Constitutional Court of Korea

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Questionnaire
Reply by the Constitutional Court of Portugal

A. Court description

A description has already been provided for the CODICES database.

B. Social integration

1. Challenges of social integration in a globalised world

1.1. What challenges has your Court encountered in the past, for example in the field of asylum law, taxation law or social security law?

On various occasions the Constitutional Court has already pronounced itself on questions which, in one way or another, were underlain by problems linked to social integration. This has particularly been the case in the field of social security law, and less often with regard to the right of asylum and tax law.

Albeit not a complete list, the following Rulings on these matters are especially worth mentioning:

Right of Asylum:

- Ruling no. 962/96: after handing down several decisions in concrete review cases that went in the same direction, the Constitutional Court declared a

number of norms contained in two Executive Laws unconstitutional with generally binding force: the part that precluded foreigners and stateless persons who wanted to legally challenge an administrative act denying them asylum from receiving legal aid in the form of legal counsel.

- Ruling no. 219/04: no unconstitutionality was found in the norm contained in Article 5(2) of Law no. 15/98 of 26 March 1998, when interpreted such that bringing political asylum proceedings suspends any new decision in extradition proceedings, but not the execution of an extradition decision that had already been given before the asylum case was brought.

- Ruling no. 587/05: the part of the norm contained in Article 16(2) of Law no. 15/98 of 26 March 1998 that sets an 8-day time limit for appealing to an administrative court against the final decision of the National Commissioner for Refugees, when interpreted in such a way as to encompass cases in which a petitioner for asylum who does not speak Portuguese asks for legal aid, was not found unconstitutional.

Social Security:

- Ruling no. 62/2002: when interpreted such as to allow the attachment of amounts received under the heading of the national Minimum Guaranteed Income (RMG), a number of Code of Civil Procedure (CPC) norms were held unconstitutional because they breached the principle of human dignity included in the principle of the state based on the rule of law, as derived from the conjugated provisions of Articles 1 and 63(1) and (3) of the Constitution of the Portuguese Republic (CRP).

- Ruling no. 72/2002: with generally binding force, the Constitutional Court declared the unconstitutionality of a norm in the Statute governing the Retirement of Public Sector Staff, which said that in cases in which Portuguese nationality is required in order to occupy the post a person has retired from, the loss of that nationality resulted in the loss of the situation of public sector retiree.

The Court took the view that this legislative measure (Article 82[1][d] of the Statute) was arbitrary and discriminatory, because there were no rational

grounds for treating nationals and non-nationals differently; and that it violated the principle of justice and thus the principle that the rights of nationals and non-nationals are the same (Article 15[1], CRP).

- Ruling no. 177/2002: with generally binding force, the Constitutional Court declared the unconstitutionality of the part of a Code of Civil Procedure norm that permitted the attachment of up to a third of social or pension benefits paid to judgement debtors without other attachable assets capable of satisfying the debt in question, where the total value of those benefits did not exceed the National Minimum Wage (SMN), because this breached the principle of human dignity included in the principle of the state based on the rule of law, as derived from the conjugated provisions of Articles 1, 59(2)(a) and 63(1) and (3) of the Constitution.

- Ruling no. 437/2006: a norm contained in Executive Law no. 380/89 of 27 October 1989 was interpreted to mean that the time an interested party spent working under a valid labour contract between the ages of 12 and 14 could not count towards the person's history of social security contributions. The Court found this unconstitutional, because it violated the principle of equality enshrined in Article 13(1) of the Constitution.

In the Court's words: *"(...) we can see no sign of reasonable grounds (...) for the discriminatory treatment the norm in question metes out to interested parties who began their working lives between the ages of 12 and 14, at a time when the law said that people could start work when they were 12 years old. This labour was lawful and possessed the same social dignity as that provided by minors aged 14 or more when this became the minimum working age. The interest in taking it into account in full when a person's lifetime of contributions and thus his/her right to social security benefits are calculated and determined, is exactly the same".*

- Ruling no. 275/2007: a norm included in Executive Law no. 119/99 of 14 April 1999 was interpreted to mean that failure by the interested party to ask the Social Security Service for the unemployment benefit within a time limit of 90 consecutive days counting from the date on which he/she became unemployed, led to the irreparable preclusion of the overall right to all the benefit instalments the

person would have been entitled to over the course of his/her involuntary unemployment. The Court found this interpretation unconstitutional, because it was in violation of the principle of proportionality, when taken in conjunction with Article 59(1)(e) of the Constitution of the Republic (the right to material assistance in unemployment).

A similar conclusion was reached in Rulings nos. 267/2010, 49/2010 and 212/2010.

Tax Law:

- Ruling no. 806/1993: the Court declined to declare the unconstitutionality of a norm contained in the Personal Income Tax Code (CIRS), under which it was possible to deduct the "*amounts paid in rent by the tenant of an urban property or autonomous unit therein for the purpose of his/her own permanent housing, when so paid with reference to rental contracts entered into under the Urban Rental Regime approved by Executive Law no. 321-B/90 of 15 October 1990*" from the taxpayer's total net income subject to IRS.

- Rulings nos. 585/2003, 446/2004 and 19/2006: the norms contained in an Executive Law that regulated the regime governing the assessment of the incapacity of disabled persons for the purpose of access to the legal measures and benefits designed to facilitate their full participation in the community, were not found to be unconstitutional.

Other:

- Ruling no. 411/1993: a norm contained in the Social Security Law that entirely exempted the benefits paid by social security institutions from the possibility of attachment was found unconstitutional, to the extent that the exemption included the amount of the benefits paid by social security institutions over and above the minimum needed to adequately ensure an appropriately dignified living, because this was in breach of the conjugated provisions of Articles 13(1) and 62(1) of the Constitution (the principle of equality, and the right to private property).

- Ruling no. 570/2001: an Urban Rental Regime norm which says that landlords cannot terminate rental contracts on the grounds that the tenant is not permanently resident at the property in cases in which this absence is due to *force majeure* or illness was interpreted to exclude cases of irreversible illness or incapacity. The Court did not find this interpretation unconstitutional.

- Rulings nos. 277/2002 and 177/2005: the Court found no unconstitutionality in the part of a norm contained in Executive Law no. 136/85 of 3 May 1985 which says that pay is an exception to the rule that rights cannot be lost by a worker who takes maternity leave (an exception which means the employer cannot be required to pay a meal allowance during the leave period).

- Ruling no. 474/2002: the Court said that omission of the legislative measures needed to make it possible for public sector workers to enjoy the right to material assistance in situations in which they become involuntarily unemployed, as provided for in Article 59(1)(e) of the Constitution (right to material assistance in involuntary unemployment), meant that the terms of the Constitution were not being fulfilled.

- Ruling no. 509/2002: a norm included in Decree of the Assembly of the Republic no. 18/IX on the right to the Social Insertion Income (RSI, a social benefit), which withdrew that right from persons between the ages of 18 and 25, was held unconstitutional because it violated the right to a minimally dignified standard of living, which is itself inherent in the principle of respect for human dignity derived from the conjugated provisions of Articles 1, 2 and 63(1) and (3) of the Constitution.

- Ruling no. 486/2003: the Court declined a request by the Public Prosecutors' Office for a declaration with generally binding force of the unconstitutionality of norms set out in Ministerial Order no. 393/97 of 17 June 1997, regarding prizes for results obtained by disabled persons in international sporting competitions (allegation of inequality because the prizes were less than those awarded to other sportspeople).

- Ruling no. 96/2004: the part of a Code of Civil Procedure norm that permitted the attachment of a proportion of the salary of a judgement debtor

without other attachable assets capable of satisfying the debt in question, to the extent that this deprived the debtor of income at least equal to the National Minimum Wage, was unconstitutional because it breached the principle of human dignity derived from the principle of the state based on the rule of law embodied in the conjugated provisions of Articles 1, 59(2)(a) and 63(1) and (3) of the Constitution.

- Ruling no. 657/2006: the interpretation of a Code of Civil Procedure norm such as to allow the attachment of any percentage of a judgement debtor's salary, when the latter is below the National Minimum Wage (SMN), or it is above that wage but the amount left to the debtor after the attachment is less than the SMN, was not found to be unconstitutional.

- Ruling no. 257/2010: the Court held that a Code of Civil Procedure norm, when interpreted in such a way as to allow the attachment of pay whose amount is equal to the National Minimum Wage, is not unconstitutional.

1.2. How were issues of social integration or conflict transformed into legal issues?

Influenced by the historical context in which it was written, the 1976 Constitution of the Portuguese Republic contains not only a catalogue of fundamental rights, but also a long list of social rights. As a result, issues of social integration or conflict are legally actionable on the constitutional level.

The breadth with which the Constitution encompasses this area is clear from the rules regarding the legal regimes governing social security and solidarity (Article 63), health (Article 64) and housing and urbanism (Article 65), the rules that regulate the environment and quality of life (Article 66), and the normative regimes on the protection of the family (Article 67), fatherhood and motherhood (Article 68), childhood (Article 69), youth (Article 70), disabled persons (Article 71) and the elderly (Article 72).

At the same time, although there may not be a direct match between such issues and a given constitutional norm, there are many situations in which questions linked to social integration or conflict are the object of proceedings before

the ordinary courts. These quite often raise questions of the constitutional conformity of norms that are applicable to the resolution of the case, on which the Constitutional Court is then called to pronounce itself. In doing so, its parameters are not only the constitutional norms on social rights themselves, but also those concerning fundamental rights, together with the key constitutional principles underlying a state based on the rule of law, such as the principles of equality, proportionality and the protection of trust.

More recently, the economic and financial crisis that has made itself felt in Europe and the austerity measures that have been applied in Portugal have given rise to questions as to whether the latter are in conformity with the Constitution. The Constitutional Court has particularly been asked to rule on measures included in budgetary laws, involving public sector pay cuts, cuts in pensions that are already being paid out to beneficiaries of the public social security system, the imposition on pensioners of an extraordinary contribution, and also a contribution taken from unemployment and sickness benefits.

These kinds of economic and budgetary measures have been scrutinised by the Constitutional Court in order to gauge their conformity with certain constitutional principles – namely the principles of equality and trust. The Court has found some of them unconstitutional, because they would have implied an excessive and disproportionate sacrifice on the part of certain groups of citizens (e.g. pensioners or public servants), or because they entailed the disproportionate sacrifice of some – already low – social benefits (e.g. the contribution payable in relation to unemployment and sickness benefits) – see Rulings nos. 353/2012 and 187/2013.

1.3 Is there a trend towards an increase in cases on legal issues relating to social integration? If so, what were the dominant questions before your Court in the past and what are they at present?

See answer to question 1.2.

2. International standards for social integration

2.1. What are the international influences on the Constitution regarding issues of social integration/social issues?

The Constitutional Court does not control whether direct violations of fundamental rights exist or not; it limits itself to assessing whether a given norm is in breach of a constitutional rule or principle.

Under the Constitution, the fact that Portugal is a European Union Member State means that the Court must take account of European Law in its decisions and other functions.

The Constitution of the Portuguese Republic includes two Articles that address the application of European and International Law.

Article 8 reads as follows:

"Article 8

(International law)

1. The norms and principles of general or common international law form an integral part of Portuguese law.

2. The norms contained in duly ratified or approved international conventions come into force in Portuguese internal law once they have been officially published, and remain so for as long as they are internationally binding on the Portuguese state.

3. The norms issued by the competent organs of international organisations to which Portugal belongs come directly into force in Portuguese internal law, on condition that this is laid down in the respective constituent treaties.

4. The provisions of the treaties that govern the European Union and the norms issued by its institutions in the exercise of their respective competences are applicable in Portuguese internal law in accordance with Union law and with respect for the fundamental principles of a democratic state based on the rule of law."

Article 16 says the following:

"Article 16

(Scope and interpretation of fundamental rights)

1. The fundamental rights enshrined in the Constitution shall not exclude any others set out in applicable international laws and legal rules.

2. The constitutional precepts concerning fundamental rights must be interpreted and completed in harmony with the Universal Declaration of Human Rights."

Under Article 8 the norms and principles of general or common international law and the norms contained in duly ratified or approved international conventions, the norms issued by the competent organs of international organisations to which Portugal is a party, and the provisions of the treaties governing the European Union and the norms issued by its institutions in the exercise of their competences remain in force in Portuguese law for as long as they are internationally binding on the Portuguese state.

The Constitutional Court recently expressly accepted the validity of international legal instruments in Portuguese law. It did so in Rulings nos. 353/2012 and 187/2013, in which it pronounced itself on the constitutional conformity of a number of norms contained in the laws that approved the State Budgets for 2012 and 2013. In both decisions the Court declared that the instruments which form the basis for the Financial Assistance Programme for Portugal and were adopted with regard to Council Regulation (EU) no. 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism are binding on the Portuguese state.

These decisions recognise that the rights enshrined in the Portuguese Constitution can be conditioned by normative instruments issued by the European Union institutions. In them, the Court defined the balance that must be achieved between the measures designed to fulfil the economic objectives set out in the Assistance Programme on the one hand, and the protection of the fundamental rights and principles enshrined in the Constitution of the Portuguese Republic on the other.

Where fundamental rights are concerned, Article 16(1) of the Constitution establishes a principle of openness to rights derived from international

sources, inasmuch as it says that the fundamental rights enshrined in the Portuguese Constitution do not exclude any others contained in the applicable international-law instruments and rules. This means that when the Constitutional Court evaluates a question, it must not only bear in mind the rights that are directly protected by the Constitution, but also those that are recognised under international law – particularly those enshrined in the European Convention on Human Rights (ECHR). However, we should note that the catalogue of fundamental rights provided for in the Portuguese Constitution, which includes several of the so-called "third generation" rights, such as data protection, administrative transparency, or even guarantees in the bioethical field, is longer and more detailed than the catalogue present in the main international treaties on human rights – namely the ECHR or the Universal Declaration of Human Rights (UDHR). The result is that in most cases the Constitutional Court does not need to resort to this kind of instrument as an autonomous criterion for validating norms with regard to fundamental rights.

Although, as we said above, the Portuguese Constitutional Court has never recognised international conventions and treaties – especially those enshrining catalogues of rights, such as the ECHR, the Charter of Fundamental Rights of the European Union and the UDHR – to possess an autonomous parametric value for constitutional review purposes, the Court has nonetheless quite often used the rules and principles established in this type of international instrument as criteria for interpreting the applicable Portuguese constitutional norms. It is thus possible to say that they play a secondary role in decisions in such cases. To put it another way, international norms often serve as guidelines in the process of rendering the provisions of the Constitution operable in practice, and can, in certain cases, help broaden the content of a given fundamental right that was already enshrined in the Portuguese Constitution.

There are various examples of Constitutional Court decisions along these lines, including those set out in Rulings nos. 185/10, 281/11, 360/12, 327/13 and 404/13. Ruling no. 101/09, on problems linked to medically assisted procreation, gives a particularly good idea of this process. In it the Court said: *"it is also within*

the context of the recognition of the universality of the principle of the dignity of the human person that one must situate the Constitution's openness to international law (...)". The Court set out a principle of interpretation in accordance with the Universal Declaration of Human Rights. It said that the practical scope of this principle was: *"that of making it possible to resort to the Universal Declaration in order to exactly determine the interpretative sense of a constitutional norm linked to one or more fundamental rights to which one cannot attribute an unambiguous meaning, or in order to make indeterminate constitutional concepts regarding fundamental rights operable in practical terms".*

In addition, the Court added that: *"given the reception clauses derived from Article 8(1) and (2) of the Constitution,"* one cannot: "a priori, *and as a general thesis, exclude the possibility that other applicable international-law instruments are important in constitutional terms. For the purposes that are important in the present case, this is particularly true of the Conventions and Declarations most closely linked to Bio-Law, such as the Oviedo Convention* (and) *its Additional Protocol on Human Cloning".* On the subject of the parametric value of these instruments, the Court took the view that: *"we cannot exclude the possibility that, although they possess a conventional nature, some of their provisions may enjoy constitutional force, to the extent that they present themselves as an expression of general legal principles that are commonly recognised within the ambit of the international community as a whole, or at least of that of a given civilizational universe (Article 8[1]), or as unwritten fundamental rights within the framework of the open clause contained in Article 16(1). (...) However, here too one cannot ignore the fact that the Constitution adopts these conventional international-law parameters as its own when it stipulates limits on the legal regulation of medically assisted procreation that enable the latter to be compatible with the basic demands imposed by the dignity of the human person or the principle of a state based on the rule of law (Article 67[2][e]). This leads us to consider that, as international-law norms which are binding on the Portuguese state, the norms contained in Articles 1 and 2 of the Oviedo Convention do not possess the value of autonomous parameters for judging constitutionality. At the*

same time, while one must recognise that, as the international conventional law they are, all the other provisions of the Oviedo Convention – particularly those set out in Articles 11, 14, 15 and 18 – and all the provisions of the Additional Protocol possess a supra-legal value, which is the dominant understanding, 'they must be considered to be subject and hierarchically subordinate to the Constitution' ".

2.2. Does your Court apply specific provisions on social integration that have an international source or background?

See answer to question 2.1.

2.3. Does your Court directly apply international instruments in the field of social integration?

See answer to question 2.1.

2.4. Does your Court implicitly take account of international instruments or expressly refer to them in the application of constitutional law?

Although some of the fundamental rights provided for in the Constitution of the Portuguese Republic are not matched by European or International-Law provisions, few of the rights established in international instruments are not directly covered in the Portuguese Constitution. This is why the Constitutional Court has never said that an autonomous constitutional value is attributed to the norms of the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union and the Universal Declaration of Human Rights.

In short, the Constitutional Court has the power to apply norms and principles enshrined in international conventions to which Portugal is a party or in other European and International-Law instruments, but has never used them as a direct, autonomous means of representing constitutional limits to which it resorts when it assesses the constitutionality of Portuguese legal provisions.

This means that even when a petitioner or appellant has invoked the content of those rights, the Court has never decided that there was an exclusive or

direct breach of International or European law. The norms set out in such international instruments are always used in conjunction with one or more matching rules or principles in the Portuguese Constitution. They thus play a secondary role in the *ratio decidendi* in each case. In other words, the Constitutional Court has never used this kind of international/European norm as a particular criterion for gauging the constitutionality of internal legal provisions.

2.5. Has your Court ever encountered conflicts between the standards applicable on the national and on the international level? If so, how were these conflicts solved?

Lack of conformity between the Constitution and International Public Law norms:

International Public Law's infra-constitutional position in the Portuguese legal system results from both Article 8(1) and (2) of the Constitution of the Portuguese Republic (CRP), as discussed above, and the constitutional norms regarding the constitutional review system.

Article 277(1) of the CRP says that: "*Norms that contravene the provisions of the Constitution or the principles enshrined therein are unconstitutional*".

This means that norms which form part of International Public Law – be it common or conventional – are subject to both *ex post hoc* abstract and concrete reviews of their constitutionality.

In the first of these two situations, Article 281(1)(a) of the Constitution gives the Constitutional Court the power to assess the constitutionality of any norm – thus including international-law norms – and where appropriate declare it unconstitutional with generally binding force, when asked to do so by any of the entities listed in paragraph (2) of the same Article. The applicable procedure is the *ex post hoc* one for normative acts, as set out in Articles 62 to 68 of the Law governing the Organisation, Modus Operandi and Procedures of the Constitutional Court (LTC).

In the second situation – concrete review cases – Article 280(1) of the CRP says that it is possible to appeal to the Constitutional Court against decisions in which other courts refuse to apply any norm on the grounds that it is unconstitutional (para. [1](a]), or apply a norm whose unconstitutionality has been alleged during the proceedings (para. [1](b]). This precept also covers international-law norms. The procedure here is that set out in Articles 69 to 85 of the LTC, which is applicable to the concrete review of the constitutionality of internal-law normative acts.

The constitutionality of conventional international-law norms is also subject to the possibility of prior review under Article 278(1) of the Constitution: "*The President of the Republic may ask the Constitutional Court to undertake the prior consideration of the constitutionality of any norm contained in an international treaty that is submitted to him for ratification (...) or in any international agreement, the decree approving which is sent to him for signature*". The procedure here is identical to that applicable to the prior review of other normative acts (see Articles 57 to 61, LTC).

Having said this, the Constitution does permit the exceptional application of norms contained in international treaties that are organically or formally unconstitutional, on condition that the norms are applied in the other party's legal system (Article 277[2], CRP).

Although the Constitutional Court has already been confronted with the issue of the projection of conventional international law into the internal legal system on several occasions, it is important to note that the majority of cases concerned internal-law norms. The question in these cases was whether or not the rules established in international conventions form part of the so-called "constitutional block" and can thus serve as a parameter for gauging the validity of internal-law norms.

On the other hand, the Court has only been called on to pronounce itself on the constitutional conformity of international-law instruments in a handful of cases.

On the subject of interest to us here, we have Ruling no. 494/99. In this prior review case the Court found that the norms contained in the "Convention on Social Security between the Portuguese Republic and the Republic of Chile", which was signed in Lisbon on 25 March 1999, were not unconstitutional.

Contradictions between constitutional norms and Universal Declaration of Human Rights rules are a special case, because Article 16(2) of the CRP refers to the UDHR expressly.

As we have already said, Article 16(2) requires that constitutional and other legal precepts on fundamental rights be interpreted and completed in harmony with the UDHR.

The Constitutional Court has never been called on to resolve a situation involving a choice between the prevalence of a CRP norm or a UDHR norm.

However, in concrete review cases the Court often faces situations in which appellants invoke UDHR precepts, which they argue form part of the "constitutional block" and want to see taken as parameters for gauging the validity of internal-law norms.

Under this heading, Portuguese constitutional jurisprudence has essentially been guided by the idea that international conventions on protecting and guaranteeing human rights primarily serve to help interpret and complete constitutional precepts, but without constituting autonomous parameters for judging the validity of challenged normative acts.

It is worth noting that the Constitutional Court has already said that the sense of Article 16(2) is such that it: "*broadens the constitutional coverage of the fundamental rights, rather than extensively or intensively restricting or limiting it*".

This was the case in Ruling no. 121/2010, on the recognition of same-sex civil marriage. Although it acknowledged that the concept of marriage protected by the Universal Declaration of Human Rights is that of a union between a man and a woman, the Court considered that it was not bound by so restrictive an interpretation.

Lack of conformity between international conventions and ordinary internal law:

Since 1989, it has been possible to appeal to the Constitutional Court for a concrete review: "*against court decisions (…) that refuse the application of any norm contained in a legislative act on the grounds that it is contrary to an international convention, or that apply it in disconformity with that which the Constitutional Court has previously decided on the question* (Article 70[1][i], LTC). Article 72(2) of the LTC is more precise about the scope of such appeals, which must be: "*restricted to questions of a constitutional-law and international-law nature that are implicated in the challenged decision*".

When Law no. 85/89 added these precepts to the LTC, the intention was to overcome conflicting judgements handed down by the former 1st and 2nd Chambers of the Constitutional Court on its competence to hear questions involving conflicts between Portuguese national law and conventional international law.

This particular type of appeal only encompasses the question of the position the Constitution attributes to international conventions within the normative framework of the Portuguese legal system, and questions that entail determining a convention's force in the international legal system and whether and to what extent it is binding on the Portuguese State; but not the material question that is directly in dispute – i.e. whether or not the legal norm in question conflicts with the convention – which remains within the competence of the common courts.

The Constitutional Court has uniformly and repeatedly said that its own competence in the concrete review field to gauge whether ordinary-law norms are compatible with an international convention is limited to the cases specified in the abovementioned Article 70(1)(i) of the LTC – refusal to apply a norm, or application contrary to an earlier Constitutional Court decision – and does not include appeals against decisions that apply national norms which a party to the proceedings has alleged are in conflict with international-law norms.

The Court has not yet heard any appeals lodged under Article 70(1)(i) of the LTC, because the specific preconditions for admissibility have never been fulfilled.

We should add that there can be no prior or abstract review of the conformity or otherwise of national norms with their international-law counterparts.

3. Constitutional instruments enhancing/dealing with/for social integration

3.1. What kind of constitutional law does your Court apply in cases of social integration – e.g. fundamental rights, principles of the Constitution ("social state"), "objective law", Staatszielbestimmungen,...?

As we said earlier (see answer to question B.1.2), in addition to a catalogue of fundamental rights, the Constitution of the Portuguese Republic also contains an extensive list of social rights. When considering the constitutionality of norms in cases linked to social integration, the Constitutional has paid special attention to fundamental rights, the dignity of the human person, social rights and also the key constitutional principles of a state based on the rule of law, such as the principles of equality, proportionality and the protection of trust, which it has used as parameters.

One example is Ruling no. 62/2002, in which the Court found that Articles 821(1) and 824(1)(b) and (2) of the Code of Civil Procedure (CPC), when interpreted such that amounts received under the heading of the Guaranteed Minimum Income (RMI) can be attached, were unconstitutional. It based this decision on the fact that this interpretation violated the principle of human dignity contained in the principle of a state based on the rule of law, as derived from Articles 1 and 63(1) and (3) of the Constitution of the Portuguese Republic.

Ruling no. 509/02 is one of many other examples of cases in which the Court referred to these major constitutional principles. Albeit in a prior review case, the Court pronounced the unconstitutionality of norms that changed the conditions for awarding the RMI, because they were in breach of the right to a minimally dignified standard of living, which is itself inherent in the principle of respect for human dignity.

More recently, and specifically in decisions on a variety of budgetary consolidation and public-spending reduction measures, the Court based its findings on the view that some of these measures were unconstitutional because they failed

to respect the principles of equality and proportionality (Rulings nos. 187/13 and 353/12).

3.2. In cases where there is access of individuals to the Constitutional Court: to what extent can the various types of constitutional law provisions be invoked by individuals?

Portuguese constitutional law does not provide for a "constitutional complaint" or "*amparo* remedy" format, in which private individuals who consider their fundamental rights to have been injured by acts or decisions by public authorities can appeal directly to the Constitutional Court.

The Portuguese-law model does, however, offer direct access to the Court by private persons in a form that is broader than the "constitutional complaint" system, which is paradigmatic in the European legal area.

For historical reasons the Portuguese system provides this access in a concrete review procedure involving an *appeal* against decisions in which common courts have refused to apply norms on the grounds that they are unconstitutional, or have applied norms which a party alleges are unconstitutional or which the Constitutional Court has itself found to be so in the past (Article 280[1] and [5], CRP).

As such, the format via which private individuals can turn to the Constitutional Court in situations in which they feel *personally* affected is the appeal to the Court against a common-court decision. This is the means *par excellence* by which private persons can gain access to the constitutional jurisdiction, by appealing against a decision in which a common court has applied a norm that the party in question alleged was unconstitutional during the proceedings.

The object of the appeal is thus the (allegedly unconstitutional) *norm*, and not some decision by a public authority, be it judicial or executive; and the Constitutional Court's decision is only valid *inter partes*.

We should also note that this procedural form of access to the Constitutional Court is subsidiary in nature – i.e. it can only be used after all the means of resorting to the common courts have been exhausted.

As we said earlier, the Portuguese model for access to the Court by private persons is wider than that which is accepted in virtually all the other European laws, inasmuch as it is only limited by formal and not substantial preconditions.

Thus, in order for a private person to gain access to the Constitutional Court, it is necessary for him/her to have argued, appropriately and at the due point during the proceedings, that there was a question of constitutionality with regard to legal norms that served as "*ratio decidendi*" for the decision the person wants to challenge. The *substance* or *content* of that question is irrelevant in this respect. The only relevant factor is that the question of constitutionality must be linked to the *thema decidendum* of the question being judged by the common court.

This means that, unlike in the "constitutional complaint" model, it is not necessary for the private individual to argue that his/her fundamental rights (the ones the legal system says can be the object of an *amparo*-style remedy) have been injured, as grounds for gaining access to the Constitutional Court. He/she can invoke a violation of any constitutional norm or principle, and not just ones regarding fundamental rights.

3.3. Does your Court have direct competence to deal with social groups in conflict (possibly mediated by individuals as claimants/applicants)?

As we have already mentioned, in Portugal the constitutional control procedure is directed at legal norms, and the country's Constitutional Court is not competent to act as a direct arbiter in conflicts between social groups.

3.4. How does your Court settle social conflicts, when such cases are brought before it (e.g. by annulling legal provisions or by not applying them when they contradict the principle of equality and non-discrimination)?

Although the competences attributed to the Constitutional Court do not include settling social conflicts, Court decisions that certain norms regarding social rights are unconstitutional when the constitutional principle of equality is used as a control parameter may end up having this effect.

One example is Ruling no. 191/88, in which the Court, basing itself on a breach of the dimension of the constitutional principle of equality that prohibits discrimination (Article 13[2], CRP), in the shape of preferential treatment in the calculation of the amount of the pension due to the widow of a work-related accident, compared to a widower in the same circumstances, declared part of the norm contained in Base XIX(1) of Law no. 2,127 of 03/08/65 unconstitutional with generally binding force. The part in question awarded a widower whose spouse died in an accident at work (the marriage had to predate the accident) an annual pension of 30 per cent of the victim's basic pay, on condition that he either suffered from physical or mental illness that significantly reduced his capacity to work, or was 65 or over when his wife died; whereas a widow received a pension of 40% of the victim's pay, and without the conditions applicable to a man in the same situation.

In Ruling no. 231/94 the Court also considered that favouring the female spouse in terms of access to a survivor's pension due on the death of the other member of the couple was in breach of the constitutional principle of equality, and therefore declared the norm contained in Article 3(3) of the Special Regulations for the Regime governing Survivor's Pensions unconstitutional with generally binding force.

The Court took the view that economic evolution had reduced the difference between working men and women on both the factual and the legal levels, and so the discrimination embodied in these norms seemed at first sight to be both objectively unjustifiable and entirely unreasonable.

The scope of the award of pensions was subsequently widened in both situations.

Among other things, it was also on the basis of the principle of equality that the Court pronounced itself on same-sex marriage in Rulings nos. 359/2009 (a

concrete review case) and 121/2010 (prior review), in both of which it declined to find the relevant normative solutions unconstitutional, despite the fact that they went in different directions.

In the first case the Court found no unconstitutionality in the norm set out in Article 1577 of the Civil Code, when interpreted to say that marriage can only take place between persons of different sexes. In the second, it refused to consider unconstitutional the norms contained in Decree of the Assembly of the Republic no. 9/XI, which went on to permit same-sex civil marriages.

The Court said that the constitutional concept of marriage is an open one that can not only be legislatively shaped in different ways, but also permits differing political, ethical and social conceptions. The ordinary legislator is entrusted with the task of understanding the dominant ideas held by society at a given moment in time and embodying them in the law. The Court held that the legislator's choice did not violate the constitutional principle of equality in either of the two cases.

After the second of the two Constitutional Court judgements, the Decree was enacted by the President of the Republic and published as Law no. 9/2010 of 31 May 2010.

More recently, and within the context of the current economic and financial crisis, in Ruling no. 353/2012 the Court declared the norms contained in Articles 21 and 25 of the State Budget Law for 2012 unconstitutional with generally binding force, because they were in breach of the principle of equality enshrined in Article 13 of the Constitution. The norms provided for the total or partial suspension of payment of the extra holiday and Christmas months of pay or equivalents to workers who received salaries from public entities and to public and private-sector retirees in the public social security system respectively, as an exceptional budgetary stability measure and for as long as the Financial Assistance Programme remained in effect.

Along the same lines, in Ruling no. 187/13, the Court declared the unconstitutionality with generally binding force of the norms included in Articles 29 and 77 of the State Budget Law for 2013, also due to a violation of the principle of

equality enshrined in Article 13 of the Constitution. These were similar to the norms addressed in the earlier case, in that they suspended payment of the extra holiday month of pay or equivalent to active public-sector workers and public and private-sector retirees, again as an exceptional budgetary stability measure and for as long as the Financial Assistance Programme remained in effect.

In these decisions the Court considered that the cumulative, ongoing effects of the sacrifices imposed on people receiving public-sector pay or pensions was not matched by an equivalent effect on other citizens with income from other sources. To the Court this represented a difference in treatment that was not sufficiently justified by the goal of reducing the public budget deficit. It concluded that the different treatment imposed on people who received pay or pensions from public funds was in violation of both the principle that there must be equality in the distribution of public costs and the principle of proportional equality.

3.5. Can your Court act preventively to avoid social conflict, e.g. by providing a specific interpretation, which has to be applied by all state bodies?

Similarly, it is not the Constitutional Court's place to prevent social conflicts, although in practice this may actually come about when the Court decides to declare a norm partially unconstitutional with generally binding force in an abstract review case.

In *ex post hoc* abstract cases it is quite common for the Court to decide that norms are partially unconstitutional; in prior abstract reviews (i.e., before the legal act is enacted) it can also find that a norm not yet perfect is partially unconstitutional.

When this happens, the Court holds just part of the precept that has been challenged to be unconstitutional. This part can correspond to one of the "provisions" included in the precept, or even just a section of or sentence in its text – this is known as "horizontal" or "quantitative" partial unconstitutionality; or it can be a certain dimension of the prescriptive content (a "norm" extracted from the

text), when it is referred to as "qualitative", "ideal" or "vertical" partial unconstitutionality.

Looking especially at the latter format, we see that in formal terms it corresponds to the "inverse" of an "interpretation in conformity with the Constitution". In the latter, the Court rejects the sense(s) that would cause the norm to be unconstitutional, and determines a different one that is compatible with the Constitution, thus opening the way to a decision in which the challenged norm is not found unconstitutional. However, both "partial unconstitutionality" and "interpretation in conformity" are guided by the same concern to do away with possible unconstitutional meanings; the difference is simply that in the former, this result is achieved by judging the precept to be unconstitutional "inasmuch as", or "to the extent that", or "in the part that" it incorporates a certain applicative dimension.

When choosing between an interpretative decision or a declaration of partial unconstitutionality, the Court has preferred the latter, given that it possesses generally binding force.

In Ruling no. 962/96, for example, the Court declared part of the norms contained in Article 7(2) of Executive Law no. 387-B/87 of 29 December 1987 and Article 1(1) and (2) of Executive Law no. 391/88 of 26 October 1988 unconstitutional with generally binding force – the part that that denied legal aid, in the form of legal counsel, to foreigners and stateless persons who wanted to challenge an administrative act denying them asylum – on the grounds that it was in breach of Articles 33(6), 20(1), 268(4) and 15(1) of the Constitution of the Republic.

In Ruling no. 177/2002 the Court made a similar declaration in relation to part of a norm that resulted from the combined provisions of Article 824(1)(b) and (2) of the Code of Civil Procedure. The part in question permitted the attachment of up to one third of periodic payments made to a judgement debtor who did not have enough other attachable assets to pay the debt in question, when those payments took the form of a social benefit or pension whose overall amount did not exceed the National Minimum Wage. The Court considered that this violated

the principle of human dignity which is contained in the principle of a state based on the rule of law and which results from the combined provisions of Articles 1, 59(2)(a) and 63(1) and (3) of the Constitution.

3.6. Has your Court ever encountered difficulties in applying these tools?

Not applicable in the light of the answers given above.

3.7. Are there limitations in the access to your Court (for example only by State powers), which prevent it from settling social conflicts?

As mentioned above, it is only indirectly possible to talk about any intervention by the Portuguese Constitutional Court in the settlement of social conflicts, in the sense that controlling the constitutionality of legal norms can in principle help resolve some such situations. In this respect one could say that the entities which possess the legitimacy to ask the Court to act and in so doing initiate the control procedure play a part in this resolution.

In the *a priori* abstract review of constitutionality, and depending on the type of "norm" that is to be brought before the Court, the entities with active procedural legitimacy are the President of the Republic, the Representatives of the Republic in the Autonomous Regions, and the Prime Minister or one fifth of the Members of the Assembly of the Republic in full exercise of their office (Article 278[1], [2] and [4], CRP).

In *ex post hoc* abstract control cases, these entities can be the President of the Republic, the President of the Assembly of the Republic, the Prime Minister, the Ombudsman, the Attorney General, one tenth of the Members of the Assembly of the Republic, and in certain situations the Representatives of the Republic, the Legislative Assemblies of the Autonomous Regions, the Presidents of the Regional Governments, or one tenth of the Members of those Legislative Assemblies (Article 281[2], CRP).

One could thus say that these limits on access to the Court may prevent certain norms from being submitted to the Court for prior or *ex post hoc* abstract review, when none of the entities listed above initiates the respective procedure. However, this situation is mitigated by the fact that any citizen can complain to the Ombudsman in relation to any action or omission by the public authorities (Article 23[1], CRP), whereupon, if the Ombudsman considers that a norm's constitutional conformity is questionable, he/she can submit it to the Constitutional Court on his/her own initiative.

Finally, with regard to the concrete review of a norm's constitutionality (also see answer to B.3.2.) and unlike the situation in the "constitutional complaint" model, in order for a private individual to gain access to the Constitutional Court it is not necessary for him/her to allege that his/her fundamental rights have been injured; instead, he/she can invoke a violation of any constitutional norm or principle, not just one linked to fundamental rights.

Having said this, the fact that access to the Court under this model is limited solely by formal preconditions (it is necessary for a question of constitutionality regarding one or more legal norms that formed part of the *"ratio decidendi"* of the challenged decision to have been argued appropriately and at the right time during the earlier proceedings) and not substantial ones, still means that while a given question of constitutionality may be substantially relevant, it may not be heard by the Court because these formal conditions are not fulfilled.

4. The role of constitutional justice in social integration

4.1. Does your Constitution enable your Court to act effectively in settling or avoiding social conflict?

As we mentioned above, the competences attributed to the Constitutional Court do not presuppose any intervention in the settlement or prevention of social conflicts. The most one can say is that this may come about indirectly, as a result of Court decisions on norms that are brought before it for review.

4.2. Does your Court de facto act as 'social mediator', or/and has such a role been attributed to it?

The Court has not been given the mission of a social mediator, and it is not up to it to act as one. However, we should note that, particularly against the current background of an economic crisis and in the light of both the progressive imposition of austerity measures and what one might call a social impasse in the social concertation between the different actors in the political and socio-professional fields, the Court has been called on to scrutinise the constitutional conformity of certain norms, and it perhaps may be that the Court's intervention is expected to bring some clarity to this conflict.

4.3. Have there been cases, when social actors, political parties could not find any agreement, they would 'send' the issue to your Court which had to find a 'legal' solution, which normally should have been found in the political arena?

Not applicable, as shown in the answers given above.

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