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Forms and Limits of Judicial Deference:
The Case of Constitutional Courts

National report: Constitutional Court of Portugal

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Questionnaire

I. Non-justiciable questions and deference intensities

1. In your jurisdiction, what is meant by "judicial deference"?

We take the term 'judicial deference' to refer to the practice, by a court, of choosing to give significant weight to judgments of other public authorities (the legislature, administrative bodies, or the executive) on a particular matter. Strong deference amounts to a court declining to render an independent judgment on the issue at hand when it would otherwise be competent to do so.

The term 'deference', in the relevant sense, is not used in the jurisprudence of the Portuguese Constitutional Court (PCC). It is also absent from judgments of ordinary courts (including the Supreme Court of Justice and the Supreme Administrative Court) and from Portuguese language scholarly writing in the domains of constitutional theory and public law[3].

There are five main reasons for this absence:

(i) There is no doctrine of deference in Portuguese public law;
(ii) The PCC is a specialized court (it scrutinizes normative provisions only – there is no constitutional review of administrative acts, no mechanism akin to a 'constitutional complaint' (*Verfassungsbeschwerde* [Germany], *Amparo* [Spain]), no direct access to the Court by individuals;
(iii) The dominant view is that the Constitution (PC) does not empower the PCC to refrain from exercising its powers of constitutional scrutiny on the basis of self-denying limits;
(iv) The PCC has a duty to resolve every case legitimately brought before it[4];
(v) The PCC is competent to render judgments on constitutional limits to its own decision-making power. It is also competent to render a judgment on constitutional limits to the decision-making power of both the legislature and the executive (when the latter issues normative provisions). The exercise of this competence is regarded, not as a matter of deference but as a matter of deciding the law of the Constitution[5].

The conspicuous absence of the term 'deference' from both judicial and doctrinal discourse in Portugal should not, however, lead us to conclude that questions related to judicial self-restraint are not a relevant theme for the PCC. Self-restraint is one of the judicial virtues meant to guide the way in which the Court exercises its power of constitutional review, and a relevant one at that. The virtue of self-restraint may manifest itself in different ways, many of which have very little to do with deference. Deferring to another constitutional actor may not be an expression of self-restraint on the part of the Court – the Court may have a conclusive reason not to do something that it is competent to do. If the Court has a conclusive reason to act and acts on such a reason,

[3] With very few exceptions: Judge Almeida Ribeiro's dissenting opinion in Judgment nº 225/2018, paras. 7/8, and Sampaio, Jorge Silva, *Ponderação e Proporcionalidade: A Operação da Ponderação, a Proporcionalidade como Norma Reguladora e as Condições para a Deferência Judicial*, vol. II (Almedina, 2023), 933-979; Canas, Vitalino, *O Princípio da Proibição do Excesso* (Almedina, 2023), 151, 195, 879/880. In addition to these, there is some literature on issues connected to judicial deference, in the relevant sense. See, for instance, Gonçalves, Pedro Costa, *Manual de Direito Administrativo* (Almedina, 2019); Caupers, João, 'Actos Políticos: contributo para a sua delimitação', Cadernos de Justiça Administrativa. 98 (2013), NA, p. 3-13; Lopes, Dulce, *Eficácia, Reconhecimento e Execução de Atos Administrativos Estrangeiros* (Almedina, 2018), 272, 497, 498, 662; Novais, Jorge Reis, *Direitos Fundamentais nas Relações entre Particulares* (Almedina, 2018), 324, 265, 312, 322.

[4] Article 20, nº 1, PC, and Judgment nº 147/2022, X.

[5] For a similar view, see Lord Hoffmann's remarks in *R. (on the application of ProLife Alliance) v. BBC* [2002] EWCA Civ 297; [2002] 2 All ER 756 (CA); and Lester, Anthony & Pannick, David (eds), *Human Rights Law and Practice*, 3rd edn. (Buttwerworths, London, 2009), para 3.19, n.3.

it is not showing self-restraint. In such instances, the Court's reason for acting is not self-restraint but a different kind of reason which conclusively determines what it is to do.

Three conceptual distinctions are relevant here:

(i) To be competent to do something v. to have a reason to do what one is competent to do

There is a distinction with a difference between being competent to do something and having a reason to do it. On the one hand, when a court acts on a conclusive reason (e.g. a legal duty) and refrains from passing judgment on an issue, it is not exercising self-restraint but acting on the basis of a particularly weighty, or even exclusionary, reason not pass judgment. In other words, if a court does what it is legally bound to do, it is neither exercising self-restraint nor deferring.

On the other hand, a court may be competent to assess whether a particular legislative measure, which restricts the exercise of a protected right, goes beyond what is necessary in achieving the particular (legitimate) aim pursued. Yet it may have reasons not to declare a measure unnecessary in a particular case, e.g. if it has no access to all relevant information about possible alternative measures and/or the technical/scientific knowledge needed to render a negative judgment on the lawful (not proper) use of discretionary power by the legislator.

Talk of deference makes sense only when a court has no conclusive legal reason to refrain from rendering its own judgment on an issue.

(ii) Deference v. justiciability

An issue is justiciable if it is suitable for a court to decide. An issue is suitable for a court to decide if it can be decided on the basis of legal reasons. This statement is true across jurisdictions.

If a court is competent and equipped to decide a matter presented to it on the basis of legal reasons, then the matter or issue before it is justiciable. To say that an issue is not justiciable is not to say that a court ought to defer. Deference, in the relevant sense, comes into play only when an issue is justiciable. When a court declares a matter non-justiciable (i.e. not suitable for the court to decide) it is not deferring. Rather, it is affirming the constitutional limits of its role, a role which is constituted both by powers and duties.

The PCC is constitutionally bound to decide what it is competent to decide. It is also constitutionally required not to overstep the limits of its powers. Deference has a place within the exercise of discretionary power by a court. Neither the scholarly literature on constitutional scrutiny, nor the PCC itself rely on the idea that the Court has discretionary power in the domain of constitutional scrutiny. When a court has a legal duty to reach a certain decision, it has no discretion. When there are legal reasons for the court to decide one way or another, the Court must support (and justify) its decision with those reasons it identifies as relevant. In the presence of legal standards guiding the decision-making process, there is no space for discretion. In the absence of talk of discretionary power, there is no logical room for deference.

(iii) Deference v. comity

In some anglophone literature, comity is presented as a reason for deference. Jointly considered, the constitutional principles of separation and interdependence of powers and of judicial independence[6] are at the root of comity as a constitutional principle. Judicial 'comity' is defined as respect that a court 'ought to show for the way another pubic authority exercises its power'[7]. As a constitutional principle, entailed by the separation of powers, comity demands that courts, the PCC among them, 'respect the constitutional functions of other public authorities'. When considered in the context of the exercise of discretionary powers, comity can be seen as a reason for deference. In the Portuguese constitutional culture, however, there is little conceptual space for talk of judges exercising discretionary power when they engage in constitutional review of legislation. They consider themselves bound by constitutional legal

[6] Articles 2, 111, nº 1, 203, and 221 of the PC.
[7] Endicott, Timothy, *Administrative Law*, 4th edn. (OUP, 2018), 19.

standards even when they clarify the boundaries of their own role in the domain of constitutional scrutiny.

In the Portuguese constitutional system, the separation and independence of judicial power are constitutionally entrenched. Both the PCC and academic commentators use terms such as 'self-restraint' (*autocontenção)*, 'light scrutiny' (*controlo de evidência*), or 'comity'[8], rather than 'deference'. Such terms are used to refer to the way in which the Court interprets the principles which regulate the allocation and distribution of power among public authorities in the Portuguese constitutional setting, including the democratic principle and the principle of separation of powers[9]. This is seen, not as a matter of discretion but of interpretation.

2. Is there a spectrum of deference for your Court? Are there "no-go" areas or established zones of legal unaccountability or non-justiciable questions for your Court (*e.g.* questions of moral controversy, political sensitivity, societal controversy, the allocation of scarce resources, substantial financial implications for the government etc.)?

There are no abstract criteria in place for determining whether and to what extent the Court ought to pass judgment on an issue. The object of constitutional review is clearly defined by the Constitution[10], by statute[11], and by the jurisprudence of the PCC. The Court is competent to assess the compatibility with the Constitution of normative provisions issued by Parliament or by the executive (which, in the Portuguese system, is authorized to legislate). It is also competent to scrutinize any general and abstract provisions issued by other public bodies, regardless of their form. The object of constitutional scrutiny are legislated rules or normative provisions, not decisions or other types of act (e.g. decisions) performed by other public authorities.

Procedural requirements having to do with standing to lodge an application for constitutional review are also clearly established both by the Constitution and by statute[12] for each of the available forms of scrutiny, as are other requirements of admissibility.

The dominant understanding is that the PCC does not have the constitutional power to craft legal standards aimed at restricting the discretion of the legislator (be it Parliament or the executive). The point of reference for the PCC is the Constitution, which the Court has ultimate authority to interpret.

3. Are there factors to determine when and how your Court should defer (*e.g.* the culture and the conditions of your state; the historical experiences in your state; the absolute or qualified character of fundamental rights in issue; the subject matter of the issue before the Court; whether the subject-matter of the case involves changing social conditions and attitudes)?

No. There are procedural requirements which a request for constitutional review must meet in order to be assessed by the PCC. Such requirements will vary according to the type of constitutional scrutiny at stake. Once such threshold requirements have been met, the Court will assess and decide each case on its merits, by reference to the constitutional standards included

[8] Equivalent terms used (for 'comity') in the relevant Portuguese literarature are *cortesia institucional* and *cortesia constitucional*. For a sample of views on this issue, see Miranda, Jorge, *Atos Legislativos* (Almedina, 2019), 143, 230, 255; Miranda, Jorge, *Direito Parlamentar* (Almedina, 2022), 24, 36; Morais, Carlos Blanco de, *O Sistema Político – Em tempo de erosão da democracia representativa* (Almedina, 2017).

[9] For an overview of the historic evolution and current shape of judicial review of legislation in Portugal, see Ribeiro, Gonçalo Almeida, ´Judicial Review of Legislation in Portugal: A Brief Genealogy', in Francesco Biagi, Justin O. Frosini & Jason Mazzone (eds.), *Constitutional History: Comparative Perspectives* (Brill, 2019). For an examination of the doctrine of constitutionally conforming interpretation in Portugal, see Ribeiro, Gonçalo Almeida, ´The Conundrum of Constitutionally Conforming Interpretation', in Mathias Klatt (ed.), *Constitutionally Conforming Interpretation - Comparative Perspectives*, vol. 1 (Hart, 2023).

[10] Articles 223, nº 1, 277, 280, and 281, nº 1, PC.

[11] Articles 6, 3, nº 1, a), 51, and 54, of Lei nº 28/82, 15 November – 'Lei do Tribunal Constitucional' (LTC).

[12] Articles 224 and 281, nº 2, PC, and Article 72, LTC.

in the request or any other constitutional standards the Court considers germane to the question at hand.

4. Are there situations when your Court deferred because it had no institutional competence or expertise?

No, though there are examples of self-restraint. In one anticipatory review case[13], for instance, the Court refrained from declaring the challenged normative provisions unconstitutional in part due to the 'epistemically limited context' in which it was required to deliberate[14]. This is not, as noted above, an instance of deference, in the relevant sense: the Court did not (could not) substitute its own judgment on the substantive question at hand for the judgment of the legislator, i.e. the Court is neither adopting nor endorsing the judgment of the decision-maker on the substance of the measure. It is simply saying that it is not in a sufficiently epistemically informed position to conclude for itself that the relevant provision is unconstitutional. Such a reason for not declaring a normative provision unconstitutional is a prudential reason to refrain from acting in such a way as to infringe the principle of separation of powers.

5. Are there cases where your Court deferred because there was a risk of judicial error?

Please see response to question 4.

6. Are there cases when your Court deferred, invoking the institutional or democratic legitimacy of the decision-maker?

There are numerous examples of judgments by the PCC in which the Court affirms that an issue before it is within the sphere of discretion (*liberdade de conformação*) of the democratically elected legislator, and, by implication, that a particular normative provision it is called to scrutinize is not to be declared unconstitutional. This happens when, having assessed the compatibility of a particular legislative measure with the Constitution, the Court concludes that there are no other constitutional limits to the legislator's power to decide how to regulate the particular area of social life it aimed to regulate by issuing a particular normative provision. Beyond its core power of constitutional scrutiny, the PCC is also competent to decide disputes on electoral matters and the registration and finances of political parties. Below are recent examples of judgments in which the Court expresses an expansive understanding of the scope of the powers of both the democratically elected legislator and the ordinary courts (looking at the limits if its own role in light of the separation of powers as a constitutional principle):

- Judgment nº 325/2023 (no violation of article 29, PC, by a provision in a criminal statute which used a vague term in defining an offence. The criminal legislator acted within the limits of its competence to create new criminal offences formulated in a sufficiently clear, precise way);
- Judgments nº 470/2022 and 279/2023 (in the domain of litigation concerning disputes within political parties - to which the PCC has had a minimalist approach - the Court is required to act with self-restraint and exercise only a 'mitigated form of control' – the associative and self-regulatory autonomy of political parties, too, is constitutionally protected);
- Judgment nº 134/2019 (citing Judgment nº 580/1999, the Court stresses the broad scope of decision-making power that the Constitution gives to the democratic legislator. It does, however, conclude that the legislative provision under scrutiny is

[13] Judgment nº 421/2009.

[14] For a comprehensive analysis of the epistemic limitations the PCC faces in anticipatory review proceedings, see Amaral, Maria Lúcia, and Ravi Afonso Pereira, 'The Portuguese Constitutional Court', in Armin von Bogdandy, Peter Huber, and Christoph Grabenwarter (eds), *The Max Planck Handbooks in European Public Law: Volume III: Constitutional Adjudication: Institutions* (Oxford, 2020; online edn, Oxford Academic, 20 Aug. 2020), https://doi.org/10.1093/oso/9780198726418.003.0013.

unconstitutional because it relies on an arbitrary distinction between categories of people, in violation of Articles 2 and 13 of the PC).

7. "The more the legislation concerns matter of broad social policy, the less ready will be a court to intervene". Is this a valid standard for your Court? Does your Court share the conception that questions of policy should be decided by democratic processes, because courts are unelected and they lack the democratic mandate to decide questions of policy?

Yes, this is, generally speaking, the conception adopted by the PCC. While the Court (along with some scholarly literature on the topic) has rejected the idea of a general presumption of compatibility of legislation with the Constitution (*presunção de não inconstitucionalidade*)[15], it has consistently stressed the need to respect and preserve the space within which the democratically elected legislator (including the executive, within certain domains) exercises its constitutionally attributed powers. On the Court's view, the tasks of constitutional scrutiny and policy making are fundamentally distinct. The Court sees itself as having the specialized, technical role of authoritatively interpreting the Constitution.

The Court's view of its own role is rather narrow: identifying, clarifying, and articulating existing constitutional limits to the exercise of legislative power. Even in the domain of incidental scrutiny, the Court's task is one of review (of discrete normative provisions by reference to parameters set out in the Constitution), not appeal (whose object is the substance and merit of a decision by an ordinary court).

8. Does your Court accept a general principle of deference in judging penal philosophy and policies?

The PCC is duty-bound, when faced with a constitutional review request, to assess whether a penal normative provision is compatible with the Constitution. A dominant concern is whether the legislator's decision to criminalize a particular type of conduct is compatible with the requirements of the *ultima ratio* principle[16] and of the rule-of-law (*Estado de Direito/Rechtsstaat*) requirement of clear definition of criminal offences (art. 29, nº 1, PC). The Court makes case-by-case judgments on this matter, but tends to give considerable weight to its own jurisprudence in relevantly similar cases. Four recent examples are noteworthy (with different outcomes):

- Judgment nº 218/23 (on the constitutional admissibility of pimping as a criminal offence - the Court concluded that the statutory provision which criminalizes pimping is unconstitutional);
- Judgments nº 867/2021 and nº843/2022 (on the constitutional admissibility of pet abuse as a criminal offence – the Court concluded (though not unanimously), in several instances of incidental review proceedings, that the provision which defines pet abuse as a criminal offence is unconstitutional. More recently, sitting *en banc* in abstract review proceedings, the Court has reversed its judgment and refrained from judging the provision unconstitutional[17];

[15] See, for example, Judgment nº 102/2016 (point 9), in which the Court states that such a presumption would be incompatible with the duty - imposed on courts by article 204, PC - not to apply, in cases brought before them, any normative provision which infringes the Constitution. However, there are specific instances in which a presumption of comparibility with the constitution exists. In incidental review proceedings, for instance, the Public Prosecutor *(Ministério Público)* is constitutionally required (Article 280, nº 3, PC) to lodge an application for constitutional review of any normative provisions disapplied by ordinary courts when the source of such provisions is an international treaty, a 'legislative act' or a 'regulatory decree'. Some commentators sustain that, read correctly, this constitutional provision entails that there is a presumption of compatibility of legislative acts with the Constitution (applications for constitutional review of such normative provisions enacted in such a way are compulsory only if the relevant provision has been disapplied by an ordinary court on the basis of a judgment of unconstitutionality).

[16] Article 18, nº 2 and 3, PC.

[17] Judgment nº 70/2024.

- Judgment nº 20/2019 (on the constitutional admissibility of the use of vague and open-textured terms in the definition of the offence of aggravated murder – the Court concluded that the provision under scrutiny, which defined the offence of aggravated murder, as formulated, is not unconstitutional). Only 'manifestly arbitrary or excessive measures' should be declared unconstitutional by the Court. The Court adopts a light-touch approach when it assesses the proportionality of penal legislative provisions and criminal sanctions.

9. There may be narrow circumstances where the government cannot reveal information to the Court, especially in contexts of national security involving secret intelligence. Has your Court deferred on national security grounds?

The kernel of the Court's task is to clarify the constitutional role of different public bodies which have the power to make decisions on national security grounds.

- Judgment nº 458/1993 (the Court states that, in their task of densifying the constitutional concept of secret intelligence (*segredo de Estado*), public bodies are bound by the Constitution and by the doctrine of rights, freedoms and guarantees[18]. However, judgments on the implications of releasing information or making documents avaliable are political judgments which do not have to (though they may) be subjected to judicial scrutiny).

10. Given the courts' role as guardians of the Constitution, should they interfere with policies stronger (apply stricter scrutiny) when the governments are passive in introducing rights-compliant reforms?

The PCC has (under article 283, PC) the power to declare that the legislator has breached the Constitution by failing to legislate when it ought to have done so (legislative omission). Despite its merely declaratory character, a judgment of unconstitutionality by omission plays an important role in the constitutional dialogue between the PCC and the legislator[19]. The Court has, however, been parsimonious in its use of this mechanism of review - it has been used only 16 times in forty years.

Even in such instances, however, the Court is constitutionally required not to 'interfere' with the way in which the legislator uses its power to legislate. A declaration of unconstitutionality by omission is limited to the question whether the absence of a legislative measure on a particular issue (independently of its substance) is a breach of the Constitution. The PCC is neither constitutionally authorised to craft standards for the legislator to follow in producing the necessary legislation, nor to condition the legislator by means of a specific time frame for the issuing of new legislative measures[20].

In matters concerning state duties of fundamental rights protection, there is a minimum threshold which must be met - a 'prohibition of deficient protection' of fundamental rights[21] by the various public authorities, including the legislator.

I. The decision-maker

[18] See Title II, PC, English version available here: https://www.parlamento.pt/sites/EN/Parliament/Documents/Constitution7th.pdf

[19] For an overview of the Portuguese system of constitutional review, and for examples of legislative omission judgments, see Ribeiro, Joaquim de Sousa & Mealha, Esperança, ´Constitutional Courts as ´Positive Legislators" (2010): https://www.tribunalconstitucional.pt/tc/content/files/relatorios/relatorio_004_confwashington.pdf

[20] Idem, 13.

[21] Two landmark decisions on this matter are Judgments nº 298/98 and nº 75/2010, on abortion rights. In the latter judgment, the Court states (points 11.4. 17 and 11.4.18) that judges are not equiped to offer an exact measure of the degree of protection the state has the duty to afford individuals. The PCC stresses that, in this domain, a judgment of unconstitutionality is justifiable only in cases of manifest error by the legislator.

11. Does your Court pay greater deference to an act of Parliament than to a decision of the executive? Does your Court defer depending on the degree of democratic accountability of the original decision maker?

The degree of democratic accountability of the author of a normative provision under constitutional scrutiny is not a criterion for the PCC to give more or less weight to their judgment on a particular matter. While the Court must take into account the constitutionally established hierarchy of legislative sources, it does not render a judgment on whether or not to *defer* on the basis of the democratic credentials of a public authority.

The Court sees this as a matter of hierarchy of sources, not of deference or intensity of scrutiny.

12. What weight gives your Court to legislative history? What legal relevance, if any, should parliamentary consideration have for the judicial assessment of human rights compatibility?

In abstract review proceedings - including in anticipatory (*a priori/preventive*) review cases -, the Court officially invites the public body who issued the relevant provision to respond in writing to the application for review[22]. Typically, the body's response includes a document with a summary of the parliamentary stages and readings/debates on the relevant bill. The Court will take such elements into account in its analysis of the aims of the relevant piece of legislation, the different iterations of the provision(s) under scrutiny, and the place of such provision(s) in a wider context of legal regulation and social change. Access to such information often informs the Court's analysis of the scope of the scrutinized provision(s)[23].

Access to relevant documents and sources of information, including the legislative history of the particular provision(s) under scrutiny, is not a matter of deference.

The fact of parliamentary consideration is not legally relevant to the assessment, by the Court, of the compatibility of a normative provision with constitutionally protected rights.

13. Does your Court verify whether the decision maker has justified the decision or whether the decision is one that the Court would have reached, had it itself been the decision maker?

At times, the Court does look into the justification(s) offered by the relevant public body for the adoption of the measures under scrutiny. It typically does so, however, in a very cautious/parsimonious/conservative way[24].

As formulated, the second part of the question assumes that the Court is entitled to engage in such an inquiry. This is, however, the wrong assumption to make in the Portuguese case. The PCC is not authorised to put itself in the shoes of the legislator (be it Parliament or the executive) and ask itself what measures it would have taken in their place. The Court cannot substitute its own judgment for that of the issuer of the scrutinised normative provision. The PCC is neither empowered nor equipped to formulate and/or answer such a question.

14. Does your Court defer depending on the extent to which the decision or measure was preceded by a thorough inquiry regarding compatibility with fundamental rights? How deep must the legislative inquiry be, for example, before your Court will, eventually, give weight to it?

[22] Articles 54 and 64-A, LTC.
[23] For instance, Judgments nº 172/2014 (point 6) and nº 324/2013 (point 2).
[24] See, for example, Judgments nº 468/2022 (point 19), nº 464/2022, and nº 465/2022 (2nd Chamber).

The PCC does not pass judgment on the quality, depth, or reach of the preparatory stages of a relevant bill. By implication, the Court is not competent to decide how much weight to give to legislative inquiry materials on the basis of a judgment on their quality, depth or reach.

15. Does your Court analyze whether the opposing views were fully represented in the parliamentary debate when adopting a measure? Is it sufficient for there to be an extensive debate on the general merits of the legislation or must there be a more targeted focus on the implications for rights?

The PCC does not scrutinise parliamentary debates. As noted in response to question 14 (above), while the Court typically has access to a summary of the substance of relevant parliamentary debates in abstract review proceedings, such materials are simply used by the Court as a source of information. At no point are they (can they be) an object of scrutiny or assessment by the Court.

According to Article 229, nº 2, PC, Parliament is required to consult the regional governments of Madeira and the Azores during the legislative process, when legislating on matters concerning those regions. A similar requirement exists for consultation of trade unions in the domain of employment and labour legislation[25]. The PCC may, thus, scrutinise and declare particular provisions unconstitutional in cases in which Parliament fails to meet such constitutionally established consultation requirements.

16. Is the fact that the decision is one of the legislature's or has come about after public consultation or public deliberation conclusive evidence of a decision's democratic legitimacy?

There is no record of a statement by the Court to this effect. The Court implicitly recognises the democratic credentials of the legislator (including the executive, in certain domains) and does not set out to seek evidence of the democratic (procedural) legitimacy of discrete measures.

II. Rights' scope, legality and proportionality

17. Has your Court ever deferred at the rights-definition stage, by giving weight to the government's definition of the right [or its application of that definition to the facts]?

It is not entirely clear what is meant by 'rights-definition stage' here. On the one hand, the Court steers clear of pure policy and 'political opportunity' judgments (in abstract review proceedings). On the other hand, as noted in our response to question 7, the object of constitutional scrutiny, in both abstract and incidental review proceedings, is not a judicial decision which applies legal standards to facts. The object of scrutiny is always a normative provision (a legal standard), not a set of facts or another public authority's application of a certain definition of a right to a set of facts[26].

18. Does the nature of applicable fundamental rights affect the degree of deference? Does your Court see some rights or aspects of rights as more important, and hence more deserving of rigorous scrutiny, than others?

[25] Article 54, nº 5, d), PC ('workers' committees') establishes the right of participation of such committees in the process of 'drawing up labour legislation and economic and social plans that address their sector'. Article 56, nº 2, a), PC ('Trade unions and collective agreements') extends the right of participtión in the legislative process to trade unions.

[26] As recently reiterated in Judgments nº 318/2023 and nº 325/2023.

The Portuguese Constitution has a vast catalogue of fundamental rights, including - quite uniquely in the European context[27] - a long list of social and economic rights. It also establishes (as noted in response to question 10) a mechanism of constitutional review which is particularly relevant in the domain of social rights: unconstitutionality by omission[28] (*inconstitucionalidade por omissão*).

The Constitution puts in place a legal regime for 'rights, freedoms, and guarantees' (*direitos, liberdades e garantias*)[29], which is also applicable to so-called 'analogous rights' (*direitos análogos*)[30] – e.g. the right to private property (Article 62, PC). This constitutional regime includes the following legal limits to the powers of various public authorities when fundamental rights are at stake: (i) exclusive parliamentary power to legislate (Article 165, nº 1, b))[31]; (ii) a stricter standard in case of restrictions to or suspension of such rights (Articles 18 and 19); (iii) special access to justice guarantees (Article 20, nº 5).

Restrictions to such rights are[32] subject to closer scrutiny by the PCC, in the sense that the Court is constitutionally required to declare unconstitutional any restriction of a fundamental right which is not a strictly necessary means of protection of another constitutionally protected right or interest.

19. Do you have a scale of clarity when you review the constitutionality of a law? How do you decide how clear is a law? When do you apply the *In claris non fit interpretatio* canon?

No such canon or scale of clarity is applied[33]. Please see responses to questions 8 and 18 (above).

20. What is the intensity review of your Court in case of the legitimate aim test?

As noted, both the PCC and the relevant scholarship in the field tend to cast issues commonly discussed under the heading of 'deference' as problems of burden of proof rather than stringency or intensity of review. In light of the discipline imposed by Article 18, nº 2, PC, on the ability of the legislature to restrict the exercise of fundamental rights, the constitutional legitimacy of the aim pursued by the adoption of a particular measure is presupposed[34]. Such a presupposition (which is a kind of presumption) is, however, capable of being rebutted.

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[27] See, for instance, Ben-Bassat, Avi, and Dahan, Momi, 'Social Rights in the Constitution and in Practice', 36 *J. Comp. Econ.* 107, 103–119 (2008); and Vieira, Mónica Brito, and Silva, Filipe Carreira da, 'Getting rights right: explaining social rights constitutionalization in revolutionary Portugal', I•CON (2013), Vol. 11 No. 4, 898–922.
[28] Article 283, PC.
[29] Article 17º and Title II, PC.
[30] Also Articles 59 (workers' rights), 61 (private enterprise, cooperatives and worker management), 63, nº4 (social security and solidarity), and 268 (citizen's rights and guarantees), PC.
[31] Though Parliament may authorise the executive to issue legislation (*decretos-leis)* in this domain (Article 198º, nº 1, b), PC).
[32] Via Article 18, nº 2 and 3, CP, according to which "2. The law may only restrict rights, freedoms and guarantees in cases expressly provided for in the Constitution, and such restrictions must be limited to those needed to safeguard other constitutionally protected rights and interests. 3. Laws that restrict rights, freedoms and guarantees must have a general and abstract nature and may not have a retroactive effect or reduce the extent or scope of the essential content of the constitutional precepts." [Excerpt taken from official English version of the PC published by the Portuguese Parliament– link in note 17]
[33] The PCC has been openly dismissive of the *in claris non fit interpretatio* maxim. See, for instance, Judgment nº 92/1987, in which the Court states that, since all legal texts call for interpretation, the maxim is 'entirely devoid of rigour'. As for considerations about how clear a provision must be, there are many possible examples. See, for instance, Judgments nº 500/2021 and nº 843/2022 (in particular, Judge Teles Pereira's dissenting opinion).
[34] As noted by Machete, Pedro, and Violante, Teresa, 'O Princípio da Proporcionalidade e da Razoabilidade na Jurisprudência Constitucional, também em relação com a Jurisprudência dos Tribunais Europeus', National Report submitted for the XV Trilateral Conference of the Constitutional Courts of Spain, Italy, and Portugal (Rome, October 2013), 18-19.

21. What proportionality test employs your Court? Does your Court apply all the stages of the "classic" proportionality test (*i.e.* suitability, necessity, and proportionality in the narrower sense)?

The PCC applies a three-stage proportionality test. At the first stage, the Court assesses the *adequacy* of the measure as a means for the pursuit of the relevant aim. At the second stage, the Court moves on to a judgment of *necessity*, through which the Court establishes whether the means chosen is less restrictive or burdensome than other similarly adequate available means. Finally, at the final stage of the test (proportionality *stricto sensu*), the Court determines whether there is, in a particular case, a balance between the need to pursue a particular (legitimate) aim and the constitutional protection of individuals against acts of public bodies which limit the exercise of their fundamental rights[35].

The Court has been increasingly cautious in its use of the third limb of the proportionality test, stressing due respect for the democratically elected legislator's exercise of its constitutionally attributed powers (particularly in abstract review proceedings). Grounds for such caution, however, have not yet been clearly and systematically articulated in the jurisprudence of the PCC.

22. Does your Court go through every applicable limb of the proportionality test?

Yes[36], except when proceeding to the following limb is logically precluded by the conclusion reached when passing judgment at the previous stage[37].

23. Are there cases where your Court accepts that the impugned measure satisfies one or more stages of the proportionality test even if there is, on the face of it, insufficient evidence to show this?

N/A

24. Has the inception of proportionality review in your Court's case-law been concomitant with the rise of the judicial deference doctrine?

N/A

25. Has the jurisprudence of the ECtHR shaped your Court's approach to deference? Is the ECtHR's doctrine of the margin of appreciation the domestic equivalent of the margin of discretion your Court affords? If not, how often do considerations regarding the margin of appreciation of the ECtHR overlap with the considerations regarding deference of your Court in similar cases?

N/A. Please see response to questions 1, 2, and 3[38].

26. Had the ECtHR condemned your State because of the deference given by your Court in a specific case, a deference that has made it an ineffective remedy?

There have been instances in which the ECtHR declared that the PCC had breached Article 6(1) ECHR (access to justice) by being too strict in its assessment of incidental review

[35] See, as a point of reference, Judgment nº 107/2001.
[36] Among many examples, see Judgments nº 318/2021 and nº 800/2023.
[37] There are examples of judgments in which the PCC does go through every limb of the test, despite having rendered a negative judgment along the way. See, for instance, Judgment nº 486/2018 (point 7, para 4), recently mentioned in Judgment nº 578/2023 (point 11.2, para 13).
[38] See Martins, Ana Maria Guerra, and Roque, Miguel Prata, 'Judicial Dialogue in a Multilevel Constitutional Network: The Role of the Portuguese Constitutional Court', in Andenas, Mads, and Fairfrieve, Duncan (eds.), *Courts and Comparative Law* (OUP, 2015), 300- 328.

admissibility requirements[39]. However, for the reasons briefly outlined at the outset (responses to questions listed in Part I) , it is doubtful that the Court's more or less strict reading of the admissibility requirements of constitutional review applications are instances of deferential behaviour.

The *Dos Santos Calado and Others v. Portugal* (application nos. 55997/14, 68143/16, 78841/16 and 3706/17) case is a case in point.

III. Other peculiarities

27. How often does the issue of deference arise in human rights cases adjudicated by your Court?

N/A

28. Has your Court have grown more deferential over time?

N/A

29. Does the deferential attitude depend on the case load of your Court?

N/A

30. Can your Court base its decisions on reasons that are not advanced by the parties? Can the Court reclassify the reasons advanced under a different constitutional provision than the one invoked by the applicant?

The PCC is required to restrict its assessment to the normative provision(s) identified by the applicant in their official request of constitutional review. However, the Court's scrutiny is not restricted to the constitutional provisions invoked in the application. There is a clear, stable line of case law on this point[40].

31. Can your Court extend its constitutionality review to other legal provisions that has not been contested before it, but has a connection with the applicant's situation?

No. The PCC is not authorized to extend its scrutiny to normative provisions not identified in the request submitted by the applicant, though it may mention (*obiter*) other provisions in a judgment. See response to question 30.

A related question is whether the Court may extend a judgment of unconstitutionality to normative provisions which, despite not having been directly contested before it, would be repristinated in the event of a declaration of unconstitutionality[41]. In point 5 of Judgment nº 452/1995 (in abstract review proceedings), the Court refers to, but does not fully address, this question. In this case, the cumulative, subsidiary scrutiny of normative provisions not directly contested in the application was expressly requested by the applicant, with the purpose of precluding the repristination of provisions rendered invalid.

[39] See Lanceiro, Rui Tavares, 'The Impact of the ECHR and of Pan-European General Principles of Good Administration on the Administrative Law of Portugal', Ulrich Sterlkens and Agné Andrijauskaité (eds.) *Good Administration and the Council of Europe: Law, Principles, and Effetiveness* (OUP, 2020), 390-391.
[40] Judgments nº 266/87, 96/2015, and 221/2019.
[41] On this issue, see Canotilho, J.J. Gomes, and Moreira, Vital, *Constituição da República Portuguesa Anotada,* 4.ª ed. (Coimbra Editora, 2010), 976; and Medeiros, Rui, *A Decisão de Inconstitucionalidade: os autores, o conteúdo e os efeitos da decisão de inconstitucionalidade da Lei* (UCP, 1999), 667-669.