The Role and Importance of Constitutional Court Decisions in Addressing Legislative Gaps and Legal Uncertainty (Experience of Different Countries)

PORTUGAL

The Guarantee of the Constitution and the Enforcement of Constitutional Court Decisions[1]

§1. Constitutional context

The effectiveness of the Constitutional text demands that mechanisms are laid down in order to guarantee its protection against unconstitutional acts; otherwise the hierarchical supremacy of its provisions could not be upheld. The Constitution of the Portuguese Republic (CPR) accordingly lays down the general principle that any acts that violate its provisions and principles are void. Simultaneously, it lays down the general principle of civil liability for acts committed against the CPR.

Judicial review is the Constitution's major protective tool, in particular the scrutiny led by the Constitutional Court[2]. According to Paragraph 277 of the CPR, the control of the Court is a normative one, implying that it does not judge concrete cases. The Court's task is that of monitoring whether legal rules – particularly those set out in laws and legislative decrees – comply with the Constitution.

There are two main means of control: the concrete control and the abstract one. While the latter is performed regardless of the implementation of the rule in any case (it is not called on in order to settle a specific case or dispute), the former looks at the enforcement of rule in a case.

The concrete control is based on two main judicial remedies: those against decisions refusing to apply a legal rule on the grounds of unconstitutionality; and those against

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[2] In spite of being a court, the Constitutional Court is not ruled by the Portuguese Constitution in the same chapter as that of the other courts. It is a "one of a kind court": ten of its thirteen judges are elected by the parliament, the other three are co-opted by the elected judges. Six of the judges are professional ones, seven are lawyers mainly chosen within the academic world, all of them appointed for a 9-year non-renewable term of office.

decisions applying a legal rule whose constitutionality has been challenged during the proceedings.

The abstract control includes prior (or anticipatory) review of constitutionality and general (or *ex post*) review of constitutionality. Review requests may be submitted to the Court by several entities, such as The President of the Republic, the President of the Assembly of the Republic, the Prime Minister, the Ombudsman, the Attorney-General or one-tenth of the Deputies of the Assembly of the Republic. The abstract control also encompasses the so called review on the grounds of unconstitutionality by omission (lack of legislative action).

§2. Case review

This type of review uses a diffused system: besides the Constitutional Court each and every one of the Portuguese courts (ordinary courts or administrative and fiscal courts[3]), is, in a way, a "constitutional court", deciding matters of constitutionality raised in the cases that come before them (we don't have in Portugal a reference for a preliminary ruling proceedings to the Constitutional Court). According to Paragraph 204 of the Constitution, if a court believes that any legal rule contravenes the provisions of the Constitution, it must refuse to enforce it. However, the decisions in constitutional issues taken by any other court are not final: they can always be reviewed by the Constitutional Court, which is the only authority invested with the ultimate jurisdiction to review the constitutionality[4]. The Constitutional Court's decision has the force of *res judicata* (i.e. definitively decides the issue of constitutionality in the case).

It is case review that gives citizens in general access to the Constitutional Court. If, in a case that is being heard by a court, one of the parties invokes the unconstitutionality of a rule and the court nevertheless enforces that rule, because it takes the view that it is not unconstitutional, the party that raised the matter can lodge an appeal to the Constitutional Court. If, otherwise, the court refuses to enforce a rule on the grounds of its

[3] Portugal has a dual courts system, inspired by the French one.
[4] Paragraph 221 of Portuguese Constitution states "The Constitutional Court is the court that has specific power to administer justice in matters involving questions of legal and constitutional nature".

unconstitutionality, a mandatory appeal shall be addressed to the Constitutional Court by the Public's Prosecutor Office.

It must also be mentioned that Portugal does not have mechanisms like the German *Verfassunsgsbeschwerde* or the Spanish *recurso de amparo*. Thus, as above mentioned, the Portuguese Constitutional Court – as well as every other Portuguese court, all of them entitled to perform judicial review of legislation, their decisions being subject to an appeal to the Constitutional Court – controls nothing but the constitutionality of legal rules (or an interpretation of them), not that of the decision *qua tale*, resulting in alleged violations of the CPR.

It should also be stressed that the Constitutional Court never settles the dispute that is the object of the proceedings; it only decides the question of constitutionality that has been raised in the case. Once the Constitutional Court passes its decision, the case returns to the court from which it came, so that the latter can proceed in accordance with the Constitutional Court's judgement on the matter of constitutionality. As we said before, the Constitutional Court does not review decisions taken by other courts or any other organ; it reviews nothing but the constitutionality of rules, as they have been enforced (or as the court has refused to enforce them) in a case.

Unlike what happens in abstract reviews, in case review the decision is valid only for that case. Having said this, once the Constitutional Court has judged a given rule unconstitutional in three different cases, the rule can be declared unconstitutional with generally binding force.

§3. Abstract review

§3.1. Prior (anticipatory) abstract review

As its name suggests, preventive abstract review (of rules) can be prior to – *i.e.* before – the publication and entry into force of the normative act comprising it. It makes it possible to prevent unconstitutional rules (or rules whose constitutionality is controversial) from taking effect.

This control is provided for by Paragraph 278 of the Constitution, but is only applicable to the more important rules in the legal order, such as those included in an international treaty or those included in a legislative act from the Assembly of the Republic (Law) or from the Government (Legislative Decree).

Preventive scrutiny can be carried out at the request of the President of the Republic, following the reception of the legislative act for enactment[5], of the Representatives of the Republic in each of the Autonomous Regions, regarding any rule included in a regional legislative decree that is sent to him for signature, and of the Prime Minister or of one fifth of the members of the Assembly of the Republic, regarding a rule contained in a legislative act which the Assembly of the Republic has passed as an "organic law"[6].

In prior review cases, besides decisions of a procedural nature (particularly as to whether or not to receive a request), the Constitutional Court issues two types of ruling: it either declares the (total or partial) unconstitutionality; or does not declare the unconstitutionality of each rule that was submitted to it.

When the Court declares a rule unconstitutional, the President of the Republic or the Representative of the Republic in an Autonomous Region is compelled to veto the text and return it to the body that passed it. This body can either reformulate the act (eliminating or correcting the rule that has been held unconstitutional), or confirm its approval, in which case it must do so by a qualified majority of two thirds of its members [Paragraph 279 of the Constitution]. The President of the Republic or the Representative of the Republic has then to enact or sign it. This does not prevent the Constitutional Court from holding that such rules are unconstitutional later on, as part of other means of reviewing constitutionality, as it did in the case we will later mention.

At the same time, if the text is reformulated and the amendments are not just limited to the removal of the rules that the Constitutional Court has declared unconstitutional, the

[5] Every law passed by the Assembly of the Republic and every legislative decree issued by the government must be enacted by the President of the Republic; rules included in international sources are sent to the President for ratification.
[6] Laws with superior value or "force", required in order to legislate on very important matters.

President of the Republic or the Representative of the Republic, as appropriate, can request a new prior review of any rule [Paragraph 279(3) of the Constitution].

Until now, the Assembly of the Republic has never exercised the power to confirm the law, always choosing to reformulate or expunge norms that have been declared unconstitutional.

When the Court does not declare the text unconstitutional, the President of the Republic or the Representative of the Republic, as appropriate, must enact or sign it, unless he chooses to exercise his right to impose a political veto, the deadline for which runs from the publication of the Constitutional Court's decision [Paragraph 136(1) and (4) and 233(2) of the Constitution].

§3.2. Successive abstract review

As the name suggests, this is a means of constitutional review that takes place after the rules under scrutiny have been published. Every rule in the Portuguese legal system is subject to this type of review, from those contained in laws to those set out in local authorities' regulations. As we said before, this means of review can be initiated by the President of the Republic, the President of the Assembly of the Republic, the Prime Minister, the Ombudsman, the Attorney General, one tenth of the Members of the Assembly of the Republic, and also, when a breach of the autonomous region's rights is at stake, the Representatives of the Republic, the Legislative Assemblies of the Autonomous Regions, their Presidents or one tenth of their members, and the Presidents of the Regional Governments [Paragraph 281(2) of the Constitution].

We should recall that citizens cannot directly initiate an abstract review - only the persons and entities listed above can do that - but they can approach one of those persons or entities (namely the *Ombundsman* or the Attorney General), set out the question and ask them to initiate a review to the Constitutional Court.

Constitutional Court Justices and the Attorney General's representatives to the Court are also entitled to initiate this kind of review in relation to rules that have been deemed unconstitutional in three review cases [Paragraph 281(3) of the Constitution and Paragraph 82 of the Constitutional Court Statute]. In successive abstract review cases the

Constitutional Court decides whether each rule submitted to it is (totally or partially) unconstitutional, or is not unconstitutional.

Should the Constitutional Court figure out that one or more rules which it has been asked to review are unconstitutional, its decision has generally binding force. This means that the rule is eliminated from the legal system and can no longer be enforced, be it by the courts, the public administration, or private individuals. As a general rule, the declaration has retroactive effects going back to the moment in time when the rule declared unconstitutional came into force. Some of the specific problems raised by this system are addressed and settled by Paragraph 282 of the Constitution.

A decision not to declare a rule unconstitutional is not necessarily the end of the matter. In cases involving either abstract or concrete reviews, the Court can take another look at a rule that it has previously declared not to be unconstitutional, and then decide that it is in fact unconstitutional.

§4. Unconstitutionality by omission

Review on the grounds of unconstitutionality by omission is also exclusively carried out by the Constitutional Court. The court verifies whether there has been a breach of the Constitution, not because some legislative act is against its provisions, but as a result of the lack of enactment of legislative measures demanded by the Constitution. There is, therefore, a violation by *inertia* or failure to act. In such case the Constitutional Court is called upon to bring the omission to the attention of the relevant body, in order that it enacts the necessary legislative provisions.

Given the great sensitivity surrounding both the problem of "legislative omissions" and the Constitutional Court's fulfillment of this important duty, these proceedings can only be initiated by the President of the Republic or the *Ombundsman*, or, in cases in which the rights of an Autonomous Region are at stake, the President of the Legislative Assembly concerned.

§5. Proceedings concerning the review of legality

In some cases, the Constitutional Court also has the power to control the violation of certain rules which don't sit at constitutional level. The Court can then declare the illegality of a rule comprised in a legislative act if it finds it in breach of a law with "superior legal force"[7].

The proceedings for reviewing the legality of rules is identical to those used to review constitutionality (as per Paragraph 280 and 281 of the Constitution), with the exception of the prior review, which is not allowed in this case, and the control of unconstitutionality by omission, which would not make sense.

Case control may operate in another scenario, closely related to the review of legality – one in which a court refuses to enforce a rule laid down by legislation on the grounds that it contradicts an international convention. In such a case the Public Prosecutor's Office must appeal to the Constitutional Court, but only in reaction to issues of a legal-constitutional and legal-international nature that are implied in the decision against which the appeal is brought [Paragraphs 70(1) and 71(2) of the Constitutional Court Statute].

The control of legality is most relevant where the Autonomous Regions are concerned. The Court is thus called on to guarantee both the proper functioning of the autonomy regime which the Constitution lays down for Azores and Madeira and the respect for the division of powers between the central organs of the state and the regional organs.

§6. The impact of constitutional decisions

As we can see, both the prior and the ex-post control of the constitutionality of legal rules are enshrined in the Portuguese legal system. The work of the constitutional jurisdiction is often considered to be influenced by the political context and other circumstances; however, the problem of its "politicization" is at its most acute with regard to prior control.

The decision to prevent a rule from entering into effect is often seen as one that has a significant political impact and, at the end of the day, as a political weapon in the hands of the entities which are entitled (because they have procedural legitimacy) to initiate it.

[7] To check what laws are included in this category, see Paragraph 112[3] of the Constitution. Within the hierarchy of law sources, this rules are placed somewhere between the Constitution and the ordinary laws.

To put it another way, in prior control cases the Constitutional Court intervenes within the scope of the law making process while that process is still underway. This has led some people to feel that the Court, which is not a legislative body, intervenes in, or is at least in a position to influence, the decision making process which leads to the rule (or rules) considered unconstitutional.

Thus far in Portugal this question of the "political nature" of the Constitutional Court's work within the prior control, and concomitantly of the possibility of conflict between the organ that controls legal rules and the bodies that produce them, has not been enmeshed in either legal or political debate, and has rarely been raised with any vehemence. This may be due, on the one hand, to the restraint and reasonableness that the President of the Republic as well as the Representatives of the Republic have displayed at the moments when they have had the chance to ask the Constitutional Court to perform this kind of review; and, on the other, to the respect that Court's decisions have generally earned, with the majorities in the Assembly of the Republic and the Legislative Assemblies of the Autonomous Regions rarely making use of their ability to overcome vetoes issued on the grounds of unconstitutionality. The above remarks in relation to prior review shall apply to the other review proceedings.

Even though the Constitutional Court does not play a part in the law making process, Court's rulings have consequences since several amendments made to existing legislation are the result of its decisions, either to incorporate or to set aside the Court's ruling on the subject.

An example, among many others, is Ruling 23/2006[8], that declared unconstitutional, with general binding force, a paragraph of the Portuguese Civil Code concerning the deadline for filing court cases on the investigation of paternity and maternity. Later such rule was modified to provide an extended time limit (Law 14/2009). Sometimes the legislator acknowledges this influence by alluding to Constitutional Court's ruling while summarizing the intention of the legislature in passing the rule. An illustration is the preamble to Decree-Law 64-A/89 (regarding the termination of labour contracts) in which

[8] Every ruling mentioned is available for consultation at www.tribunalconstitucional.pt.

Ruling 107/88 (taken in a prior review case) is referred to as having given bounding guidelines.

Ruling 230/2013, also taken in a prior review case, is one of many other examples of cases in which the Constitutional Court rulings lead to amendments in legislation. In this case, the President of the Republic asked the Constitutional Court to run a prior review on the constitutionality of a rule comprised in the law that both created the Sports Arbitration Tribunal (SAT) and laid down the statute governing it.

The rule under scrutiny required parties to submit to arbitration disputes concerning sports (not, of course, disputes arising from sports games, but conflicts emerging from administrative decisions held by sports associations and federations) and simultaneously prohibited them from seeking access to state courts in order to protect their rights and interests. Making things as simple as possible it was forbid to appeal to a state court against decisions taken within the scope of a mandatory SAT arbitration process.

The Court upheld the unconstitutionality, judging this ban a violation both of the right of access to the courts and of the principle of effective jurisdictional protection – fundamental rights which the Constitution assigns to all citizens in order to enable them to protect their rights and interests.

Subsequently the Law was vetoed by the President of the Republic and returned to the assembly for reconsideration. Following this, the Assembly approved a new Law with the same scope, allegedly including the amendments required by Ruling 230/2013. However, arguing that the amended rules were still unconstitutional, the President asked for a successive review of these rules (Ruling 781/13) which lead to a new declaration of unconstitutionality.

In order to better understand what was at stake let’s take a closer look to the object of this rulings.

§7. Ruling 230/13

Executive Decree 128/XII, which contains the rule *sub judicio*, created the Sports Arbitration Tribunal (SAT), assigning it exclusive jurisdiction to settle disputes in the field of the so called sports-related justice.

According to the Decree, SAT jurisdiction comprises both mandatory and voluntary arbitration competences. Mandatory arbitration, which is at stake in the case, encompassed disputes arising from acts and omissions by the sports federations and other sports bodies and professional sport leagues, as well as appeals against decisions taken by disciplinary bodies of sports federations, or against Portuguese Anti-Doping Authority (decisions with regard to breaches of anti-doping regulations).

We must also remark that in mandatory arbitration proceedings the SAT acts as a collegial body of three arbitrators. Each party chooses an arbitrator from a list (there is a list of SAT's arbitrators which is drawn up by the Sports Arbitration Council, a part of the SAT's organizational and functional structure), being this Council free to choose both the first level and the second level of arbitrators (these last ones amongst members of the SAT's appeals chamber). Together, these two arbitrators choose the third, whom shall be the President of the Panel.

We should emphasize, as above mentioned, that the SAT was established as an independent jurisdictional entity with exclusive competences. SAT's rulings, in first or second level of jurisdiction, were meant to be final and binding and might not be challenged before state courts, with the exceptions of the appeal to the Constitutional Court and the annulment appeals against arbitration awards to the ordinary courts (more precisely, a second degree administrative court).

In accordance with the law acts undertaken by sports federations exercising their powers to regulate and discipline sporting activities are subject to the administrative jurisdiction. This is a logical consequence emerging from the public nature of the powers the state entrusts to them when it grants them public-interest status, that in turn assigns a sports federation the sole competence to exercise regulatory and disciplinary powers concerning a certain kind of sport.

These days it is widely accepted in Portugal that administrative courts are the ones with the competence to handle cases regarding acts of public authority performed by sports federations., except when at stake is a decision on a "strictly sporting matter" (one that arises from the enforcement of the "rules of the game"), decisions that cannot be qualified as administrative acts because they don't exercise a public power.

Administrative case law has sought to operationalize the concept of "strictly sporting matters" in order to define the scope of the administrative courts' own competence within the field of sports-related justice. The Supreme Administrative Court (SAC) is restrictively interpreting the concept of "issues that concern strictly sporting matters", in the light of the constitutional right of access to the courts, in such a way not to exclude from the jurisdiction of the state those decisions that, undermining or negatively affecting fundamental rights, rights which the holders are not free to dispose of, or legal assets which are protected by legal rules other than those strictly relating to sporting practices, harm key values engraved in the core of the legal order.

Paragraph 202(4) of the Constitution, added by the 1989 Revision (embodied in Law 1/89) states that «The law may institutionalize non-jurisdictional instruments and means of settling conflicts», making clear that arbitration tribunals may exist and are included within the types of courts established by Paragraph 209(2).

As the Court acknowledged in Ruling 230/86, arbitration tribunals are an autonomous type of courts, submitted to a statue alike to that of state courts and the decisions they hand down share the same executive authority as court sentences[9], but they are not a part of the state courts. The task of arbitration tribunals, explicitly mentioned in the Constitution, is equivalent to a true private exercise of the jurisdictional function.

The Constitutional Court said that the explicit recognition of arbitration tribunals in the Constitution means that the legislator can create them in order to judge certain kinds of disputes, thereby compelling the citizens engaged in such disputes to resort to this jurisdictional conflict-solving path. However, it said that consequences must be drawn from the fact that mandatory arbitration has nothing to do with the autonomous will of

[9] Nevertheless, they cannot be enforced by arbitration courts. Only state courts have that ability, emerging from the so called *jus imperii*, a state monopoly.

the parties. If a dispute is submitted to mandatory arbitration, the decision to resort to the arbitration jurisdiction arises from the legislative act that makes it compulsory, and the interested parties are not allowed to access to either state jurisdiction or voluntary arbitration.

The Court stressed that resort to a state court is crucial to access the law. This imposes a hub of state courts' jurisdiction which simultaneously is the basis for the setting of limits to the creation of arbitration courts.

Having said this, the key issue is whether the guarantee of access to the courts can be fulfilled by means of an arbitration-based jurisdiction in a way that reviewing the case by a state court is always excluded, regardless of the nature and relevance of the rights and interests at stake.

In the request for the prior review, the President of the Republic had asked the Court to assess the constitutionality of the legal rule which created SAT as an independent jurisdictional entity with exclusive competences, whose decisions on the merits (*i. e.* excluding merely procedural decisions) in mandatory arbitration proceedings could not be challenged before a state court, on the grounds that they violated both the right of access to the courts and the principle of effective jurisdictional protection – rights, as said before, assigned by the Constitution to all citizens in order to enable them to protect their rights and interests.

The Court found that, except in cases within the states courts' exclusive jurisdiction, the right of access to the courts may be ensured only at the appeal level. In such a case, one would be talking about a partially exclusive jurisdiction. And the Court emphasized that the absolute inability to appeal against arbitration awards implies a clear violation of the right of access to the courts, not only because these decisions are taken within a mandatory arbitration process, but also given the nature of the rights and interests and the fact that we face an exercise of delegated powers of state authority.

What is more, the way in which the rule proposed that arbitrators should be appointed limited the parties' freedom - when it is precisely in that individual act of appointment that we find the material grounds for the submission of a certain type of dispute to a

legally required arbitration jurisdiction. Furthermore, the president of the tribunal could take a decision on a provisional settlement of the dispute without any need for acceptance or agreement by the parties.

These circumstances impose limitations on the parties' self-determination and undermine the requirements of independence and impartiality which an arbitration tribunal has to meet. As such, the inability to bring an appeal against an arbitration award on the merits before an administrative court also means a breach of the principle of effective jurisdictional protection[10].

On these grounds the Court considered the rules included in Decree 128/XII unconstitutional.

§8. Ruling 781/13

As we said before, following Ruling 230/13, Decree 128/XII was vetoed by the President and sent back to the Assembly for reconsideration. In order to comply with that Ruling, the Assembly passed a new Decree (Decree 170/XII), with the same scope, introducing the amendments to the rules that had previously been the object of the prior review proceedings in Ruling 230/13.

However, despite the changes made in the set of rules of the new Decree, the President asked for a successive review, arguing that the amended rules were also unconstitutional, because they disproportionately limited the right of access to the courts and to effective jurisdictional protection.

First of all, we should recall that in Ruling 230/13 the Court considered that it is not forbidden to submit to mandatory SAT arbitration disputes whose object is either an act or an omission by a sports federation or other sporting body exercising public powers.

[10] One concurring and one dissenting opinion were attached to the Ruling. The dissenting Justice took the view that the guarantee of the fundamental right of access to the courts – a right that is linked to the monopoly of the jurisdictional function by these – doesn't apply only to state courts. In her opinion, although the TAD was not a state court, the fact that its creation arose from a legislative act and not a private-law private legal transaction, implied that its typically public nature was undeniable.

However, provisions must be made for tools that give the state courts the last word in the resolution of such disputes.

In other words, the fundamental right of access to the courts requires the parties to be able to debate the merits of an arbitration award before a state court, and that there will be no restriction on the right of access to state courts as a result of a lack of mechanisms for granting access to state justice. It is imperative a remedy whereby a judicial state organ can re-examine common situations in which a private individual wishes to challenge a decision on the merits of the issue (or a decision which, while it does not go to the heart of the matter, does terminate the arbitration proceedings).

In Ruling 230/13 the Constitutional Court also made clear that the fundamental right of access to the courts tends to constitute a guarantee of access to state courts in particular – a tendency that emerges from the umbilical link between the right of access and the principle that jurisdiction is a monopoly belonging to those courts. It is only acceptable for an arbitration-based jurisdiction to be exclusive when access to the arbitration tribunal is free and voluntary.

Having said this, the issue to be settled is whether the way in which the challenged rules define the possibility of appealing against arbitration decisions regarding mandatory arbitration proceedings to state courts implies a breach of the right of access to the courts.

Decree 170/XII laid out two major differences in comparison with Decree 128/XII.

First of all, it gave up the explicit and unacceptable rule that SAT's arbitration awards could not be challenged on the merits of the award to the administrative (state) courts.

Secondly, it set out a new remedy: the awards of the SAT's appeal chamber might themselves be appealed to the Supreme Administrative Court.

The scrutiny run by the Constitutional Court has shown that in spite of these improvements, the new rules still contravened the Constitution. In fact, the awards of the SAT's appeals chamber could only be challenged before the SAC by means of an appeal only when the matter was one of major legal or social importance, or on the grounds that the admission of an appeal to the SAC was essential to the interest of a better

implementation of the law. In addition, SAC's dominant interpretation considered that this appeal was extraordinary and so that the SAC's intervention should only be accepted in «matters of noteworthy importance and complexity».

The access to a state court was no longer explicitly denied but the appeal was allowed only in exceptional circumstances, namely against disciplinary measures or when the award was contradictory with another decision of the same tribunal.

The Court underlined that, except with regard to issues other than "matters of noteworthy importance and complexity", the last word in the resolution of disputes submitted to mandatory SAT's arbitration still didn't belong to state courts. Mechanisms for granting access to state justice were yet insufficient, since they did not provide for a tool able to ensure that arbitration awards might be as a rule re-examined by a state judicial organ in ordinary situations, in which a private individual wants to challenge a decision taken by an arbitration body on the merits of the case or a decision that terminated the proceedings.

Besides, according to Portuguese legal tradition inspired by the French concept of *contentieux administrative*, the appeal to an administrative court was[11] primarily an objective one, not conceived as such to protect those rights and interests of private persons to which the law grants its protection. In addition, the appeal did not allow the parties to debate the merits of the arbitration award. This means that the appeal, as it was designed, would also fail to overcome the insufficiency of the mechanisms alleged able to ensure access to state justice – an insufficiency which the Constitutional Court had already pointed out in the earlier prior review case.

The Court restated the understanding expressed in the prior review of the earlier Decree setting up and governing the SAT: the creation of arbitration tribunals must take other constitutional principles into account – namely the guarantee of access to the courts and the guarantee that these courts have some exclusive jurisdiction. The access to a state court is the main means of access to the law itself, which implies that the existence of arbitration courts might be submitted to certain boundaries.

[11] Itis no longer.

The Court emphasized that, although the possibility of resorting to arbitration in the administrative dispute field can sometimes apply to disputes concerning the exercise of Administration's powers of authority, the provision laid down in the SAT Law was of a different kind, because it stated that mandatory arbitration was the *only* way to settle those disputes. No exception was made with regard to administrative acts that might come before an arbitration tribunal, because this mandatory system encompassed every act undertaken in the exercise of powers of authority, including those that entailed the imposing of sanctions.

The Court accepted that, with the exception of the cases in which the Constitution grants exclusive jurisdiction to state courts, the right of access to the latter may be provided only at the appeal level. In such cases one could say that there is a partially exclusive jurisdiction. However, in the present case there were special difficulties, because it concerned a mandatory means of arbitration and the administrative authority engaged in the arbitration process is a private entity that only intervenes in the performance of a task which pursues a public interest as a result of a transfer of the exercise of powers originally belonging to a public entity.

The Constitutional Court considered that it was unacceptable for the state to delegate powers of authority to a private entity, thereby effectively bringing about an organic privatization of the Administration's duty to perform a public task, while simultaneously giving up any jurisdictional control by state courts of the merits of administrative decisions taken within the legal framework of the delegated powers.

This is why, in spite of the reformulation of the rules that had already been the object of prior review, the Court stated that the rules included in Decree 170/XII were once again unconstitutional.

So, as you see, we did it twice. Not by stubbornness, but because the Portuguese Constitutional Court doesn't surrender its believes and it keeps on fighting for the respect of the Constitution and the enforcement of its principles, whatever the political, economic and social context may be. I shall remind you that *sub juditio* was probably the most serious and disturbing level of legal uncertainty: not that one merely concerning the lack of an appropriate rule or the accurate interpretation of a rule, but that one which concerns

the jurisdiction rule itself, *i. e.* the ascertainment of the judicial organ relevant to settle a dispute.

I guess you might be wondering what happened afterwards. Well, the Parliament passed another bill, modifying the Law in order to satisfy the demands of the Court.

Did it succeed?

Indeed, we don’t know. The modified Law was never submitted to the control of the Constitutional Court and we lack the initiative to do that *ex-officio*. The last episode of this story is still not written.