

Concrete Control of Constitutionality in Portugal: A means towards Effective Protection of Fundamental Rights*

António Cortês and Teresa Violante

In Portugal concrete control of constitutionality is one of the basic mechanisms available to individuals for the protection of their fundamental rights. It is exercised by *all Courts* since they all have a duty not to apply legal provisions which are in breach of the Constitution¹. The *Constitutional Court* is the final instance of concrete constitutional control. The control of constitutionality by the Constitutional Court in judicial cases takes place in a proceeding designated *constitutionality appeal*. It is *not a procedural incident* and, accordingly, there is no staying of proceedings; it is a *proper appeal* and, as such, *presupposes a previous judicial decision* on the subject.

There is no specific mechanism 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” in Portugal like there is in Germany, Austria or Switzerland, nor an appeal similar to the *recurso de amparo* that can be found in Spain and Latin America countries. This assertion, however, does not imply that individuals are left without the possibility of judicially defending their fundamental rights against specific offensive acts. Firstly, all Courts are competent to appreciate the constitutionality of a norm against fundamental rights provisions and principles. Secondly, there are special mechanisms designed for the protection against judicial decisions depriving of liberty and administrative acts offending fundamental rights. Lastly, the case-law of the Constitutional Court is based on

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²An updated English version of the *Constitution of the Portuguese Republic* (CPR [Constitutional Law 1/1976, seventh amendment, according to Constitutional Law 1/2005]) and of the *Law of the Constitutional Court* (LCC [Law 28/82, of 15 November]) may be found at www.tribunalconstitucional.pt. At the same address it is possible to find most of the decisions of the Constitutional Court mentioned in this text.

a wide concept of norm which allows for the consideration of the special typical circumstances of the case.

The development of the concept of "norm" in the case-law of the Constitutional Court has been a matter of crucial importance. With the acceptance of the control of "*normative interpretations*", the "norm" is not only a *legal provision* but tends to be the abstract result of the interpretation. We could refer to it as a "norm of the case" (*Fallnorm*) in the sense of Fikentscher² or a "rule" in the meaning of the *ratio decidendi* of a decision in the Common Law systems. However, it has not been a pacific phenomenon nor has it been immune to strong controversy both amongst the Justices themselves and within the legal doctrine. There are voices which label the results of this case-law as the creation, by the Court, of a system which draws the same results of the individual constitutional complaint, even if these consequences exceed the logic which presided the creation of an exclusive normative concrete control. Some even say that the "enlargement" of the concept of norm has deployed results which go beyond those of a typical *amparo* mechanism. This will be the object of this article. Logically, a full understanding of the relative uniqueness of the Portuguese system presupposes a basic knowledge of the control of constitutionality as it has been established by the Constitution of 1976. Hence we will start with a brief description of this system.

1. The Portuguese system of concrete control of constitutionality in a nutshell

It is possible to divide the Portuguese system in two basic types of constitutional control mechanisms³: (i) *concrete control of unconstitutionality by all the Courts, including the Constitutional Court* and (ii) *abstract control of unconstitutionality exclusively by the Constitutional Court*. The Portuguese system intertwines characteristics of both the American model of *judicial review* and the *kelsenien* model of control of constitutionality⁴. This *mixed* character of the Portuguese system provides for its relative *uniqueness* within the European

² See FIKENTSCHER, *Methoden des Rechts*, IV, p. 202 ss. See also Mota PINTO, "Reflexões sobre jurisdição constitucional e direitos fundamentais...", in *Themis. Edição especial: 30 anos da Constituição Portuguesa*, p. 212.

³ Considering this distinction the basic distinction in the Portuguese system, Cardoso da COSTA, *A Jurisdição Constitucional em Portugal*, 2ª ed., Coimbra 1992, p. 44.

⁴ See Vital MOREIRA, "A Fiscalização Concreta no quadro do sistema misto de justiça constitucional", *Boletim da Faculdade de Direito de Coimbra. Volume Comemorativo do 75.º Aniversário*, 2003 p. 815 ss. e Rui MEDEIROS, *A Decisão de Inconstitucionalidade. Os autores, o conteúdo e os efeitos da decisão de inconstitucionalidade da lei*, Lisboa 1999, p. 17 -18 e 54-57.

systems of control of constitutionality. There are similar mixed systems in other Portuguese speaking countries such as Brazil⁵.

Concrete control was introduced in Portugal with its first republican Constitution, of 1911⁶. It was maintained during the Constitution of the authoritarian dictatorship (1933-1974) and has lasted until today (CPR). Since its first draft concrete control has been, like the American model, *diffuse, incidental and concrete*⁷. We can add *decentralized* to these characteristics. Ordinary courts shall not apply rules that are inconsistent with the constitutional provisions or principles. This means that there is a duty on the judiciary not to enforce rules that are in opposition to the Constitution. Like the American model, developed from the judgment on *Marbury v. Madison*, the Portuguese system is typically characterized for its endorsement of the competence for the control of constitutionality to the judiciary as a whole. The issues on the concrete control of constitutionality of statutes are thus not reserved to a special jurisdiction. All the courts are – for this purpose – *constitutional courts*. This means that not only the Constitutional Court but also the Supreme Court of Justice and the Supreme Administrative Court, as well as the other higher and first instance courts, can refuse to enforce a legal rule on the grounds of its unconstitutionality. The role of the Portuguese courts, when it comes to concrete control, is not limited to allowing or refusing a constitutionality appeal as it happens for example in Italy or Germany. Ordinary courts can rule on every constitutionality issue raised by the parties. And they can also raise such issues *ex officio*. This means that, as a rule, when the dispute comes to the Constitutional Court there has already been at least one decision on the constitutionality *quaestio*. And it may be the case that the parties have conformed themselves with such decision and chose not to bring the case to the Constitutional Court⁸.

⁵ Blanco de MORAIS, *Justiça Constitucional*, II, Coimbra 2005, p. 992-1000.

⁶ Portugal was the first country in Europe that formally admitted a system of judicial review of legislation in the text of the Constitution (1911). It was directly influenced by the Brazilian Constitution of 1891. For all see Jorge MIRANDA, *Contributo para uma teoria da Inconstitucionalidade*, 1968, p. 107; e Rui MEDEIROS, *A Decisão de Inconstitucionalidade*, 1999, p. 12.

⁷ These concepts are used in the sense given by large legal doctrine. For all, see Gomes CANOTILHO, *Direito Constitucional e Teoria da Constituição*, 7.^a Edição, Almedina, Coimbra, 2003, pp. 898-901. *Diffuse* because every judge is competent to assess the conformity of norms with the Fundamental Law. *Incidental* meaning that the problem of unconstitutionality may only be assessed within a concrete dispute and as long as the resolution of such problem is relevant to the settlement of the dispute. *Concrete*, in connection with the previous two concepts, because the unconstitutionality is asserted within a specific dispute and the judge has the duty to assess the consistency of the applicable norms with the Constitution.

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

When it comes to basic fundamental rights, even the Public Administration may autonomously appreciate the constitutionality of legal provisions. This is unanimously accepted as to what refers to basic rights, freedoms and guarantees, set forth in Article 19(6) CPR: right to life, personal integrity and identity, civil capacity and citizenship, the principle of non-retroactivity of criminal law, right of defence in sanctionary proceedings, and freedom of conscience and of religion⁹. It is also undisputed that the Administration may refuse to apply a provision which has already been declared unconstitutional by the Court with general binding force. However, there is more controversy on such prerogative of the Administration when there is only one precedent (without general binding force) of the Constitutional Court or of any of the Supreme Courts, or when there is no previous judicial precedent at all¹⁰.

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

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

First, it is up to the Constitutional Court to control the *process of selection* of the cases it admits. This selection takes place in two moments of admission: the decision of admission is firstly laid by the court *a quo* (Article 76(1) LCC) and, on later moment, by the rapporteur judge to whom the process has been distributed in the Constitutional Court (Article 78-A(1) LCC). 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 (Articles 76(4)(5) and 78-A(3) LCC). Secondly, as we will see, the broad concept of “norm” developed by the Court as a condition of admissibility expands its activity and the control it exercises over other courts. Thirdly, when an ordinary judge refuses the application of a legal norm on the ground of its unconstitutionality, the appeal is not only possible (Article 280(1))(a) CPR and Article 70(a)

⁹ For all see Jorge MIRANDA, *Manual de Direito Constitucional*, VI, Lisboa 2008, p. 203. Referring to all rights, liberties and guarantees, see Vieira de ANDRADE, *Os Direitos Fundamentais*, 3^a ed., Coimbra 2006, p. 350.

¹⁰ Sustaining that in these situations the Administration may refuse to apply the legal provision see Rui MEDEIROS, *A Decisão de Inconstitucionalidade*, cit., p. 167 ss.

LCC) but also mandatory to the Public Prosecutor (Article 80(5) LCC). Finally, in case there is an applicable precedent of the Constitutional Court an appeal may be lodged even if the parties have not raised the question during the procedure (Article 70(c) LCC). This means that the Constitutional Court is awarded with mechanisms to control the observance of its own jurisprudence by the other courts.

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

Currently, concrete control of constitutionality represents more than 90% of the cases submitted to the Constitutional Court. The decisions of the Court in concrete control proceedings may take four forms: a summary decision, issued by the rapporteur judge; a decision taken by the “conference” of three judges (on the appeals of summary decisions or of decisions of non admission by the other courts); a decision issued by the “section” of five judges¹¹; and a decision of the plenary.

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

¹¹ In 2007 the Constitutional Court issued, according to its own internal statistic, 1268 decisions in concrete control: 855 summary decisions; 211 conference decisions and 206 plenary section decisions.

2. Conditions of admissibility of the appeal

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

The *conditions of admissibility* of a constitutionality appeal are set forth in Article 280 CPR and Article 70 LCC.

a) *A question of unconstitutionality (or reinforced illegality)*

The appeal of constitutionality can be lodged not only when a constitutional problem is identified but also in some situations of illegality which are specified in the Constitution and the LCC. The Universal Declaration of Human Rights is a parameter of constitutionality within the Portuguese system of control of constitutionality. In fact, according to Article 16(2) CPR, the constitutional provision on fundamental rights must be interpreted and integrated according to such Declaration¹².

The European Convention on Human Rights or other international documents on fundamental rights are not a formal parameter of constitutionality. However they may have relevance on the constitutionality judgment. The Court expressly admits the importance of the Convention for the interpretation of the Constitution; it is not excluded, however, that it may have a wider role of integration¹³, namely when their provisions include non-written fundamental rights compatible with the constitutional order (Article 16(1) CPR)¹⁴ or as long as they may be considered as expression of general principles of international law, belonging to the core of *ius cogens* (Article 8(1) CPR)¹⁵.

The Constitutional Court can only rule if the appeal concerns a problem of direct unconstitutionality, i.e., it can only judge whether the application of the provision should have

¹² Cfr. Moura RAMOS, "O Tribunal Constitucional Português e as Normas de Outros Ordenamentos", in Estudos em Memória do Conselheiro Luís Nunes de Almeida, Coimbra 2007, p. 811 s, and Jorge MIRANDA, *Manual de Direito Constitucional. IV. Direitos Fundamentais*, Coimbra 2008, p. 164-176.

¹³ Moura RAMOS, "O Tribunal Constitucional Português e as Normas de Outros Ordenamentos", cit., p. 812-814.

¹⁴ Vieira de ANDRADE, *Os Direitos Fundamentais na Constituição Portuguesa de 1976*, cit., p. 40.

¹⁵ See Moura RAMOS, "Relações entre a Ordem Interna e o Direito Internacional e Comunitário", in *Da Comunidade Internacional e do seu Direito*, Coimbra 1996, p. 272 e seg.

been refused according to what the Constitution establishes. This means that the Court cannot appreciate issues of illegality or whether a provision has been wrongfully applied to the case unless a constitutional parameter has been invoked (or a parameter with equivalent value namely international treaties or statutes with reinforced value).

b) *A normative question*

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

Therefore, the Constitutional Court does not scrutinise the decisions issued by ordinary courts – its jurisdiction is strictly concerned with the normative constitutionality question raised in the dispute. There is neither a review of the judicial decision of the court *a quo* nor of the interpretation given by such court to the applicable infra-constitutional law.

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

Because of this broad concept of norm, *it may sometimes be very difficult to draw the line between what is a normative control or a control of the decision itself*. The jurisprudence of the Court provides however *some criteria* which may help to make the distinction and to prevent cases of an eventual *abuse* of the concept of norm or normative interpretation¹⁶. When contesting a certain and concrete interpretation of a norm, the appellant *must clearly identify the content of such interpretation*. It is not sufficient to say, for e.g., that the norm, as it has

¹⁶ Rui MEDEIROS, “A Força expansiva do conceito de norma no sistema português de fiscalização concentrada da constitucionalidade”, in *Estudos em Homenagem ao Prof. Doutor Marques Guedes*, p. 183-202; idem, *A Decisão de Inconstitucionalidade. Os Autores, o conteúdo e os efeitos da decisão de inconstitucionalidade da lei*, Lisboa, Universidade Católica Editora, 1999, p. 347.

been applied, is in breach of the Constitution. The enunciation of the normative criterion must observe the requisites of generality and abstraction – this is very important because it clearly stresses that the object of control will be a norm (even if not taken in the objective meaning of the disposition where it is included) and not the judicial decision. And such specification must be done in advance by the appellant. The Court cannot substitute itself in the definition and delimitation of the object of the appeal of constitutionality – it is a burden pending on the appellant. Moreover, the Court has also repeatedly stated that it will only admit appeals on normative interpretations as long as these can be supported, even if remotely, by the literal content of the rule or rules to which they are attributed.

This means that in these situations the burden pending on the appellant before bringing the case to the Constitutional Court is heavier. He must not only raise the issue of constitutionality before the ordinary courts have issued their final decision, but should also pay extra attention to the way such issue is raised in order to avoid imputing the breach on the decision or on the judicial activity. The distinction between what is part of the decision and what may be elected as a normative criterion applied therein is sometimes very difficult to establish. It may be possible to theoretically enounce, *a propos* of a case, a normative criterion, distinct from the judicial act of applying it to the dispute. But if during the dispute the appellant has failed to identify such a criterion, enouncing it in a way as to clearly separate it from the concrete situation which is being decided, then the appeal will not be admissible.

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

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

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

c) *Legitimacy*

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

Although the constitutionality issues are to be known *ex officio*¹⁷, the judge *a quo* is never allowed to submit the question to the Constitutional Court. In the logic of a diffuse system, all the Courts are competent to decide in matters of constitutionality. If the judge is competent to decide, he should have no doubts. The logic is different of the preliminary and incidental procedure to the Constitutional Court, that structures the generality of the systems of concentrated concrete control¹⁸, or the preliminary ruling procedure to the European Court of Justice as set forth in Article 234 EC on the basis of which the uniformity of European law is guaranteed.

d) *Form of the appeal*

The request must be filled in written form, but may be delivered to the Court by the usual forms of the Civil Procedure Code (Articles 150 CPC and 69 LCC).

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

(i) The applicable sub-paragraph of Article 70(1) LCC. This provision specifies three main possibilities for appeal, according to the decision *a quo*: decisions which have rejected the application of a rule on the grounds of its unconstitutionality; decisions which have

¹⁷ Jorge MIRANDA, *Manual de Direito Constitucional*, VI, 2008, p. 216 ss.

¹⁸ Maria Lúcia AMARAL, "Problemas da *judicial review* em Portugal", in *Themis* n.º 10, 2005, p. 74 and 84.

applied a rule the unconstitutionality of which has been raised during the proceeding; decisions which have applied a norm which has already been declared or judged¹⁹ unconstitutional by the Constitutional Court;

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

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

If the request for filing an appeal does not include any of the details above specified the judge shall invite the appellant to submit such information within a period of 10 days (Article 75-A(1) LCC).

e) Lawyer

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

f) Subsidiarity: exhaustion of remedies

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

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

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

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

3. Norms against which the appeal on ground of unconstitutionality may be raised

¹⁹ According to Decision 374/99.

The Court has stated, from the outset, that the concept of norm – for the purpose of concrete control of constitutionality – should not be restricted to a specific provision of a normative act. In fact the concept of "norm" adopted is simultaneously *functional* and *formal*. *Formal* because the Court may assess provisions which, despite having an individual and concrete nature, are contained in legislative acts - the traditional requirements of *generality* and *abstraction* do not provide for a satisfying test. *Functional* because it must be appropriate as to define the object of a control of constitutionality system as provided for in the Constitution²⁰ – the jurisdiction of the Court is not concerned only with the provisions in its textual expression in legal texts – the object of control is the *norm* and not the literal support.

We will now see the main types of normative acts which may be scrutinised by the Constitutional Court²¹. This is a mere exemplificative enunciation – there may be other provisions which can compose the object of a concrete control proceeding (such as the normative decrees issued by the President of the Republic or the provisions of other legal orders which are applicable in the Portuguese order²²).

a) Legislative Acts

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

All the provisions contained in a legislative act may be the object of a constitutionality judgement, even if they are not general or abstract. The concept of law, as the legislative act which may be the object of a control of constitutionality proceeding, is thus a *formal* one.

For instance, facing the need to assess the constitutional conformity of two decrees enacted by the Government which extinguished two public companies – and thus contained provisions of an individual and concrete nature – the Court asserted its jurisdiction since such legislative acts should be considered normative for the purpose of concrete control of constitutionality²³.

²⁰ Gomes CANOTILHO, *Direito Constitucional e Teoria da Constituição*, 7^a ed., p. 932; Vieira de ANDRADE, *Os Direitos Fundamentais na Constituição Portuguesa de 1976*, 3^a ed., Coimbra 2006, p. 377.

²¹ Jorge MIRANDA, *Manual de Direito Constitucional*, p. 159-164; Gomes CANOTILHO, *Direito Constitucional e Teoria da Constituição*, 7^a ed., p. 935-939; Lopes do REGO, “O objecto idóneo dos Recursos de Fiscalização concreta da Constitucionalidade. Interpretações normativas sindicáveis pelo Tribunal, in *Jurisprudência Constitucional*, p. 5-7.

²² Moura RAMOS, “O Tribunal Constitucional Português e as normas de outros ordenamentos jurídicos”, cit., p. 783-807.

²³ Decision n. 26/85. According to the Court, a *norm* would be any act enacted by the public powers which entailed a rule of conduct (for the individuals or to the Administration) or a criterion of decision for the courts.

b) Administrative regulations

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

c) Collective work agreements.

Whether collective work agreements contain *norms* for the purpose of control of constitutionality by the Court has generated an intense debate which lasted for the past fifteen years with division both on the constitutional case-law and among the legal doctrine. The *vexata quaestio* has been answered in two opposite fashions. Some Authors have failed to recognise a public character to these agreements. As far as these opinions are concerned, such agreements are enacted by the private will of the contracting parties and do not constitute any form of autonomous law. Accordingly, for the purpose of concrete control of constitutionality, the provisions of a collective work agreement lack the public nature which must characterise any norm under a control of constitutionality proceeding. This position was largely followed by the predominant case-law of the Constitutional Court until early 2008. However, some minority judgments regarded collective agreements as entailing norms adequate to be submitted to the Constitutional Court. These judgments, dating back to a dissident opinion by Justice José de Sousa e Brito (Decision 172/93), led to a first plenary session, in 2005, to discuss the issue. Decision 224/2005, with five dissident opinions, enforced the predominant position of not admitting the constitutionality appeal on these provisions. In 2008, however, following a change in the Court's composition, the question was brought back to the plenary on initiative of the President according to Article 79-A(1) LCC. The plenary then ruled on the admissibility of Clause 137 of the Collective Work Agreement to the Banking Sector. The judgment (Decision 174/2008) is mainly based on the dissident opinion abovementioned.

According to it, collective agreements entail general and abstract norms which are potentially heteronomous. Furthermore, the normative character of these norms is explicitly *recognised* by the Constitution which establishes the workers' fundamental right to regulate their status through the celebration of collective agreements (Article 56(3) CPR). Moreover, the Court acknowledges that relevance must be given to the fact that the importance of collective agreements to regulate and establish the labour regime is increasing – denying these norms the possibility of access to the highest instance of the constitutional jurisdiction would thus be a paradox.

d) Rules of judicial origin

The Court has accepted to review the constitutionality of procedural norm set forth by an arbitral tribunal. In fact, in Decision 150/86 the Court stated that for the purpose of concrete control of constitutionality the referring norms do not necessarily have to be enacted in a legislative or regulative form. A further note on the specification of what should be considered a norm was then added – the provisions at stake should have their immediate validity parameter on the Constitution. Furthermore, the clauses at stake were not deemed as having been enacted by a private autonomy since arbitral tribunals exercise a public function.

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

More important, the Court appreciates the constitutionality of the rules underlying a judicial decision. That means, as we have seen, the “rule” as *ratio decidendi* in the sense of a Common Law system or the norm of the case in the sense of Fikentscher's theory of the *Fallnorm*. In these cases the Court deals with a concept of “norm” as a result of legal interpretation. The concept of norm includes the norm built by analogy in the terms of Article 10(1)(2) of the Portuguese Civil Code²⁵ and even the norm to which Article 10(3) of the same Civil Code (in line of the famous Article 1 of the Suisse Civil Code) makes reference to: “*the norm that the interpreter himself would create if he had to legislate within the spirit of the system*”²⁶.

²⁴ Lopes do REGO, “O objecto idóneo dos Recursos de Fiscalização concreta da Constitucionalidade”, cit., p. 6.

²⁵ Vital MOREIRA, “A Fiscalização Concreta no quadro do sistema misto de justiça constitucional”, *Boletim da Faculdade de Direito de Coimbra. Volume Comemorativo do 75.º Aniversário*, 2003 p. 847.

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

Sometimes the Court rules on the constitutionality of a norm as far as it is interpreted as *including a typical case or situation*. For instance, in Decision 155/2007 the Court decided “To declare unconstitutional, in violation of Articles 25, 26 and 32, paragraph 4, of the Constitution of the Portuguese Republic, the rule contained in Article 172, paragraph 1, of the Code of Criminal Procedure, when interpreted to allow, without the permission of the judge, the forced gathering of biological traces of a defendant for determination of his genetic profile, when the latter has expressed his explicit refusal to cooperate or to allow such collection”.

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

In a very controversial case the Court admitted to decide on a *rule created by abduction on the basis of two different legal provisions*. In Decision 183/2008 the Court decided to overrule a precedent of the Supreme Court and “to declare, with general force, the unconstitutionality, in violation of Article 29, paragraphs 1 and 3, of the Constitution, the rule extracted from the combined provisions of Article 119, paragraph 1, of the Penal Code and Article 336, Paragraph 1 of the Code of Criminal Procedure, in the interpretation that the prescription of prosecution was suspended with the declaration of contumacy”.

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

4. Conclusive reflexion: 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 decisions²⁷.

²⁷ Gomes CANOTILHO, *Direito Constitucional e Teoria da Constituição*, 7^a ed., Coimbra 2003, p. 939-943.

Furthermore they claim that, paradoxically, the system entails too many guarantees for cases where no fundamental rights are at stake since the appeal on constitutionality is not restricted to fundamental rights issues²⁸.

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 – scrutinise administrative acts in order to assess their conformity with the constitutional provisions and principles (Article 266(2) CPR). The Courts may confront directly the administrative act against not only fundamental rights but also any fundamental principle of administrative activity, like equality, legitimate expectations or proportionality²⁹.

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

It is not true that there is a breach on the system of protection of fundamental rights. As a rule, there is no direct action against public acts. But there are some important exceptions³⁰ to this rule even in what concerns administrative acts and norms. Article 268(5) CPR established, since the 1997 amendment, the right of individuals to a *proceeding against administrative norms*. There are also other administrative judicial proceedings specially designed for the protection of fundamental rights: (i) summon for the protection of fundamental rights, freedoms and guarantees (applicable when there is an imminent violation of fundamental rights and there is no time for a preliminary injunction); (ii) provisional judgment of a preliminary injunction (also applicable in urgent cases related to fundamental rights, freedoms and guarantees); (iii) exceptional review appeal by the Supreme Administrative Court (in questions of fundamental legal and social relevance – the Courts have held that this expression encompasses the cases related to fundamental rights).

In judicial Courts there are also special procedures for the protection of fundamental rights. The Constitution establishes the priority nature of any procedure designed for the

²⁸ Jorge NOVAIS, “Em defesa do recurso de amparo”, in *Direitos Fundamentais. Trunfos contra a Maioria*, Coimbra 2006, p. 159 ss

²⁹ For a list of decisions of the Administrative Supreme Court based on the constitutional principles of administrative activity: M. Glória GARCIA/António CORTÊS, in *Constituição da República Portuguesa Anotada*, vol. III, org. Jorge MIRANDA/Rui MEDEIROS, Coimbra, 2007, p. 554 ff.

³⁰ Vieira de ANDRADE, *Os Direitos Fundamentais na Constituição de 1976*, 3^a ed., Coimbra 2006, p. 376 s.

protection of personal rights (Article 20(5) CPR). It also sets forth, in Article 31, the *habeas corpus* proceeding against any illegal detention which is directly appreciated by the Supreme Court of Justice.

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

The broad concept of “norm” converts the Constitutional Court in a “Court of the Citizens”³¹. In global terms, the Portuguese system of concrete control of constitutionality may come to results similar to the results of the “constitutional complaint”.

The main criticism which can be drawn to the system is the relative uncertainty of the *normative question* criterion³² particularly when taking into account the fact that such criterion is not uniformly applied by all judges. The system is therefore lying upon a question whose answer is not always predictable: is there a “norm” at stake?

However, both the *amparo*³³ and the individual constitutional complaint systems also face the issue of filtering mechanisms against an excessive use. Such filtering mechanisms are based in relatively undetermined concepts which means that there is a common problem pertaining the jurisprudential concretisation of those mechanisms. Should such control rely more on the formal definition of the object of the procedure or on the relevance of the rights which have potentially been offended? Perhaps the latter option would be preferable.

This might lead to the conclusion that the advantages of an individual constitutional complaint system would outweigh those of a purely normative control. However, such solution would have a paradoxical consequence. As the Constitutional Court would no longer be limited by the normative criterion its competence would overlap the other courts’ which can directly decide cases of constitutionality issues. Since the appeal to the Constitutional Court presupposes, as a rule, the exhaustion of legal remedies, the Court would remain as the

³¹ Rui MEDEIROS, *A Decisão de Inconstitucionalidade*. Os autores, o conteúdo e os efeitos da decisão de inconstitucionalidade da lei, Lisboa 1999, p. 357.

³² Mota PINTO, “Reflexões sobre jurisdição constitucional e direitos fundamentais...”, in *Themis. Edição especial: 30 anos da Constituição Portuguesa*, p. 214.

³³ António de ARAÚJO e J. A. Teles PEREIRA, “Justiça Constitucional nos 30 anos da Constituição portuguesa: uma aproximação ibérica”, in *La Constitución portuguesa. Un estudio académico treinta años después*, org. Javier Rajadura Tejada, prol. Cardoso da Costa, Madrid 2006, p. 226 s.

third or fourth instance of appeal what would probably render impossible its functioning. That would impose a redefinition of the concrete control system through the abrogation of the diffuse control with decision on the merits by all courts and the introduction of a preliminary and incidental procedure to the Constitutional Court³⁴ with additional filtering mechanisms. The whole system should then be changed in the search of a new equilibrium.

There are however alternatives within the existing system towards a wider protection of fundamental rights by the Constitutional Court. The most obvious, and perhaps coherent, of them all, would be a clearer and more uniform assumption of the functional concept of norm. The appeals could then be filtered through summary decisions on the merits based on the precedent culture which already encompasses the case-law of the Court.

³⁴ On the introduction of a preliminary incidental procedure in the Portuguese system of control of constitutionality, see Maria Lúcia AMARAL, "Problemas da *judicial review* em Portugal", in *Themis* n.º 10, 2005, p. 89-90.