the court *a quo* (Article 76(1) Law of the Constitutional Court ("LCC")) and, on later moment, by the rapporteur judge to whom the process has been assigned in the Constitutional Court (Article 78-A(1) LCC). In both cases it is possible to appeal to the conference of three judges of the Constitutional Court the preliminary decision to refuse to admit the appeal (Articles 76(4)(5) and 78-A(3) LCC). Second, as we will see, the broad concept of "norm" developed by the Court as a condition of admissibility expands the Court's activity and the control it exercises over other courts. Third, when an ordinary judge refuses to apply a legal norm on the ground of its unconstitutionality, the appeal is not only possible (Article 280(1))(a) CPR and Article 70(a) LCC) but also mandatory to the Public Prosecutor (Article 80(5) LCC). Finally, if there is an applicable precedent of the Constitutional Court, an appeal may be lodged even if the parties have not raised the question during the proceedings (Article 70(c) LCC). This means that the Constitutional Court is awarded with mechanisms to control the observance of its own jurisprudence by the other courts.

In concrete-control proceedings, the effects of the unconstitutionality, expressed in a *judgment of unconstitutionality*, are produced *inter partes*, i.e., are restricted to the concrete dispute within which the issue has been raised. The restricted effects of these judgments *may however be expanded by the Constitutional Court in one situation.* According to Article 281(3) CPR and Article 82 LCC, if a norm has been judged unconstitutional in three concrete cases, the Public Prosecutor or any of the Justices may promote a proceeding of successive abstract control[11] of that norm.

Currently, concrete control of constitutionality accounts for more than 90% of the cases submitted to the Constitutional Court. The decisions of the Court in concrete-control proceedings may take four forms: a summary decision, issued by the rapporteur judge; a decision taken by the "conference" of three judges (on the appeals of summary decisions or of decisions of non-admission by the other courts); a

11. Successive abstract control is abstract control that is not preventive, i.e., that takes place after the legal provisions have been fully adopted and entered into force.

decision issued by the "section" of five judges;[12] and a decision of the plenary.

Hence, if it is decided that there can be no ruling on the object of the appeal or that the case is simple, the summary decision can be issued by the rapporteur judge (Article 78-A(1) LCC). If there is an appeal of a summary decision or of a decision of other courts which fails to admit the appeal of constitutionality, the Court will rule on conference of three judges (Article 78-A(3)(4)(5) LCC). In all other cases the Court will rule on a section of five judges (Article 70 LCC). When the uniformity of the jurisprudence of the Court is at risk, there may be an intervention of the Plenary Session of the Court. The Plenary may be summoned on the initiative of the President (Article 79(A) LCC) or on the basis of an appeal grounded on the existence of a contradictory precedent (Article 79(D) LCC).

II. CONDITIONS OF ADMISSIBILITY OF THE APPEAL

Before ruling on the merits of an appeal, appellate courts must first check its admissibility. The courts *a quo* may refuse to admit the appeal of constitutionality (Article 76 LCC) as it happens in Italy or Germany. However, as it has already been mentioned, the selection of cases is centralised in the Constitutional Court since all the decisions of the courts *a quo* on admissibility may be appealed to that Court. Moreover, the rapporteur judge in the Constitutional Court must always appreciate the admissibility of the appeal. The *conditions of admissibility* of a constitutionality appeal are set forth in Article 280 CPR and Article 70 LCC.

A. A Question of Unconstitutionality (or Reinforced Illegality)

The appeal of constitutionality can be lodged not only when a constitutional problem is identified but also in some situations of illegality that are specified in the Constitution and the LCC. The Universal Declaration of Human Rights is a parameter of constitutionality within the Portuguese system of control of constitutionality. In fact, according to Article 16(2) CPR, the constitutional provision on fundamental rights must be interpreted and integrated according to such Declaration.[13]

12. In 2007 the Constitutional Court awarded, according to its internal statistic, 1,268 decisions in concrete control; 855 summary decisions; 211 conference decisions and 206 plenary section decisions.

13. *See* Moura Ramos, *O Tribunal Constitucional Português e as Normas de outros Ordenamentos Jurídicos*, *in* ESTUDOS EM MEMÓRIA DO CONSELHEIRO LUÍS NUNES DE

The European Convention on Human Rights or other international documents on fundamental rights are not a formal parameter of constitutionality. However, they may have relevance to the constitutionality judgment. The Court expressly admits the importance of the Convention for the interpretation of the Constitution; it is not excluded, however, that the Convention may have a wider role of integration,[14] namely when its provisions include non-written fundamental rights compatible with the constitutional order (Article 16(1) CPR)[15] or as long as they may be considered an expression of general principles of international law, belonging to the core of *ius cogens* (Article 8(1) CPR).[16]

The Constitutional Court can only rule if the appeal concerns a problem of direct unconstitutionality, i.e., it can only decide whether the application of the provision should have been refused according to what the Constitution establishes. This means that the Court cannot appreciate issues of illegality or whether a provision has been wrongfully applied to the case, unless a constitutional parameter (or a parameter with equivalent value for this specific purpose, namely, international treaties or statutes with reinforced value) has been invoked.

B. A Normative Question

The constitutionality appeal is exclusively aimed at the control of *norms* (Article 280 CPR and Article 70 LCC). As Article 280 CPR reads, an appeal may be made to the Constitutional Court against court rulings that refuse the application of any norm on the grounds of its unconstitutionality or that apply any norm whose unconstitutionality has been raised during the proceedings in question. Concrete control is thus exclusively *normative*. There is no specific procedure designed for the review of the constitutionality of any other acts such as judicial or administrative decisions. Only rules—or norms—can be the object of concrete control of constitutionality in the way that it may derive in the form of an appeal to the Constitutional Court.

Therefore, the Constitutional Court does not scrutinise the decisions issued by ordinary courts—its jurisdiction is strictly concerned with the normative constitutionality question raised in the dispute. There is a review of neither the judicial decision of the court *a quo* nor of the

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ALMEIDA 811 (2007). *See also* JORGE MIRANDA, MANUAL DE DIREITO CONSTITUCIONAL IV 164-176 (Coimbra 4th ed. 2008).

14. *See* Ramos, *supra note* 13, at 812-14.

15. *See* ANDRADE, *supra* note 9, at 40.

16. *See* Moura Ramos, *Relações entre a Ordem Interna e o Direito Internacional e Comunitário, in* DA COMUNIDADE INTERNACIONAL E DO SEU DIREITO 272 (Coimbra 1996).

interpretation given by such court to the applicable infra-constitutional law.

Moreover, in any of the above situations the appeal will be admitted only if the question of constitutionality is *ratio decidendi* of the contested judicial decision. The judgment awarded by the Constitutional Court must be *useful* in that it should have a direct effect on the outcome of the decision. *Obiter dicta* on constitutionality issues or *ad ostentationem* arguments do not amount to a possible object of appreciation by the highest Court of the constitutional jurisdiction.

Because of this broad concept of norm, *it may sometimes be very difficult to draw the line between what is a normative control or a control of the decision itself.* The jurisprudence of the Court provides, however, *some criteria* that may help to make the distinction and to prevent cases of an eventual *abuse* of the concept of norm or normative interpretation.[17] When contesting a certain and concrete interpretation of a norm, an appellant *must clearly identify the content of such interpretation.* It is not sufficient to say, for example, that the norm, as it has been applied, is in breach of the Constitution. The enunciation of the normative criterion must observe the requisites of generality and abstraction—this is very important because it clearly stresses that the object of control will be a norm (even if not taken in the objective meaning of the disposition where it is included) and not the judicial decision. And such specification must be done in advance by the appellant. The Court cannot substitute in its own definition and delimitation of the object of the appeal of constitutionality; such is a burden pending on the appellant. Moreover, the Court has also repeatedly stated that it will admit appeals on normative interpretations only so long as the interpretations can be supported, even if remotely, by the literal content of the rule or rules to which they are attributed.

This means that in these situations the burden pending on the appellant before bringing the case to the Constitutional Court is heavier. He or she must not only raise the issue of constitutionality before the ordinary courts have issued their final decision but should also pay extra attention to the way such issue is raised in order to avoid imputing the breach to the decision or to the judicial activity. The distinction between what is part of the decision and what may be elected as a normative criterion applied therein is sometimes very difficult to draw. It may be possible to theoretically enounce, *a propos* of a case, a normative

17. *See* Rui Medeiros, *A Força Expansiva do Conceito de Norma no Sistema Português de Fiscalização Concentrada da Constitucionalidade*, *in* ESTUDOS EM HOMENAGEM AO PROF. DOUTOR MARQUES GUEDES 183-202 (Coimbra 2004); *see also* MEDEIROS, *supra* note 4, at 347.

criterion, distinct from the judicial act of applying it to the dispute. But if during the dispute the appellant has failed to identify such a criterion, enouncing it in a way as to not clearly separate it from the concrete situation under adjudication, then the appeal will not be admissible.

The question of knowing whether an alleged *normative dimension* or *interpretation* can be accepted as a norm for the purpose of concrete control by the Constitutional Court is probably the most difficult question relating to the procedural requirements of this type of control. And the answers given by the Court have not been uniform over time and are still today the subject of disagreement amongst the Judges and the three different sections.

Sometimes legality and unconstitutionality are linked, especially in situations involving the principle of legality (in criminal- and tax-law cases). The Court sustains that it cannot control the process of *qualification of concrete facts* under the *norm of the law*. For instance, Plenary decision 674/99 concerned a case where the appellants, who had been convicted of the practice of fraud, claimed that the court *a quo* had included, within the criminal type, a different and further element concerning mental reserve in the concept of astuteness. The Court then decided that the object of the appeal did not concern any "norm" but rather the judicial process of "concrete application" that had concluded that the behaviour of the appellant fulfilled, in fact, the criminal type of fraud.

However, the Court has further accepted—although with significant dissident opinions—that although it cannot scrutinise the concrete qualification of the facts, it may control the *jurisprudential construction of general and abstract criteria* by the ordinary courts if such construction is harmful for the defendant in a criminal procedure. According to this reasoning, the Court ruled on the admissibility of a jurisprudential construction of a new cause of interruption or suspension of the statute of limitations for crimes—see decisions 412/2003 and 110/2007 and plenary decision 183/2008. In all these cases the Court assessed its jurisdiction to rule on the validity of such *normative construction* stemming from the case law of ordinary courts and further concluded that there was a breach of the constitutional principle of criminal legality when excluding a cause for non-punishment.

C. Legitimacy

The following people may file an appeal to the Constitutional Court: persons who, in accordance to the law regulating the case in which the decision was passed, have legitimacy to file an appeal, and in some cases, the Public Prosecutor's Office (Article 72LCC).

Although constitutionality issues are to be known *ex officio*, the judge *a quo* is never allowed to submit the question to the Constitutional Court. In the logic of a diffuse system, all the courts are competent to decide matters of constitutionality. If a judge is competent to decide, he or she should have no doubts. The logic is different of the preliminary and incidental procedure to the Constitutional Court, that structures the generality of systems with concentrated concrete control,[18] or the preliminary ruling procedure to the European Court of Justice as set forth in Article 234 EC on the basis of which the uniformity of European law is guaranteed.

D. Form of the Appeal

The request must be filed in written form but may be delivered to the Court by the usual means allowed by the Civil Procedure Code (Articles 150 CPC and 69 LCC).

According to Article 75-A(1) LCC, an appeal can be lodged to the Constitutional Court only through the filing of a request in which the appellant must identify:

(i) The applicable sub-paragraph of Article 70(1) LCC. This provision specifies three main possibilities for appeal, according to the decision *a quo*: decisions which have rejected the application of a rule on the grounds of its unconstitutionality; decisions which have applied a rule the unconstitutionality of which has been raised during the proceeding; and decisions which have applied a norm which has already been declared or judged[19] unconstitutional by the Constitutional Court;

(ii) The provision the unconstitutionality or illegality of which the Court is asked to examine and the constitutional provision or principle considered to have been infringed;

(iii) The document in which the appellant raised the question of unconstitutionality or the decision of the Constitutional Court that previously judged unconstitutional the provision applied by the decision.

If the request for filing an appeal does not include any of the details specified above, the judge shall invite the appellant to submit such information within a period of ten days (Article 75-A(1) LCC).

E. Lawyer

The appellant must be represented by a lawyer (Article 83(1) LCC).

18. *See* MARIA LÚCIA AMARAL, *Problemas da Judicial Review em Portugal*, 10 THEMIS 74, 84 (2005).

19. According to Tribunal Constitucional [Constitutional Court] Decision 374/99 (Port.).

F. Subsidiarity: Exhaustion of Remedies

If the appeal is based *on an alleged unconstitutionality of a norm* that has not been sustained by the decision *a quo*, the party claiming such unconstitutionality must first exhaust all the available remedies before lodging the appeal to the Constitutional Court (Article 70(2) LCC).

Furthermore, that same party must always raise the question of constitutionality before each higher court. In other words, the question of unconstitutionality must never be abandoned by the party who wants to resort to this procedure.

Only in rare situations—for example, when the interested party has had no opportunity to raise the constitutionality question previously or when there is a previous decision of the Constitutional Court—will the Court admit appeals which are based on *new* constitutionality issues, i.e., issues which have been raised by the interested party only after the court *a quo* has awarded its final decision.

Concrete control of constitutionality by the Constitutional Court, as it has been set forth in the Constitution and the LCC, takes form in an *appeal* which demands that the contested issue have already been appreciated by the ordinary court or that, at least, such court have had the procedural opportunity to do so.

III. NORMS AGAINST WHICH THE APPEAL ON GROUND OF UNCONSTITUTIONALITY MAY BE RAISED

The Court has stated, from the outset, that the concept of norm—for the purpose of concrete control of constitutionality—should not be restricted to a specific provision of a normative act. In fact the concept of "norm" adopted is simultaneously *functional* and *formal*. *Formal* because the Court may assess provisions which, despite having an individual and concrete nature, are contained in legislative acts—the traditional requirements of *generality* and *abstraction* do not provide for a satisfying test. *Functional* because it must be appropriate as to define the object of a control of constitutionality system as provided for in the Constitution[20]—the jurisdiction of the Court is not concerned only with the provisions in its textual expression in legal texts, which means that the object of control is the *norm* and not the literal support.

We will now examine the main types of normative acts that may be scrutinised by the Constitutional Court.[21] This is a mere exemplificative

20. *See* CANOTILHO, *supra*, note 7, at 932; ANDRADE, *supra* note 9, at 377.

21. *See* MIRANDA, *supra* note 9, at 178-90; CANOTILHO, *supra* note 7, at 935-39; LOPES DO REGO, "O Objecto Idóneo dos Recursos de Fiscalização Concreta da Constitucionalidade" Interpretações Normativas Sindicáveis pelo Tribunal, 3 JURISPRUDÊNCIA CONSTITUCIONAL, Julho/Setembro, 2004, 5-7.

enunciation—there may be other provisions which can integrate the object of a concrete-control proceeding (such as the normative decrees issued by the President of the Republic or the provisions of other legal orders which are applicable in the Portuguese order[22]).

A. Legislative Acts

The *usual* object of a constitutionality appeal is a legislative act (laws, decree-laws or regional decree-laws).

Any provision contained in a legislative act may be the object of a constitutionality appeal, even if the provision is not general or abstract. The concept of law, as the legislative act that may be the object of a control of constitutionality proceeding, is thus a *formal* one.

For instance, facing the need to assess the constitutional conformity of two decrees enacted by the Government which extinguished two public companies—and thus contained provisions of an individual and concrete nature—the Court asserted its jurisdiction since such legislative acts should be considered normative for the purpose of concrete control of constitutionality.[23]

B. Administrative Regulations

Administrative regulations may also be scrutinised by the Constitutional Court if they are directly in breach of Constitutional provisions or principles. But this is not a general principle since it is required that the provisions contained therein have a *public* nature. For example, an internal regulation of a public company—on the prevention of alcoholism—was considered as a purely *private* norm and thus was not admitted as the object of a constitutionality appeal (decision 156/88). The same decision was reached when the object consisted of provisions of the Statute and the Discipline Regulation of the Portuguese Football Federation (decision 472/89). However, a later judgment came to admit an appeal on a provision of the Discipline Regulation of that Federation (decision 730/95). And in 2005, although having ruled the appeal inadmissible on different grounds, the Court accepted a provision of the Regulation of the Justice Council of the Football Federation as a possible object of a constitutionality appeal since the Federation had been conferred public powers by law.

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22. *See* Ramos, *supra* note 13, at 783-807.

23. *See* Tribunal Constitucional [Constitutional Court] Decision 26/85 (Port.) (according to the Court, a *norm* would be any act enacted by the public powers that entails a rule of conduct (for the individuals or to the Administration) or a criterion of decision for the courts).

C. *Collective Work Agreements*

Whether collective work agreements contain *norms* for the purpose of control of constitutionality by the Court has generated an intense debate that has lasted for the past fifteen years with division both on the constitutional case law and among the legal doctrine. The *vexata quaestio* has been answered in two opposite directions. Some authors have failed to recognise a public character to these agreements. As far as these opinions are concerned, such agreements are enacted by the private will of the contracting parties and do not constitute any form of autonomous law. Accordingly, for the purpose of concrete control of constitutionality, the provisions of a collective work agreement lack the public nature that must characterise any norm under a control-of-constitutionality proceeding. This position was largely followed by the predominant case law of the Constitutional Court until early 2008. However, some minority judgments regarded collective agreements as entailing norms adequate to be submitted to the Constitutional Court. These judgments, dating back to a dissident opinion by Justice José de Sousa e Brito (decision 172/93), led to a first plenary session, in 2005, to discuss the issue. Decision 224/2005, with five dissident opinions, enforced the predominant position of not admitting the constitutionality appeal on these provisions. In 2008, however, following a change in the Court's composition, the question was brought back to the Plenary on initiative of the President according to Article 79-A(1) LCC. The plenary then ruled on the admissibility of Clause 137 of the Collective Work Agreement to the Banking Sector. The judgment (decision 174/2008) is mainly based on the dissident opinion abovementioned. According to it, collective agreements entail general and abstract norms that are potentially heteronomous. Furthermore, the normative character of these norms is explicitly *recognised* by the Constitution that establishes workers' fundamental right to regulate their status through the celebration of collective agreements (Article 56(3) CPR). Moreover, the Court acknowledges that relevance must be given to the fact that the importance of collective agreements to regulate and establish the labour regime is increasing—denying these norms the possibility of access to the highest instance of the constitutional jurisdiction would thus be a paradox.

D. *Rules of Judicial Origin*

The Court has accepted to review the constitutionality of a procedural norm set forth by an arbitral tribunal. In fact, in decision 150/86 the Court stated that for the purpose of concrete control of

constitutionality, the referring norms do not necessarily have to be enacted in a legislative or regulative form. A further note on the specification of what should be considered a norm was then added: the provisions at stake should have their immediate validity parameter on the Constitution. Furthermore, the clauses at stake were not deemed as having been enacted by private autonomy since arbitral tribunals perform a public function.

The Court has also agreed to control the rule stated at the end of a decision for the unification of jurisprudence of the Supreme Courts (Supreme Court of Justice and Administrative Supreme Court).[24]

More important, the Court appreciates the constitutionality of the rules underlying a judicial decision. That means, as we have seen, the "rule" as *ratio decidendi* in the sense of a Common Law system or the norm of the case in the sense of Fikentscher's theory of the *Fallnorm*. In these cases the Court deals with a concept of "norm" as a result of legal interpretation. The concept of norm includes the norm built by analogy in the terms of Article 10(1)(2) of the Portuguese Civil Code[25] and even the norm to which Article 10(3) of the same Civil Code (in line of the famous Article 1 of the Suisse Civil Code) makes reference: "*the norm that the interpreter himself would create if he had to legislate within the spirit of the system.*"[26]

Sometimes the Court rules on the constitutionality of a norm as far as it is interpreted as *including a typical case or situation*. For instance, in decision 155/2007 the Court decided

> To declare unconstitutional, in violation of Articles 25, 26 and 32, paragraph 4, of the Constitution of the Portuguese Republic, the rule contained in Article 172, paragraph 1, of the Code of Criminal Procedure, when interpreted to allow, without the permission of the judge, the forced gathering of biological traces of a defendant for determination of his genetic profile, when the latter has expressed his explicit refusal to cooperate or to allow such collection.

In other situations the Court has ruled on the constitutionality of a provision so far as it is interpreted as *excluding a typical case or situation*. In decision 232/2004 the Court decided "To declare the unconstitutionality of the provisions that allow for the expulsion of foreigners for the practice of a crime when applied to foreigners who are in charge of underage children of Portuguese nationality resident in Portugal."

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24. *See* DO REGO, *supra* note 21, at 6.

25. *See* MOREIRA, *supra* note 4, at 847.

26. In decision 264/98 the Court explicitly states that it is controlling the rule created by the Supreme Court on the basis of the power given by Article 10(3) of the Civil Code.

In a very controversial case the Court admitted to decide on a *rule created by abduction on the basis of two different legal provisions.* In decision 183/2008 the Court decided to overrule a precedent of the Supreme Court and

> to declare, with general force, the unconstitutionality, in violation of Article 29, paragraphs 1 and 3, of the Constitution, the rule extracted from the combined provisions of Article 119, paragraph 1, of the Penal Code and Article 336, Paragraph 1 of the Code of Criminal Procedure, in the interpretation that the prescription of prosecution was suspended with the declaration of contumacy.

In the same line, the Court admitted, in decision 292/2008, to rule on the constitutionality of the combined interpretation of Articles 483(1) and 484, of the Civil Code, and Article 14 of the Statute of Journalists, according to which compensation for harm to the good name of a legal person takes place even when there is only unconscious guilt of the journalist. This hypothetical norm allowed the Court to control the specific *balancing process* (in the sense of German constitutional-law scholar Robert Alexy) between two fundamental rights contained in the decision of the ordinary court.

IV. CONCLUSIVE REFLEXION: SHOULD PORTUGAL HAVE A CONSTITUTIONAL COMPLAINT?

Critics say that the many fundamental rights declared in the text of the Constitution do not enjoy effective protection because it is not possible to bring a direct action to the Constitutional Court on concrete administrative acts and judicial decisions.[27] Furthermore, critics claim that, paradoxically, the system entails too many guarantees for cases where no fundamental rights are at stake since the appeal on constitutionality is not restricted to fundamental-rights issues.[28]

We must first note that the constitutionality of judicial decisions or administrative acts is not, as such, excluded from the judicial order.

All ordinary courts may—and indeed have a duty to—scrutinise administrative acts in order to assess their conformity with constitutional provisions and principles (Article 266(2) CPR). The courts may confront directly the administrative act against not only fundamental rights but also any fundamental principle of administrative activity, such as equality, legitimate expectations or proportionality.

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27. *See* CANOTILHO, *supra* note 7, at 939-43.

28. *See* NOVAIS, *Em Defesa do Recurso de Amparo, in* DIREITOS FUNDAMENTAIS: TRUNFOS CONTRA A MAIORIA 159 (2006).

Higher Courts, including the Supreme Court of Justice and the Supreme Administrative Court, may also scrutinise judicial decisions in order to assess their conformity with constitutional provisions and principles. Such activity, however, may not forwardly be appreciated by the Constitutional Court since its jurisdiction is strictly concerned to the constitutionality of norms.

The question of assessing whether there is a breach on the system of protection of fundamental rights must also take under consideration other aspects that are not directly related to the system of judicial control of constitutionality. It is true that as a rule, there is no direct action against public acts. But there are some important exceptions[29] to this rule even in what concerns administrative acts and norms. Article 268(5) CPR established, since the 1997 amendment, the right of individuals to a *proceeding against administrative norms.* There are also other administrative judicial proceedings specially designed for the protection of fundamental rights: (i) summon for the protection of fundamental rights, freedoms and guarantees (applicable when there is an imminent violation of fundamental rights and there is no time for a preliminary injunction); (ii) provisional judgment of a preliminary injunction (also applicable in urgent cases related to fundamental rights, freedoms and guarantees); (iii) exceptional review appeal by the Supreme Administrative Court (in questions of fundamental legal and social relevance—the Courts have held that this expression encompasses the cases related to fundamental rights).

In judicial courts there are also special procedures for the protection of fundamental rights. The Constitution establishes the priority nature of any procedure designed for the protection of personal rights (Article 20(5) CPR). It also sets forth, in Article 31, the *habeas corpus* proceeding against any illegal detention, which is directly appreciated by the Supreme Court of Justice.

Furthermore we must take into account the broad concept of norm. If, for instance, a higher court were to allow the use of torture on a suspect of terrorism, without a specific provision but only on the basis of an analogy or a supra-legal unwritten justification, could the Constitutional Court admit an appeal on the decision? As we have already seen the answer might be positive if the appellant were to successfully formulate the constitutionality question in normative terms: the Court might acknowledge ruling on the *norm* that had been applied by the ordinary court.

29. *See* ANDRADE, *supra* note 9, at 376.

The broad concept of "norm" renders the Constitutional Court a "Court of the Citizens."[30] In global terms, the Portuguese system of concrete control of constitutionality may come to results similar to the results of the "constitutional complaint."

The main criticism that can be levied against the system is the relative uncertainty of the *normative question* criterion,[31] particularly when taking into account the fact that the criterion is not uniformly applied by all judges. The system is therefore lying upon a question whose answer is not always predictable: is there a "norm" at stake?

However, both the *amparo*[32] and the individual constitutional complaint systems also face the issue of filtering mechanisms against excessive use. Such filtering mechanisms are based in relatively undetermined concepts, which means that there is a common problem pertaining to the jurisprudential concretisation of those mechanisms. Should such control rely more on the formal definition of the object of the procedure or on the relevance of the rights that have potentially been offended? Perhaps the latter option would be preferable.

This might lead to the conclusion that the advantages of an individual constitutional complaint system would outweigh those of a purely normative control. However, such a solution would have a paradoxical consequence. As the Constitutional Court would no longer be limited by the normative criterion, its competence would overlap the competence of the other courts, which can directly decide cases of constitutionality issues. Since the appeal to the Constitutional Court presupposes, as a rule, the exhaustion of legal remedies, the Court would remain as the third or fourth instance of appeal, and that would probably render impossible its functioning. Such a scenario would impose a redefinition of the concrete-control system through the abrogation of the diffuse control with decision on the merits by all courts and the introduction of a preliminary and incidental procedure to the Constitutional Court[33] with additional filtering mechanisms. The whole system should then be changed in the search of a new equilibrium.

There are, however, alternatives within the existing system towards a wider protection of fundamental rights by the Constitutional Court. The most obvious, and perhaps most coherent, of them all would be a

30. *See* MEDEIROS, *supra* note 17, at 214.

31. *See* PINTO, *supra* note 2, at 214.

32. *See* António de Araújo and J.A. Teles Pereira, *Justiça Constitucional nos 30 anos da Constituição Portuguesa: Uma Aproximação Ibérica, in* LA CONSTITUCIÓN PORTUGUESA. UN ESTUDIO ACADÉMICO TREINTA AÑOS DESPUÉS, 226 (Javier Rajadura Tejada ed., 2006).

33. *See* AMARAL, *supra* note 18, at 89-90 (on the introduction of a preliminary incidental procedure in the Portuguese system of constitutional control).

clearer and more uniform assumption of the functional concept of norm. The appeals could then be filtered through summary decisions on the merits based on the precedent culture, which already encompasses the case law of the Court.