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SEMINAR ON
PRELIMINARY REQUESTS BEFORE
CONSTITUTIONAL COURTS

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“The experience of the Constitutional Court of Portugal”

REPORT BY

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I. Constitutional control

It is possible to divide the Portuguese system in two types of constitutional control: (i) *concrete control by all the Courts, including the Constitutional Court* and (ii) *abstract control by the Constitutional Court*. The Portuguese system has characteristics of both the American model of *judicial review* and the European model of control (*kelsen model*).

Portugal does not have a specific mechanism which entitles an individual to direct access to the Constitutional Court when faced with a violation of his/her fundamental rights. There is no "individual constitutional complaint" like there is in German (*Verfassungsgeschwerde*) Austria or Switzerland nor an appeal similar to the ones that can be found in Spain and Latin America countries (*amparo appeal*). It means that the Constitutional Court does not control the constitutionality of judicial or administrative decisions but only the constitutionality of the legal norms (or one interpretation of them) applied in those judicial decisions, or in which the application is denied on the grounds of its unconstitutionality.

The citizens do not have direct access to the Constitutional Court. In order to protect their own rights they must previously file a complaint in other courts and then, through the mechanism of the appeal, obtain access to the Constitutional Court.

One of the most important aspects is that, according to the Portuguese Constitution, "in matters brought before them for decision, the courts shall not apply any rules that are against the provisions of the Constitution or the principles contained there".

We can say that all the courts (supreme courts and other ones) are *constitutional courts* as they shall not apply any rules that are against the provisions of the Constitution or the principles contained there and as they can decide any constitutional question raised by the parties. So 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 can decide in matters of constitutionality.

However, the decisions in constitutional issues of other courts are not definitive, since there is always the possibility to appeal to the Constitutional Court – the court with the specific power to decide in matters of constitutional-law nature, like in the *kelsen* model. The Constitutional Court is the final instance of concrete constitutional control, and the control in judicial cases takes place in a proceeding named constitutionality appeal. It is not a procedural incident as there is no staying of proceedings. It is a proper appeal and, as such, there is always a previous judicial decision on the subject.

II. The abstract control

We also have abstract review and concerning this type of control only Constitutional Court can declare a provision unconstitutional with general binding force.

The abstract control includes the prior review of constitutionality and the successive (or *ex post*) review of constitutionality.

The Portuguese Constitution has a special provision for prior control of any laws. The President of the Republic may ask the Court to undertake the prior consideration of the constitutionality of any norm contained in an international treaty or agreement or in any decree that was sent to him for enactment as a law. Last Saturday (23th November), the President of Republic asked the Court if a norm that reduces the old age pensions is against the Constitution or not. Now we have 25 (twenty five) days to answer this big question.

In successive abstract review the President of the Republic, the President of the Parliament, the Prime Minister, the Ombudsman and one tenth of the members of the Parliament may ask the Constitutional Court for a declaration of with generally binding force. If the Court concludes that one or more rules are against the Constitution, this means that

the rule is eliminated from the legal system and can no longer be applied by the courts, the public administration or private individuals.

III. Concrete control

The concrete control is based in two main types of appeals: those against court decisions refusing the application of any norm on the grounds of unconstitutionality; and those against decisions applying a norm that has been raised during the proceedings.

From a statistic point of view, the concrete review is the main instrument of control of the constitutionality. Last year in 930 (nine hundred thirty) cases 879 (eight hundred seventy nine) were about concrete review, 4 (four) about prior review and 15 (fifteen) about abstract successive review. The others were about others matters like political parties or local referenda.

The Constitutional Court plays a central role in the system of concrete control of constitutionality.

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 firstly laid by the court that made the decision which is the object of appeal and, on later moment, by the judge to whom the process has been distributed in the Constitutional Court. In both cases it is possible to appeal of the decision which refuses to admit the appeal to the conference of three judges of the Constitutional Court.

Second, when any judge or court refuses the application of a norm on the grounds of unconstitutionality, the appeal is not only possible but also mandatory to the Public Prosecutor.

Third, the court decision that applies a norm which has previously been judged against the Constitution by the Constitutional Court may be appealed to the Constitutional Court.

Finally I would like to point out that in concrete control the effects of the judgement are produced *inter partes*. But if a norm has been judged unconstitutional in three concrete cases the Public Prosecutor or any of the Judges of the Court may promote a proceeding of successive abstract control of that norm.

As I have already said, in concrete control the judge in the Constitutional Court must always appreciate the admissibility of the appeal.

a) A question of unconstitutionality

The appeal can be lodged when a constitutional problem is identified. The fundamental rights in the Constitution shall not exclude any others set out in international laws – for instance in the European Convention on Human Rights – and legal rules and the constitutional norms concerning fundamental rights must be seen and completed in harmony with the Declaration of Human Rights.

b) A normative question

The concrete control is a *normative* one. There is neither a review of the judicial decision of the court that made the decision which is the object of appeal nor a review of the interpretation given by such court to the infra-constitutional law.

The usual object of the appeal is a legislative act (laws, decree-laws or regional decree-laws). But also administrative regulations if the provisions contained there have a *public* nature. There was a big discussion about collective work agreements but nowadays the Court recognises a public nature to these agreements and because of that they can be controlled by the Constitutional Court. The Court also controls the rules stated by the Supreme Courts when there is a decision which unify other decisions concerning law interpretation.

The jurisdiction of the Court is not concerned only with the provisions in its literal expression in legal texts – the object of control is the *norm* and not the literal support. That means that the Court controls the norm of the case. In these cases the Court deals with a concept of “norm” as a result of legal interpretation.

d) Lawyer

In appeals made to the Constitutional Court, the appointment of a lawyer is mandatory.

e) Subsidiarity: exhaustion of remedies

The party who claims must exhaust all the possible appeals before going to the Constitutional Court. Concrete control of constitutionality by the Constitutional Court takes form in an *appeal* which demands that the contested norm has already been appreciated by the ordinary court or that, at least, such court has had the opportunity to do so.

IV. The control made by the Constitutional Court – some questions

1. Constitutional as Court a *negative legislator*

We can say that the Portuguese Constitutional Court is a *negative legislator*. The Court does not participate in the active law making decision nor orders another authority to act. The Court's power is to say whether the norm is in accordance with or in contravention of the provisions and principles of the Constitution.

That means it has a *cassatory* function and restricts itself to annul norms that do not comply with the Constitution. Despite of this, many amendments made to legislation are the result of the Court decisions and even some amendments to the Constitution were a result of constitutional case law.

2. Interpretative, manipulative and additive decisions

In concrete control the Constitutional Court can order a conform-interpretation of the rule in order to avoid a judgment of unconstitutionality, and the court *a quo* will be bound by it, having to apply such interpretation of the norm in the case in question.

The Constitutional Court has set that *conform-interpretation* not in many cases. Some people say that the Court should not have the power to issue interpretations that are binding to other courts.

In some exceptional cases the Court's decisions are considered to have *normative* effects. A special situation may arise under the Constitution's equal protection clause (principle of equality), when a norm is unconstitutional for granting favours to certain groups of persons while excluding others in violation of an equal protection clause. The Court may then declare the norm unconstitutional and declare that non-inclusion of the relevant group is unconstitutional.

The Court has not the power to impose the legislator to bring about an equal solution for the excluded group. However, in some cases the Court's ruling by itself made possible the inclusion of certain groups under the scope of rules that omitted or excluded them.

3. The concept of *norm*

The wide concept of “norm” developed by the Court expands its activity and the control it exercises over other courts.

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 question of knowing whether an interpretation can be accepted as a norm for the purpose of concrete control by the Constitutional Court is really a difficult one.

4. Should Portugal have a constitutional complaint?

Critics say that the large number of fundamental rights declared in the text of the Constitution do not have effective protection because it is not possible to bring a direct action to

the Constitutional Court on concrete administrative acts and judicial decisions. Furthermore they claim that the system has too many guarantees for cases where no fundamental rights are at stake since the appeal on constitutionality is not restricted to fundamental rights provisions.

We must firstly 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 – control administrative acts in order to assess their conformity with the constitutional provisions and principles. Superior Courts, including the Supreme Court of Justice and the Supreme Administrative Court, may also control judicial decisions in order to assess their conformity with the constitutional provisions and principles. Such activity, however, cannot be appreciated by the Constitutional Court since its jurisdiction is strictly concerned to the constitutionality of norms.

In judicial Courts there are also special procedures for the protection of fundamental rights. The *habeas corpus* proceeding against any illegal detention is one of them.

Furthermore we must take into account the wide concept of norm, which allows for the consideration of special typical circumstances of the case. A wide concept of “norm” converts the Constitutional Court in a “Court of the Citizens”.

5. Conclusion

Portuguese Constitutional Court has already a large experience as it was created in 1982.

I think we can say that our system of concrete control of constitutionality come to similar results to the results of the “constitutional complaint”, when we think about the protection of citizens fundamental rights.

We also can say that every day the most important point is the one concerning the limits of constitutional jurisdiction which involves not only the relationship with other courts but also the relationship with the legislator. We are always returning to two important points: the Constitutional Court is a court, but is a different court; the legislative power is a power and it is a separated power.