4th Congress of the World Conference on Constitutional Justice

The rule of law and constitutional justice in the modern world

11–14 September 2017, Vilnius, Lithuania

*

Report – Constitutional Court of Portugal

1. What are the relevant sources of law (e.g. the Constitution, case-law, etc.) which establish the principle of the rule of law in the legal system of your country?

As one can see from the Venice Commission's Report on the Rule of Law, as adopted at the 86th plenary session (Venice, 2011),[1] "*The concept of the "Rule of Law", along with democracy and human rights, makes up the three pillars of the Council of Europe and is endorsed in the Preamble to the European Convention on Human Rights. It is also enshrined in a number of international human rights instruments and other standard-setting documents*". However, as the same document then goes on to point out, *"Although the terminology is similar, it is important to note at the outset that the notion of "Rule of law" is not always synonymous with that of "Rechtsstaat", "Estado de Direito" or "Etat de droit" (or the term employed by the Council of Europe: "prééminence du droit"). Nor is it synonymous with the Russian notion of "Rule of the laws/of the statutes", (verkhovenstvo zakona), nor with the term "pravovoe gosudarstvo ("law governed state")".*

Let us take the Preamble to the European Convention on Human Rights as an example:

> "[…]
> *Being resolved, as the governments of European countries which are likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration…*
> […]"

In the Portuguese version of the same text, the expression 'rule of law' was translated as "*primado do direito*" (literally 'primacy of the law', which is somewhat similar,

[1] Cfr. http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)003rev-e

but not identical, to 'supremacy of the law') and not as "*Estado de direito*" (literally 'state of law', sometimes translated into English as 'state based on the rule of law', and sometimes equated with just 'rule of law'):

> "[…]
> *Decididos, enquanto Governos de Estados Europeus animados no mesmo espírito, possuindo um património comum de ideais e tradições políticas, de respeito pela liberdade e pelo primado do direito, a tomar as primeiras providências apropriadas para assegurar a garantia coletiva de certo número de direitos enunciados na Declaração Universal* […].
> […]"

To some extent this Portuguese version of the text highlights the first of the elements that are needed in order to recognise the existence of the rule of law (see Venice Report, *op. cit.*, p. 10):

> "[…]
> *(1) Legality, including a transparent, accountable and democratic process for enacting law.*
> *(2) Legal certainty.*
> *(3) Prohibition of arbitrariness.*
> *(4) Access to justice before independent and impartial courts, including judicial review of administrative acts.*
> *(5) Respect for human rights.*
> *(6) Non-discrimination and equality before the law.*
> […]"

Having made these brief introductory remarks, we will henceforth talk about *Estado de direito* and the rule of law (in the broad sense), without forgetting that the term(s) contain(s) the idea of the supremacy (primacy) of the law.

The Constitution of the Portuguese Republic makes various references to "democratic state based on the rule of law" (*Estado de direito democrático*): in the Preamble ("[…] *the Portuguese people's decision to defend national independence, guarantee citizens' fundamental rights, establish the basic principles of democracy, ensure the primacy of a democratic state based on the rule of law* […]"); when it regulates the scope of the cooperation with European Union institutions (Article 7[6]: *"Subject to reciprocity and with respect for the fundamental principles of a democratic state based on the rule of law* […], *Portugal may agree to the joint exercise, in cooperation or by the Union's institutions, of the powers needed to construct and deepen the European Union."*) and the applicability of Union law (Article 8[4]: *"The provisions of the treaties that govern the European*

Union and the norms issued by its institutions in the exercise of their respective competences are applicable in Portuguese internal law in accordance with Union law and with respect for the fundamental principles of a democratic state based on the rule of law"); and when it outlines the fundamental tasks entrusted to the state (Article 9[b]): *"The fundamental tasks of the state are:* […] *b) To guarantee the fundamental rights and freedoms and respect for the principles of a democratic state based on the rule of law"*) (all underlining added).

The core normative provision is to be found in Article 2, CRP:[2]

"[…]

Article 2

(Democratic state based on the rule of law)

The Portuguese Republic is a democratic state based on the rule of law, the sovereignty of the people, plural democratic expression and political organisation, respect for and the guarantee of the effective implementation of the fundamental rights and freedoms, and the separation and interdependence of powers, with a view to achieving economic, social and cultural democracy and deepening participatory democracy.

[…]"

This is one of the absolutely basic legal concepts in the Portuguese Constitution, and one in which countless of the CRP's other precepts and principles are rooted. In the original 1976 version, the expression "*Estado de direito*" only appeared in the Preamble (Article 2 referred to "democratic state"). *"In addition to defining the political regime as a democratic state based on the rule of law, the 1982 constitutional revision broadened the framework of rights, freedoms and guarantees and the review mechanisms even further and created a Constitutional Court. Finally, the 1989 and 1997 revisions continued to pursue that line of thought, with special effect on the rights of those* [entities] *that are subject to administration"* (Jorge Miranda and Rui Medeiros, "*Constituição Portuguesa Anotada*", tome I, 2nd edition, Coimbra: Coimbra Editora, 2010, p. 100).

So, over the years, by means of successive constitutional revisions and as a result of abundant constitutional case law, the concept of *Estado de direito* and a democratic state based on the rule of law was progressively developed and deepened.

Estado de direito and the rule of law bring with them many implications and manifest themselves in many ways, irradiating into different norms and principles which in turn lead

[2] *Artigo 2.º*
(Estado de direito democrático)
A República Portuguesa é um Estado de direito democrático, baseado na soberania popular, no pluralismo de expressão e organização política democráticas, no respeito e na garantia de efetivação dos direitos e liberdades fundamentais e na separação e interdependência de poderes, visando a realização da democracia económica, social e cultural e o aprofundamento da democracia participativa.

to many other positivised dimensions of the Portuguese legal system, such as (Jorge Miranda and Rui Medeiros, *op. cit.*, pp. 100 *et seq.*): the exceptional nature of any restrictions on rights, freedoms and guarantees; the principles of legal certainty (and the ensuing protection of legitimate expectations), proportionality and the effective jurisdictional protection of rights; the principle of the separation and interdependence of powers; the restriction of the jurisdictional function to the courts alone, together with the guarantees of the latter's independence; the subjection of the political power and administrative organs, entities and agents in general to the Constitution and the ordinary law; the state's civil liability; and the system for reviewing constitutionality.

Constitutional case law has also contributed to the definition of many aspects of the *Estado de direito* / rule of law. Particular examples include the extension of some of the guarantees applicable under criminal law to cover mere social administrative offences as well (Rulings nos. 666/94 and 490/09), the principle of procedural equality and the adversarial principle (Rulings nos. 16/90 and 62/91), the prohibition on the retroactivity of norms that restrict the right of appeal (Ruling no. 71/87), and the principle that official acts must be publicised (Ruling no. 234/97).

This relationship between the *Estado de direito* / rule of law and a variety of constitutional norms is due to the fact that it is *"a key concept"* of the Constitution, and one that is *"more than* [just] *constitutive of legal precepts,* […] *above all amassing and integrating a broad set of rules and principles which are dispersed throughout the constitutional text and which densify the idea that power is subject to legal principles and rules, guaranteeing citizens freedom, equality and security"*, taking on an *"agglutinating and synthesising"* function (J. J. Gomes Canotilho and Vital Moreira, "*Constituição da República Portuguesa Anotada*", vol. I, 4th edition, Coimbra: Coimbra Editora, 2014, pp. 204 and 205).

In the Portuguese Constitution, the *democratic* element of an *Estado de direito* is inseparable from the concept as a whole. *"A state based on the rule of law is* [must be] *democratic, and only thus is it a state based on the rule of law; a democratic state is* [must be] *a state based on the rule of law, and only thus is it democratic. There is a democracy which is based on the rule of law, there is a rule of law that is democratic. This material link between the two components does not make it impossible to consider each of them specifically, but the meaning of one cannot fail to be conditioned and qualified in accordance with the meaning of the other"* (J. J. Gomes Canotilho and Vital Moreira, *op. cit.*, p. 204).

It is important and of particular interest to the present questionnaire to emphasise that the fact that the public administration is bound by the law – a manifestation of the

principle of the primacy or supremacy of the law, and to that extent of the state based on the rule of law – is directly provided for in the Constitution, Article 266(2) of which says that *"Administrative organs and agents are subject to the Constitution and the law, and in the exercise of their functions must act with respect for the principles of equality, proportionality, justice, impartiality and good faith"*. This provision is concretely embodied in a variety of infra-constitutional precepts, among which the Code of Administrative Procedure (CPA, approved by Executive Law no. 4/2015 of 7 January 2015) is especially noteworthy. The CPA precisely establishes the principle of legality as the first of the general principles that govern the activity of the administration:

"[…]

Article 3
Principle of legality

1 - Public Administration organs and entities must act in obedience to legislation and the law in general, within the limits of the powers granted to them and in conformity with the respective purposes.
2 - Administrative acts undertaken in a state of necessity, setting aside the rules laid down in the present Code, shall be valid, on condition that their results could not have been achieved in another way, but injured parties shall have the right to be compensated under the general terms governing the liability of the Administration.
[…]"

2. How is the principle of the rule of law interpreted in your country? Are there different concepts of the rule of law: formal, substantive or other?

See, in general, the answer to the previous question, from which we can summarily deduce that, as enshrined in the Constitution of the Portuguese Republic, the meaning of the *Estado de direito* principle goes well beyond its mere formal sense. It signifies not merely a formal subjection of the public authorities to the Constitution and the law in the broad sense of the term, but also the need for the law to be in conformity with the material requirements of the ability to rely on legitimate expectations, the absence of arbitrariness, justice, equality and human rights. It is thus a concept that is strongly and decisively substantive – a point on which Portuguese scholars and constitutional case law agree.

3. Are there specific fields of law in which your Court ensures respect for the rule of law (e.g. criminal law, electoral law, etc.)?

The *Estado de direito* / rule of law principle is projected into countless different areas (generically speaking, see the answers to the previous questions and the following question).

The Constitutional Court sometimes intervenes directly in election law. In particular, it is competent to: receive the candidacies in the process leading to election of the President of the Republic (Article 92[1] of the Law governing the Organisation, *Modus Operandi* and Procedure of the Constitutional Court (LTC)); draw the lots for the order in which candidacies are listed on voting slips (Article 92[2], LTC); and check that the respective processes are in order, the documents are authentic and the candidates are eligible (Article 93[1], LTC).

The Court is also competent to hear appeals against decisions taken by the National Electoral Commission (CNE; Article 102-B[1], LTC), decisions of courts of first instance in matters concerning disputes about candidacies for election to the Assembly of the Republic (Parliament), regional assemblies and local authority organs and entities (Article 101[1], LTC), and also decisions regarding complaints or protests in relation to alleged irregularities during voting and partial and general counts in those elections (Article 102[1], LTC).

In addition to being able to hear claims that are made directly under the *Estado de direito* principle (see answer to question 18), the Constitutional Court ensures respect for a range of principles and rules that are affiliated to it, but are themselves also enshrined in precepts of their own. Particular examples include: legality in administrative law (Ruling no. 296/13) and the separation and interdependence of the entities that exercise sovereignty (Ruling no. 214/11); the proportionality of restrictions on rights, freedoms and guarantees (Rulings nos. 85/85, 103/87, 39/88, 634/93, 201/00, 187/01, 632/08, 353/12); equality (Ruling no. 39/88, which establishes the bridge between proportionality and equality); access to justice (Ruling no. 1182/96); the natural judge (Ruling no. 41/16); legality in criminal law (Rulings nos. 428/10 and 587/14), including in related matters regarding the right of appeal (Ruling no. 324/13); criminal procedural guarantees (Ruling no. 429/95); that taxation must be lawful and provided for by law (Ruling no. 127/04); the duty to provide the grounds for judicial decisions (Ruling no. 61/06); the right to housing, as a requirement of the principle of the dignity of the human person (Ruling no. 723/04); that injuries and losses derived from the state's administrative activities are subject to reparation

(Ruling no. 154/07); and that injuries and losses in general are subject to reparation (Ruling no. 55/16).

4. Is there case-law on the content of the principle of the rule of law? What are the core elements of this principle according to the case-law? Please provide relevant examples from case-law.

Given the various different ways in which the *Estado de direito* / rule of law principle is projected (see previous answers), the Constitutional Court tends to highlight the particular aspects of it that are relevant to the matter before it in each case. Merely to offer a few leading examples of this (in addition to the information given in our answers to the other questions), the Court has emphasised:

a) **With regard to legality in criminal law**, that the legislator must establish penal punishments with respect for the principles of the subsidiarity of the criminal law, that the penalty must be necessary, justice, and proportionality (Ruling no. 577/11), formulating norms that are written, precise and established in advance (Ruling no. 449/2002).

b) **With regard to criminal procedure**, that *"two essential objectives* [must be achieved]*: on the one hand, to enable the state to implement the right to punish, and on the other, to make it possible that when that goal is being pursued, citizens are granted the guarantees which are essential to their protection against any abuses of that power to punish. In order to concretely achieve these ends, the guarantees available to the defence require compliance with constitutionalised criminal procedural principles, such as the accusatory principle (one of the key structural principles of the so-called "Criminal Procedural Constitution"), the adversarial principle, the principle of equality of arms, and the principles of oral pleading and that evidence must be presented in court"* (Ruling no. 429/95).

c) That application of the principle of **the protection of legitimate expectations**, which is a corollary of the principle of a democratic state based on the rule of law, *"must begin with a rigorous definition of the cumulative requisites which the situation surrounding the expectation must fulfil in order to warrant protection: firstly, expectations that a given legal regime will be stable over time must have been induced or fuelled by behaviours on the part of the public authorities; they must also be legitimate, which is to say underlain by good reasons, which must themselves be assessed in the light of the constitutional-*

law axiological framework; and lastly, the citizen must have oriented his/her life and made choices precisely on the basis of expectations that the legal framework would be maintained" (Ruling no. 413/14).

d) **With regard to tax-related affairs**, the costs imposed by taxation must not exceed that which is legitimately tolerable in the light of the right to freedom and personal autonomy (Ruling no. 413/14).

e) That legislative measures which impose **restrictions on rights** must be appropriate, requirable and proportionate to the desired ends, with respect for the principle of **proportionality** (Ruling no. 413/14).

f) **With regard to procedural law**, that, in general, the guarantee of a "fair process", which in turn leads on to the equality of arms, is a requirement imposed by the *Estado de direito* / rule of law principle (Rulings nos. 681/06 and 660/06), which also gives rise to the right of appeal (Ruling no. 638/06).

g) **With regard to the exercise of the jurisdictional function**, the right to know the grounds for decisions is a guarantee that forms an integral part of the concept of the principle of a democratic state based on the rule of law (Ruling no. 61/06).

h) **With regard to executive process**, that attaching income in such a way as to deprive the recipient of income equal to at least the national minimum wage is incompatible with the principle of the dignity of the human person, which is itself contained in the *Estado de direito* / rule of law principle (Ruling no. 657/06).

i) **That the principle of the dignity of the human person** is in its own right a standard or criterion that can possibly be used to issue a finding of (un)constitutionality in relation to legal norms (Ruling no. 105/90).

j) **With regard to legality in administrative law**, laws must be sufficiently certain, densified and clearly determined (Ruling no. 296/13).

k) That the principle that **reparation must be made for injuries and losses**, both in general and in cases involving the exercise of public functions, is derived from the *Estado de direito* / rule of law principle (Rulings nos. 154/07 and 55/16).

l) That in addition to the negative sense of **the separation of powers** (instrument for inhibiting public authorities from acting in certain situations, by means of the traditional checks-and-balances model and with a view to safeguarding

citizens' individual freedom), there is also a positive sense which *"ensures a fair and appropriate ordering of the state's functions, and which consequently intervenes in the form of a relational scheme governing the competences, tasks, functions and responsibilities of the entities that exercise sovereignty under the Constitution"* (Ruling no. 214/2011).

5. Has the concept of the rule of law changed over time in case-law in your country? If so, please describe these changes referring to examples.

The notion of *Estado de direito* has not exactly changed over time. As we can see from the answers to the previous questions and question 18, it has, however, been progressively deepened and broadened as the Constitutional Court has successively applied the principle in different domains.

6. Does international law have an impact on the interpretation of the principle of the rule of law in your country?

As we will describe in more detail below (see answer to question 15), in its reviews the Constitutional Court does not look at whether rights have been directly violated; it only issues findings as to whether a given *norm* is in breach of one or more constitutional rules.

Inasmuch as Portugal is a Member State of the European Union, the Court is constitutionally required to bear in mind and respect European law in the exercise of its functions.

The Constitution of the Portuguese Republic contains two Articles on the application of European and international law.

Article 8 reads as follows:

"[…]

Article 8[3]

[3] *Artigo 8.º*
(Direito internacional)
1. As normas e os princípios de direito internacional geral ou comum fazem parte integrante do direito português.
2. As normas constantes de convenções internacionais regularmente ratificadas ou aprovadas vigoram na ordem interna após a sua publicação oficial e enquanto vincularem internacionalmente o Estado Português.

(International law)

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

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

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

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

[…]"

While Article 16 says the following:

"[…]

Article 16[4]

(Scope and interpretation of fundamental rights)

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

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

[…]"

Article 8 means that the norms and principles of general and common international law, the norms set out in duly ratified or approved international conventions, the norms produced by competent bodies of international organisations to which Portugal belongs, and the provisions of the treaties governing the European Union and the norms produced by the Union's institutions in the exercise of their competences are in force in domestic Portuguese law and remain so for as long as they are internationally binding on the Portuguese State.

---

3. As normas emanadas dos órgãos competentes das organizações internacionais de que Portugal seja parte vigoram diretamente na ordem interna, desde que tal se encontre estabelecido nos respetivos tratados constitutivos.

4. As disposições dos tratados que regem a União Europeia e as normas emanadas das suas instituições, no exercício das respetivas competências, são aplicáveis na ordem interna, nos termos definidos pelo direito da União, com respeito pelos princípios fundamentais do Estado de direito democrático.

[4] *Artigo 16.º*

(Âmbito e sentido dos direitos fundamentais)

1. Os direitos fundamentais consagrados na Constituição não excluem quaisquer outros constantes das leis e das regras aplicáveis de direito internacional.

2. Os preceitos constitucionais e legais relativos aos direitos fundamentais devem ser interpretados e integrados de harmonia com a Declaração Universal dos Direitos do Homem.

The Constitutional Court expressly admitted the possibility of the domestic validity of international legal instruments in Rulings nos. 353/12 and 187/13, in which it pronounced itself on the constitutional conformity of certain norms contained in the Laws approving the State Budgets for 2012 and 2013. In both decisions, the Court declared that the instruments on which the Financial Assistance Programme was based and which were adopted with regard to Council Regulation (EU) no. 407/10 of 11 May 2010 establishing a European financial stabilisation mechanism, were binding on the Portuguese State.

These decisions recognised that the rights enshrined in the Portuguese Constitution can be conditioned by normative instruments produced by the European Union, and defined the balance that has to be achieved between the measures designed to fulfil the economic objectives established by the Financial Assistance Programme on the one hand and the need to protect the fundamental rights and principles enshrined in the Constitution of the Portuguese Republic on the other.

At the same time, with regard to fundamental rights, Article 16(1), CRP, lays down a principle of openness to rights with an international source, in that it says that the fundamental rights enshrined in the Portuguese Constitution do not exclude any others contained in applicable international-law laws and rules. As such, when it considers the questions that are brought before it, the Constitutional Court must bear in mind not only those rights that are directly protected by the Constitution, but also those that are recognised in international law, and particularly those enshrined in the European Convention on Human Rights (ECHR). Having said this, we should note that the catalogue of fundamental rights provided for in the Portuguese Constitution, which includes several of the so-called "third-generation rights", such as those to data protection, administrative transparency and even guarantees in the bioethics field, is longer and more detailed than its counterparts in virtually any of the international human rights treaties – namely the ECHR and the Universal Declaration of Human Rights (UDHR). This means that in most cases, the Court has no need to resort to this type of international instrument as an autonomous criterion for validating norms with regard to questions involving fundamental rights.

Although the Portuguese Constitutional Court has never recognised that international conventions and treaties – especially those which enshrine catalogues of rights, such as the ECHR, the UDHR and the Charter of Fundamental Rights of the European Union (CFREU) – possess an autonomous parametric value for constitutional review purposes, the Court has quite frequently employed rules and principles set out in such international instruments as criteria with which to interpret the applicable Portuguese

constitutional norm, and they have thus played a secondary role in some of the Court's decisions. International norms often serve in this way as guidelines in the process of densifying the provisions of the CRP, and in certain cases can contribute to a broadening of the content of a given fundamental right that is already enshrined in the Portuguese Constitution.

There are various examples of Constitutional Court decisions that confirm this understanding, including Rulings nos. 185/10, 281/11, 360/12, 327/13 and 404/13. Besides these, Ruling no. 101/09, on issues linked to medically assisted procreation, is of particular interest here. In it, the Court said that *"it is also within the context of recognition of the universality of the principle of the dignity of the human person that one must situate the Constitution's openness to international law* [...]*"*. The Court set out a principle of interpretation in conformity with the Universal Declaration of Human Rights, the useful scope of which is *"that of making it possible to resort to the Universal Declaration in order to determine the interpretative sense of a constitutional norm regarding fundamental rights that cannot be attributed a univocal meaning, or in order to densify indeterminate constitutional concepts regarding fundamental rights"*.

The Court also added that it was unable, *"in the light of the reception clauses derived from Article 8(1) and (2) of the Constitution, without further consideration and as a general thesis, to exclude the possible constitutional relevance of other applicable international-law instruments and in particular, where that which is important to us here is concerned, of the Conventions and Declarations more closely linked to Bio-law, such as the Oviedo Convention* [and] *the respective Additional Protocol on Human Cloning"*. Having said this, on the subject of the parametric value of these international-law instruments, the Court took the view that *"one cannot exclude the possibility that, despite their conventional appearance, some of their provisions may enjoy constitutional force, to the extent that they are presented as an expression of general legal principles which are commonly recognised in the international community as a whole, or at least within a given civilizational universe (Article 8[1]), or as unwritten fundamental rights within the framework of the open clause in Article 16(1) (...) However, even here one cannot ignore the fact that the Constitution adopts those conventional international-law parameters as its own when it stipulates limits on the legal regulation of medically assisted procreation which make it possible to render it compatible with the basic requirements of the dignity of the human person or the rule of law (Article 67[2][e]). This leads us to consider that, as international-law norms that are binding on the Portuguese State, the norms contained in Articles 1 and 2 of the Oviedo Convention do not possess an autonomous value with which to determine constitutionality. At the same time, and in accordance with the dominant understanding, albeit one must recognise that as conventional international law, all the other provisions of the Oviedo Convention – particularly those set out in Articles 11, 14, 15 and 18 – and all*

the provisions of the Additional Protocol possess a supra-legal value, they cannot fail to be deemed subject – and hierarchically subordinate – to the Constitution".

While some of the fundamental rights provided for in the Constitution of the Portuguese Republic are not matched by corresponding provisions in European or international law, it is rare for rights established in international instruments not to be directly provided for in the CRP. This is why the Constitutional Court has never said that the norms contained in the ECHR, the UDHR and the CFREU are attributed an autonomous constitutional value in Portuguese law.

In short, the Court has the power to apply norms and principles that are enshrined in international conventions to which Portugal is a party, or in other European and international-law instruments, but has never used them as a direct, autonomous means of representing constitutional limits to which it can resort when it reviews the constitutionality of domestic legal provisions.

So even when an applicant has invoked the content of those rights, the Court has never decided in a way that would imply the existence of an exclusive or direct violation of international or European law. The norms in these international instruments are always used in conjunction with a matching rule or principle from the Portuguese Constitution. Such international/European norms thus play a secondary part in a case's *ratio decidendi* – i.e. the Court has never used them as a particular criterion for assessing the constitutionality of domestic legal provisions.

The position which public international law occupies in the Portuguese legal system is the result of both the abovementioned paragraphs (1) and (2) of Article 8 of the Constitution, and the constitutional norms applicable to the constitutional review system, which itself occupies an infra-constitutional position in the system.

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

As such, norms that form part of public international law – be it common or conventional – can be subjected to *ex post* abstract and concrete reviews of their constitutionality.

In the *ex post* abstract case, the Constitutional Court has the power to assess and declare the unconstitutionality with generally binding force of any norms (Article 281[1][a], CRP), so this includes international-law norms. The request must come from one of the entities referred to in paragraph (2) of the same Article, and the procedure is that applicable

to the *ex post* review of normative acts set out in Articles 62 to 68 of the Law governing the Organisation, *Modus Operandi* and Procedure of the Constitutional Court (LTC).

With regard to concrete reviews, Article 280(1), CRP, says that appeal can be made to the Constitutional Court against decisions in which courts refuse to apply any norm on the grounds of its unconstitutionality (para. [1][a]), or do apply a norm whose unconstitutionality has been argued during the proceedings (para. [1][b]). This precept covers decisions involving international-law norms (see e.g. Ruling no. 596/15, in which the Court considered the possible unconstitutionality of norms contained in the Convention on Extradition between Members of the Community of Portuguese-Speaking Countries (CE-CPLP)). The procedure in this case is that provided for in Articles 69 to 85 of the LTC, which is applicable to concrete reviews of the (un)constitutionality of normative acts contained in domestic law.

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

Having said this, the Constitution does also exceptionally permit the application of norms contained in treaties which are unconstitutional from an organic or formal standpoint, on condition that those norms are applied in the other party's legal system (Article 277[2], CRP).

Although the Constitutional Court has already been faced with the projection of conventional international law into the domestic legal system on various occasions, it is important to note than in the majority of cases the question before the Court concerned domestic-law norms, and that the issue was whether the rules included in international conventions formed part of the so-called "block of constitutionality" (Fr : *bloc de constitutionnalité*) as parameters for gauging the validity of domestic-law norms.

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

Relevant to this topic is Ruling no. 494/99 in which, in a prior review case, the Court declined to find any unconstitutionality in norms contained in the "Convention on Social Security between the Portuguese Republic and the Republic of Chile", which was signed in Lisbon on 25 March 1999.

Contradictions between constitutional norms and rules contained in the UDHR are a particular case, due to the express reference to the Declaration in Article 16(2) of the Constitution. As we have already said, Article 16(2) requires that constitutional and ordinary legal precepts regarding fundamental rights be interpreted and integrated in harmony with the UDHR.

The Constitutional Court has never had to resolve a situation in which there was a choice as to whether a constitutional norm should prevail over a UDHR norm or vice versa.

However, and as also mentioned above, in concrete review cases the Court is often faced with situations in which appellants invoke UDHR precepts, which they argue form part of the "block of constitutionality" they want to see treated as a parameter for determining the validity of Portuguese-law norms.

Constitutional case law under this heading has essentially gone in the direction of the view that international conventions on the protection and guaranteeing of human rights are above all elements that help interpret and integrate constitutional precepts, albeit without representing autonomous parameters for gauging the validity of challenged normative acts.

It is worth emphasising that the Constitutional Court has already declared that the sense of Article 16(2), CRP, is "*to widen the constitutional coverage of the fundamental rights, and not to restrict or limit it, be it extensively or intensively*". In Ruling no. 121/2010, on recognition of the civil marriage of same-sex couples, although the Court acknowledged that the concept of marriage to which the UDHR affords its protection refers to unions between a man and a woman, it deemed that it was not bound by such a restrictive interpretation.

In addition to this, as part of its concrete review competences, since 1989 it has been possible to appeal to the Constitutional Court against *"decisions in which courts (…) refuse to apply one or more norms contained in a legislative act on the grounds that they contravene an international convention or apply it in a manner that is not in conformity with that which the Constitutional Court has previously decided on the question"* (Article 70[1][i], LTC). Article 72(2), LTC, specifies the scope of such appeals more precisely: [these appeals are] "*restricted to questions of a constitutional-law and international-law nature that are implicated in the challenged decision*".

When Law no. 85/89 added these precepts to the LTC in 1989, the intention was to overcome a situation created by contradictory decisions handed down by the Court's

first and second chambers as to its competence to hear questions regarding a lack of conformity between domestic law and conventional international law.

This particular type of appeal can only address the question of the position the Constitution attributes to international conventions within the normative framework of the Portuguese legal system, and questions that effectively entail determining the force of a convention in the international legal system and whether and to what extent it is binding on the Portuguese State. It cannot be directed at the material question that is directly in dispute – i.e. it is not up to the Constitutional Court to say whether a convention is contradicted by a legal norm, which is a question that remains within the decisional purview of the ordinary courts.

The Constitutional Court has uniformly and repeatedly said that in concrete review proceedings its own competence to judge whether ordinary-law norms are compatible with an international convention is restricted to the cases specified in Article 70(1)(i) of the LTC – refusals to apply norms, or applications of norms in ways that are not in conformity with earlier Constitutional Court decisions – and does not include the ability to review decisions in which another court has applied a domestic-law norm that one of the parties to the proceedings has argued is not in conformity with an international convention.

In the absence of cases in which these specific preconditions were fulfilled, the Constitutional Court has not yet heard any appeal brought under Article 70(1)(i) of the LTC.

We should also note that there can be no prior or abstract review of alleged absences of conformity of domestic norms with international-law norms.

*

The openness of Portuguese constitutional case law to international law means that it includes frequent references to the ECHR (see, for example, in just the last year, Rulings nos. 676/16, 591/16, 519/16, 193/16, 55/16, 41/16 and 24/16), the CFREU (Rulings nos. 591/16, 519/16, 193/16 and 106/16) and other international-law instruments, as well as to the case law of the Court of Justice (Rulings nos. 430/16, 265/16) and the European Court of Human Rights (Rulings nos. 591/16, 429/16, 277/16, 265/16, 193/16 and 55/16).

There are also recurrent references to the UDHR, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention for the Protection of Human Rights and the Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine. To give just a few examples, we can mention Rulings nos.

101/08 (the UDHR and the CRP), 185/10, 327/13, 404/13 and 212/10 (the ECHR and the CRP), 461/11 (case law of the Court of Justice and the CRP) and 281/11 (the ECHR, case law of the Court of Justice and the CRP). The Constitutional Court often invokes Article 6 of the European Convention on Human Rights as a guideline criterion for interpreting Portuguese constitutional-law norms (Rulings nos. 424/09, 281/11, 243/13 and 181/97).

In short, the interpretation and application of the rights derived from the *Estado de direito* / rule of law principle (see answers to the previous questions and question 18) reflect the regime and practice we have just described. In other words, they are deepened and constructed via the dialogue between Portuguese constitutional case law, international-law instruments and the case law of international courts. To take just one of the most recent examples, in the grounds for Ruling no. 24/16, which addressed criminal procedural guarantees, the Court said the following:

> "[…]
> *In comparative law, especially German and Italian law, and without prejudice to respect for the principle that evidence must be presented in court, one finds differentiated solutions to the question of the usability of statements and testimony given in procedural acts prior to the trial hearing – solutions that are more restrictive in some respects and less in others* […].
> *The regime that has been established in relation to the same question in the case law of the European Court of Human Rights on Article 6(3)(d) of the European Convention on Human Rights is less demanding than that provided for in the Code of Criminal Procedure (CPP; see Paulo Pinto de Albuquerque,* op. cit.*, pp. 911-912). In particular, with regard to the guarantee of an adversarial process and the rights available to the defence in relation to witness statements and testimony, the aforementioned Court considers that while, in principle, they may be produced in the presence of the accused at a public hearing, with a view to an adversarial debate, there are exceptions – particularly, and in cases in which witnesses are not present at the hearing, the statements they have given previously during the preliminary investigative or fact-finding phase can be read out, on condition that the rights of the defence are safeguarded. As a general rule, the latter require the accused to have been given the possibility of directly or indirectly questioning such witnesses, either at the moment at which they gave their statement, or at a later time (among many others, see Isgrò v. Italy, judgement of 19 February 1991, § 34; Saïdi v. France, application no. 14647/89, 20 September 1993, §§ 43-44; Trampevski v. Former Yugoslav Republic of Macedonia, no. 4570/07, 10 July 2012, § 44; A.G. v. Sweden (dec.), no. 315/09, 10 January 2012; Al-Khawaja and Tahery v. United Kingdom, nos. 26766/05 and 22228/06, 15 December 2011, § 118; and Schatschaschwili v. Federal Republic of Germany, no. 9154/10, 105; also see Ireneu Cabral Barreto,* A Convenção Europeia dos Direitos do Homem Anotada*, 3rd ed., Coimbra Editora, Coimbra, 2005, note 9.5. on Article 6, p. 175). That which is at stake is the so-called "sole or determinant evidence rule", according to which (criminal) proceedings are not fair if the conviction is based exclusively or to a decisive extent on*

statements and testimony from witnesses whom the accused person been unable to question in any of the procedural phases.
However, in its judgement on Al-Khawaja and Tahery, the Court (ECtHR) *accepted greater flexibility in the application of this rule, depending on a series of criteria and principles. It even accepted that under certain circumstances, it could be waived without contravening Article 6(3)(d) of the Convention, thereby admitting the possibility that an accused could be convicted on the basis of witness statements that are read out at the trial hearing without those witnesses ever having been directly or indirectly questioned by the accused (see §§ 119* et. seq.*). The Schatschaschwili judgement confirmed this guideline and defined some of those criteria and principles more precisely (see Schatschaschwili, §§ 106* et. seq.*).*
These indications confirm that recognition of a space in which there is a freedom to shape the legal discipline governing the reading out at trial hearings of statements which were previously made by witnesses who are present at that hearing is current within the overall European legal scene, and that there are no absolute solutions. The only constants are the general guideline that the evidence must be presented in court, and the requirement that the statements and testimony which are to be considered during the hearing must be subject to the rights of the defence and an adversarial process.
[…]"

In summary and conclusion, the Portuguese Constitutional Court interprets and applies constitutional law in a process of constant and open dialogue with the most relevant international-law instruments.

The Court has even gone to the point of modifying its own case law in the light of that of the European Court of Human Rights. In the wake of *Feliciano Bichão v. Portugal* (decision of 20.11.2007, application no. 40225/04), the Portuguese Constitutional Court changed its understanding with regard to the omission of notification of an applicant of the Public Prosecutors' Office's response to his/her allegations, in situations in which new facts have been added to the case file.

As we can see from the above, the Portuguese Constitutional Court tends to follow ECtHR case law, albeit in certain circumstances it is necessary to adapt that case law to the specificities of both Portuguese law and the concrete case in question. Such differences as may exist are thus not very significant, or merely apparent (see, for example, the decision in *Da Conceição Mateus and Santos Januário v. Portugal*, 8 October 2013, in which the ECtHR found no grounds for an appeal regarding pay cuts, whereas in its Ruling no. 353/12, the Portuguese Court took the view that those cuts constituted a violation of the Constitution of the Portuguese Republic. In practice the difference was negligible, given that the effects of the Portuguese Court's decision were suspended in 2012 due to exceptional economic/financial circumstances, while the ECtHR decision took the effective limitation imposed by the latter into account).

Finally, two examples of how this dialogue works in the other direction as well: in *Almeida Garrett, Mascarenhas Falcão and Others v. Portugal* (decision of 11.01.2000, applications nos. 29813/96 and 30229/96, citing Rulings nos. 39/88 and 425/95), the ECtHR mentioned decisions of the Portuguese Constitutional Court; and in *Lopes Gomes da Silva v. Portugal* (decision of 28.09.2000, application no. 37698/97), it mentioned the Portuguese Court's finding that there are constitutional limits on the exercise of freedom.

7. Are there major threats to the rule of law at the national level or have there been such threats in your country (e.g. economic crises)?

The Constitutional Court has recently handed down decisions – particularly in the budgetary and labour-related fields – that are sometimes known as "crisis case law" and were set against the backcloth of the Financial Assistance Programme for Portugal, which resulted in a long list of measures (e.g. restrictive changes to the pension system) whose supporting norms were assessed by the Court in that exceptional context. This case law did not exactly reveal a *threat* to the rule of law, but was a challenge for the Constitutional Court, which had to seek a just balance between citizens' rights and guarantees and the budget deficit that the state had to deal with.

The Court responded to the legal questions that were posed at the time by referring to principles (focusing here solely on those that can be associated with the rule of law – i.e. equality, the protection of legitimate expectations, and proportionality) that took on a central role in which they were at one end of a kind of major 'tug-of-war' with the legislator's freedom to shape legislation as it sees fit (see the address of the President of the Constitutional Court of Portugal, Justice Joaquim de Sousa Ribeiro, to the Conference to commemorate the 5th anniversary of the Constitutional Court of the Republic of Angola, on the topic of "The role of key structural constitutional principles in the protection of economic and social rights during times of crisis: the recent case law of the Portuguese Constitutional Court")[5]. In Ruling no. 396/11, the Court cited its own case law in Ruling no. 304/01 as follows: "*it is thus necessary to undertake a just balancing of the protection of citizens' expectations derived from the principle of a democratic state based on the rule of law on the one hand, and the freedom to create and shape legislation that pertains to the legislator on the other – a legislator that is*

5 http://www.tribunalconstitucional.pt/tc/content/files/relatorios/comunicacao_ptcv_aniversario_do_tc_angola_20130725.pdf (in Portuguese).

also democratically legitimated and must unequivocally be recognised to possess the legitimacy (and perhaps even the duty) to try to make legal solutions fit existing realities, enshrining the most appropriate and reasonable of them, even if it means 'touching' [affecting] *relationships or situations which were governed in other ways up until then".*

In its assessment, the Constitutional Court emphasised that *"the protection of legitimate expectations embodies the subjective application of the protection of legal certainty, the two of which, when conceptualised in a way whose acceptance has already been consolidated, together represent an unrefusable (albeit not expressly formulated) requirement for the concrete implementation of the principle of a democratic state based on the rule of law (Article 2, CRP)".* When, as the Court recognised in Ruling no. 93/84, that principle "*is unable to find due support in other constitutional precepts",* it is one whose *"outlines are fluid*" and whose "*content is relatively indeterminate*"; and it has been the "*object of intense work to densify it, which has determined a precise scope of application, as well as a procedural format entailing a (necessary) confrontation with opposing constitutional principles and constitutionally accredited interests"* (Ruling no. 396/11).

In Ruling no. 353/12, the Court noted that *"despite recognising that we are in a very serious economic and financial situation, in which achieving the public deficit goals established in the aforementioned memoranda of understanding is important in order to ensure that the state's funding is maintained, those objectives must be achieved by means of spending-reduction and/or revenue-increasing measures that are not reflected in an excessively differentiated division of sacrifices. Indeed, the greater the degree of sacrifice imposed on citizens in order to satisfy public interests, the greater the requirements for equity and justice in the way in which those sacrifices are shared out. The situation referred to earlier and the need for efficacy on the part of the measures adopted in order to deal with it cannot serve as grounds for dispensing the legislator from being subject to the fundamental rights and the key structural principles of an* Estado de Direito*, namely parameters such as the principle of proportional equality. The Constitution certainly cannot remain aloof from economic and financial reality, and especially from the existence of a situation that can be considered one of grave difficulty. However, it* [the CRP] *possesses a specific normative autonomy that prevents economic or financial objectives from prevailing without any limits over parameters such as that of equality, which the Constitution defends and must cause to be complied with".*

In 2013, the Court handed down Ruling no. 187/13, in which it reiterated that *"the Constitution is sensitive to the variations in (at least) the level of legislative implementation which the right to be paid may experience. It provides a control, not over whether pay can be reduced as such, but over the terms under which such cuts can effectively be made – i.e. over the reasons for and extent of the cuts. That control acts via a mediating intervention of the principles of the protection of legitimate expectations, equality and proportionality, which densify the idea of the subjection of public authority to legal principles and rules*

– *an interpretation which incorporates the idea of* Estado de direito *included in the principle of a democratic state based on the rule of law (Article 2, CRP). In this field too, the legislator's freedom to shape legislation is constitutionally bound by those principles"*. The Court also considered that the Constitution opposes an intolerable, arbitrary, oppressive or overly accentuated downgrading of those minima in terms of certainty and security which people, the community and the law must respect as essential dimensions of a democratic *Estado de direito.*

The Court took the same line in Rulings nos. 474/2013 (on retrospective norms), 602/13 and 794/13.

This case law thus did not waive or ignore the key structural principles underlying the *Estado de direito* principle in any way, although it tested and applied them to points that were close to some of their limits.

8. Have international events and developments had a repercussion on the interpretation of the rule of law in your country (e.g. migration, terrorism)?

In Ruling no. 296/15, the Court found a norm contained in Article 6(1)(b) and (4) of Law no. 13/2003 of 21 May 2003, under which recognition of entitlement to the Social Integration Income (RSI) required certain foreign citizens to have legally resided in Portugal for the last three years, to be unconstitutional because it was in violation of the principle of proportionality. In Ruling no. 509/2002, the Court had already characterised the RSI social benefit as *"a positive dimension of a right to a minimally dignified standard of living"*, and said that *"the principle of respect for human dignity, which is immediately proclaimed in Article 1 of the Constitution and is also derived from the idea of a democratic state based on the rule of law, which is itself enshrined in Article 2 and is also touched on in Article 63(1) and (3) of the same CRP, which guarantees everyone the right to social security and charges the social security system with the protection of citizens in every situation in which there is a lack of or reduction in the means of subsistence or the capacity to work, implies recognition of the right to or guarantee of a minimum degree of dignified subsistence"*. The government sought to say that the three-year requisite should be upheld, arguing that it *"is not arbitrary, nor does it violate the principle of proportionality, inasmuch as it is intended to ensure the constitutionally protected interest in the financial sustainability of the social security regime, aiming to preserve the RSI from the 'pull effect' of migratory movements that is greatly enhanced by immigrants'*

family relationships and can even pervert the intended sense of social benefits like the Social Integration Income".

The Constitutional Court took the following stance:

"[…]
[The Court] *does not contest the cogency of the interest in preventing excessive costs for the social security system, or the 'need to ensure a certain prior connection with the country in order to avoid both situations in which* [beneficiaries remain here] *in an inconstant manner, and any unfair benefits', which the government put forward as evidence that the requirement for a minimum residency period is a 'reasonable and proportionate condition' for granting the RSI.*
However, the simple fact is that, even considering (…) that the Court has already admitted the possibility of differentiating other citizens from Portuguese citizens in this matter (Ruling no. 141/2015), one cannot fail to attach value to the circumstance that requiring three years of legal residence in order for the RSI to be awarded to foreign citizens, with a view to providing for the sustainability of the social security system, sacrifices a right to a benefit which ensures a minimally socially adequate living.
On many occasions, the imposition of such a long time period cannot but compromise timely access to a benefit which ensures minimum vital needs of citizens in situations of serious economic want and lack of social and occupational integration, thereby irremediably undermining that benefit's purpose.
By subjecting the right to a social benefit which ensures a minimally dignified subsistence or a minimum degree of survival and which results from the conjugation of the principle of the dignity of the human person and the right to social security in situations of need to a period of three years of legal residence in Portugal, the legislator is imposing a sacrifice on foreigners that is disproportionate to the purpose of the restriction.
This option affects citizens who are in seriously vulnerable situations, find themselves without the immediate means to satisfy their household's vital needs and were, as has been demonstrated, admitted to Portugal in compliance with the rules laid down by the legislator, namely with regard to the setting of requisites in relation to the availability of means of having an income.
If, given that the amount of the benefit is small and it encompasses a very limited universe of recipients, one weighs up the combination of the relative insignificance of the RSI within the overall Social Security budget and the tiny amount that is spent on granting the RSI to non-nationals, the disproportionate nature of this solution becomes evident.
Considering that there are impositions and controls – defined by the host state – which gauge the beneficiary's autonomous capacity for self-sustenance and his/her link to the country, and which are provided for with regard to entering and remaining in Portuguese territory and to the issue of residence permits, and also bearing in mind both the small amount of the social benefit in question and the circumstance that that benefit is targeted at the most vulnerable and neediest citizens, in relation to whom the passage of time inexorably leads to a worsening of the conditions under which they subsist, then [one reaches the conclusion that] *as concretely configured therein, the requisite established in Article 6(1)(b) of Law no. 13/2003 proves disproportionate.*
In summary, after everything has been weighed up, one must conclude that the imposition of a three-year time period – which effectively results in denial of the award of means of subsistence to a foreign citizen in a socially at-risk situation until that time period is up – is excessive and intolerably collides with the right to a benefit that ensures

the basic means of survival. With that kind of duration, the defined time period constitutes a sacrifice that is disproportionate or overly burdensome in relation to the advantage associated with the public-interest goals which setting it seeks to achieve.
As such, the Court considers that the challenged norm suffers from unconstitutionality due to a violation of the principle of proportionality.
[…]"

We can see that in this case the Constitutional Court did not move away from its existing line of interpretation with regard to the meaning of the principles of an *Estado de direito* and proportionality, applying them in accordance with the requirements derived from the interests at stake.

In Ruling no. 403/15, the Court (in a majority decision) found a norm contained in Article 78 (2) of Decree of the Assembly of the Republic no. 426/XII "Approving the Legal Regime governing the Intelligence System of the Portuguese Republic" unconstitutional. At issue was access by the intelligence services to traffic, localisation and other communications-related data needed to identify the service subscriber or user or find and identify the source, destination, date, time, duration and type of communication, as well as to identify the telecommunications equipment or its location. Under the Decree, access to such data had to be necessary, appropriate and proportionate in a democratic society in order for the intelligence services to be able to fulfil their legal mission, and a prior request setting out the grounds for the use had to be sent to a Prior Review Commission (CCP), which obligatorily had to authorise it in advance. In the exposé of the reasons for the government bill that gave rise to the Decree, the possibility of such access was justified by the need to *"prevent serious phenomena like terrorism, espionage, sabotage and highly organised crime, and even in these cases is limited to that which is strictly appropriate, necessary and proportional in a democratic society. To this end, a specific entity is hereby created – the Prior Review Commission (see Articles 35 to 38), which grants prior authorisation to access the information and data needed in a given operation, in accordance with a demanding legal procedure that is designed to review access to personal data which might undermine the preservation of the privacy of personal life, to be conducted by three judges".*

The Court began by saying that access to traffic data should be considered an intrusion into telecommunications for the purposes of the applicable constitutional norm (Article 34[4], which says: "*The public authorities are prohibited from interfering in any way with correspondence, telecommunications or other means of communication, save in the cases in which the law so provides in matters related to criminal procedure*" [underlining added]). It concluded that *"in the case*

of the prohibition of intrusion by the public authorities into communications which the first part of Article 34(4) enshrines as a general principle, the exceptions referred to in the final segment of that precept are limited to matters concerning criminal proceedings. Given that the Constitution only authorises that restriction [on the prohibition] *in those terms, it would not be admissible to interpret it in any other way that would make it possible to broaden it to encompass other effects, as if the restriction were not specified in the constitutional text itself or entailed a merely implicit restriction that would allow one to take other constitutionally recognised values or assets into account"*. I.e. the Constitution only allows the intelligence services to access data within the scope of criminal investigations, and the Court also took the view that despite the fact that the Prior Review Commission was to be composed of Supreme Court Justices, its administrative nature meant that it would not possess *"the virtue of judicializing access to traffic data"*. In addition, the norm which authorised access to data was not implemented in a sufficiently concrete manner. The Court ended by concluding that *"it is important to recognise that in the present context, intrusion into communication data has no place in a procedure which provides guarantees and possibilities of protection with a scope similar to those to which the Constitution subjects criminal procedure. The reasons which justified the exception expressly mentioned in Article 34(4), CRP, which are precisely linked to the specific guarantees that exist in criminal procedure, are thus not present in this case"*.

Here too, the Constitutional Court did not depart from its existing line of interpretation with regard to the meaning of the principles associated with an *Estado de direito*, particularly that of the exceptional nature of restrictions on rights, as laid down in the Constitution and the ordinary law.

9. Has your Court dealt with the collisions between national and international legal norms? Have there been cases of different interpretation of a certain right or freedom by your Court compared to regional / international courts (e.g. the African, Inter-American or European Courts) or international bodies (notably, the UN Human Rights Committee)? Are there related difficulties in implementing decisions of such courts / bodies? What is the essence of these difficulties? Please provide examples.

See answer to question 6.

10. What is the impact of the case-law of your Court on guaranteeing that state powers act within the constitutional limits of their authority?

The Constitutional Court does not directly decide conflicts of competence between organs and entities of the various state powers, inasmuch as its own review competence is essentially normative (see answer to question 15).

However, this does not prevent *norms* from being reviewed by the Court, precisely in the light of the principle of the separation and interdependence of the various entities that exercise sovereignty.

Thus, for example, in Ruling no. 214/11 the Court found that, with reference to the governmental competences listed in Article 199(c), (d) and (e), CRP, the norms contained in Articles 1 and 3 of Decree of the Assembly of the Republic no. 84/XI were unconstitutional because they were in breach of that principle, as enshrined in Article 111(1), CRP. The Court concluded that Parliament cannot deprive the government *"of the instruments which the Constitution reserves to it* [the government] *for the purpose of pursuing the tasks that are constitutionally entrusted to it in this domain"*. In Ruling no. 395/12, the Court also underlined that *"although, where the entities that exercise sovereignty are concerned, the principle of the separation and interdependence of powers is formulated in Article 111(1) of the Constitution, that principle is essential to a democratic state based on the rule of law. As such, and given the provisions of Article 2 of the Constitution, it is a principle that is a fundamental defining principle for the whole of the way in which the political community and the state, including the autonomous regions, are organised"*.

Be this as it may, whenever the Constitutional Court, using the normative review competence that pertains to it, takes decisions on the scope of and limits on the competences of the organs and entities of the various state powers, those decisions are fully respected and do not give rise to any difficulties in terms of their practical and effective implementation.

11. Do the decisions of your Court have binding force on other courts? Do other / ordinary courts follow / respect the case-law of your Court in all cases? Are there conflicts between your Court and other (supreme) courts?

See the answer to question 15, where we describe the review system and the effects and impacts of the Court's decisions. Given that the present question is covered therein, at

this point it only remains to say that there is no record of difficulties in terms of the acceptance and normal effect of Constitutional Court decisions, nor have there been any conflicts of competence worth mentioning vis-a-vis other courts.

12. Has your Court developed / contributed to standards for law-making and for the application of law? (e.g. by developing concepts like to independence, impartiality, acting in accordance with the law, *non bis in idem*, *nulla poena sine lege*, etc.).

Constitutional case law has played a very important role in settling principles and refining their practical application by the other courts, which often quote it. As such, in addition to the various different areas mentioned in other answers (questions 1, 2, 3, 4, 16 and 18), the Constitutional Court produces case law that positively influences other courts' understanding and application of norms and principles related to the concept of an *Estado de direito*. This is particularly true of: the **independence of the courts and the impartiality of judges** (see Rulings nos. 41/16, in which the Court talks about *"a normative interpretation that is not only innovatory in relation to legal criteria, but also neutralises and contradicts those same criteria, thereby offending against the principle that competence must be attributed by law, and thus also against the dimension of the principle of the natural judge under which it is guaranteed that there will be a court established by law"*, and 620/07, the result of which is that the legislator cannot deprive judges of a specific, unique status that combines all the provisions which regulate their functional situation); **the principle of *non bis in idem*** (Ruling no. 1/13) and **the untransmissible nature of criminal liability** (Ruling no. 171/14); and **the principle of legality in criminal law** (Rulings nos. 587/14, which means that the prohibition of analogies which result in an increase in the accused's criminal liability is a corollary of the principle of legality in criminal law, and 285/92, in which the Court stated that *"the principle that laws must be determinable or precise does not constitute a constitutional parameter "*a se*" – i.e. one which is disconnected from the nature of the matters in question or from a conjugation with other constitutional principles that are relevant to the case at hand. So, while it is true that in our constitutional system there is no general prohibition on issuing laws that contain indeterminate concepts, it is no less true that there are domains in which the Constitution expressly requires laws not to be indeterminate, as in the case of the requirements for 'typicity' in criminal matters set out in Article 29(1) of the Constitution* […] *or as a development of the principle of legality (*nulla poena sine lege*)* […]*"*).

The Constitutional Court's findings and positions have been a very important factor in the evolution and modification of other courts' case laws (on occasion, even bringing about legislative amendments), and occupy a leading place in matters regarding criminal procedural guarantees.

13. Do you have case-law relating to respect for the rule of law by private actors exercising public functions?

In Ruling no. 230/13, among others, the Constitutional Court took a stance whereby private subjects that exercise public functions are in general subject to administrative jurisdiction. The following excerpt is of particular interest to our topic here:

> "[…]
> [The] *delegation of public powers to a private entity only means that, via a process of transfer of responsibilities, the latter becomes an instance which performs a public function, during the exercise of which there is a requirement that it be bound by administrative law and public inspection and verification procedures. We are not in the presence of the execution of a task which has passed into the private sector, but one which remains a public task and for which the state remains ultimately responsible.*
> *The grant or delegation of public powers thus corresponds to a way of pursuing activities that are in the public interest, which originally pertain to the state, and with regard to which the state occupies an institutional position as guarantor* […].
> *At the same time, the fact that private entities with public powers are subject to administrative jurisdiction is the result of the standard competence laid down in Article 212(3) of the Constitution, which entrusts the administrative courts with the task of judging disputes arising out of administrative-law relations, and which is expressly enshrined in Article 4(1) of the Statute governing the Administrative and Fiscal Courts (ETAF). Thus, and notwithstanding the possibility of arbitration, it is categorically impossible to exclude the consideration of acts undertaken by a private entity in the exercise of public powers from the possibility of review by the state courts –* [a conclusion] *which is, quite apart from anything else, imperatively derived from the right of access to the courts and the principle of effective jurisdictional protection* […].
> […]"

In Ruling no. 117/15, the Court also says:

> "[…]
> *Private administrative entities are located within the state sphere and for that precise reason always engage in public actions, notwithstanding the fact that they adopt a private format. As Pedro Gonçalves says,* 'the fact that the state or another public entity creates or in any way assumes a dominant position in a private entity can only mean that it is seeking to turn that entity into an

instrument with which to intervene in the social area. To us, that indirect intervention represents a public intervention'.
[…]
Private entities charged with taking part in the execution of public tasks are located in Society, in the private sphere, and precisely for that reason the activity they undertake is in principle a private action. However, when they perform administrative functions that have been delegated by a public entity, the activity so exercised must be deemed public.
[…]"

The exercise of public functions by private-law subjects thus does not waive the subjection of that activity of theirs – i.e. of the acts practised as part of that activity – to the juridical regime governing public entities. Within the scope of that activity, those subjects continue to be bound by the principle of legality laid down for public entities.

14. Are public officials accountable for their actions, both in law and in practice? Are there problems with the scope of immunity for some officials, e.g. by preventing an effective fight against corruption? Do you have case-law related to the accountability of public officials for their actions?

The regime governing the extra-contractual civil liability of the state and other public entities (compensation for injuries and losses caused in the exercise of public activities) is laid down by law (Law no. 67/2007 of 31 December 2007). In particular, that law means that: injuries and losses caused in the exercise of legislative, jurisdictional and administrative functions are subject to compensation (Article 1[1]); actions undertaken and omissions committed in the exercise of public-authority prerogatives or prerogatives that are regulated by administrative-law provisions or principles are equivalent to the exercise of an administrative function (Article 1[2]); officeholders of public administration organs and entities and public administration staff and agents are liable for their actions and omissions, as laid down by law (Article 1[3]); private-law legal persons and their staff, members of governing bodies, legal representatives and third-party entities and staff are liable as laid down by law for actions they undertake and omissions they commit in the exercise of public-authority prerogatives or prerogatives that are regulated by administrative-law provisions or principles; and full reparation must be made for such injuries and losses (Article 3[1]).

In connection with the civil liability of public entities or entities that exercise public functions, it is worth mentioning Rulings nos. 154/07 (in which the Court found "*the norm*

contained in Article 2[1] of Executive Law no. 48,051 of 21 November 1967 to be unconstitutional when interpreted to mean that an administrative act which is annulled due to lack of grounds is absolutely and under any circumstances incapable of being considered an illicit act for the purposes of making it possible for the state to be civilly liable for an illicit act"), and 650/04 (in which the Court declared "*the part of the norm contained in the first section of Article 19(1) of the General Transport Tariff (TGT) which entirely excludes liability on the part of the Railway (CF) for injuries and losses caused to passengers as the result of delays, train cancellations or missed connections unconstitutional with generally binding force"*).

In addition to *civil* liability, there is a broad range of crimes that apply to the improper exercise of public functions and entail the *criminal* liability of officeholders for acts undertaken in the exercise of their functions. Of particular note in this respect are the crimes committed in the exercise of public functions that are provided for in the Criminal Code (CP) itself (particularly: improper receipt of an advantage, passive corruption, active corruption, embezzlement of public funds or property ('peculation'), improper use of public property, deriving economic benefit from public dealings, extortion by abuse of a public position or authority ('concussion'), abuse of authority, breach of urban-planning rules by a public servant, and breach of a duty of secrecy or confidentiality); and the fact that some crimes are deemed to be aggravated when committed by public officeholders (Law no. 34/87 of 16 July 1987). In the case of the crimes of improperly receiving an advantage and corruption, the Criminal Code says that **the agent can be dispensed from the applicable penalty** whenever: (a) he/she has reported the crime within at most 30 days after committing the act in question, on condition that this occurs before criminal proceedings are brought and that he/she voluntarily returns or makes up the advantage so received, or its value in the case of something fungible; (b) before the fact occurs, he/she voluntarily repudiates the offer or promise he/she accepted, or returns or makes up the advantage so received, or its value in the case of something fungible; or (c) before the fact occurs, he/she withdraws the promise or offer of an advantage or asks for it to be returned or made up (Article 374-B[1]). On the other hand, the penalty is especially attenuated if the agent: (a) by the time the first-instance trial hearing is concluded, concretely helps obtain or produce evidence that is decisive to the identification or capture of other responsible parties; or (b) committed the act in question at the request of a public servant, with the request made either directly or via a third party (Article 374-B[2]).

The fight against corruption faces difficulties linked to the nature of the unlawful act concerned, and the crime is difficult to investigate. However, in practice immunities –

e.g. the immunity which the law gives to Members of the Assembly of the Republic (Article 11, Law no. 7/93 of 1 March 1993) – have not been an obstacle to the investigation and pursuit of crimes, given that they have usually been lifted in corruption investigations.

15. Is there individual access to your Court (direct / indirect) against general acts / individual acts? Please briefly explain the modalities / procedures.

In answering this question, we will take "general acts" to mean legislative norms and "individual acts" to refer to administrative acts.

The Portuguese report to the Summit of Presidents of Supreme, Constitutional and Regional Courts (Mexico, 2012) summarised the situation with regard to the first group as follows[6]:

> "[…]
> *In Portugal, the constitutional review process conducted by the Constitutional Court is directed solely at legal norms, given that Portuguese law does not offer the possibility of a 'constitutional complaint' or '*amparo *remedy'.*
> *Given this, the Constitutional Court only hears* [questions concerning] *the violation* [of constitutional norms and principles] *within the context of the review of the constitutionality of norms with a content that can affect* [those norms and principles].
> *The system includes four types of review: prior,* ex post facto *abstract, concrete, and the review of unconstitutionality by omission. The Constitutional Court has sole competence to conduct the first two and the last of these, while a number of public entities possess the legitimacy to request them (in the case of prior control, only the President of the Republic in general, and the Representatives of the Republic in the autonomous regions with regard to regional legislative decrees specifically: Article 278[1] and [2], CRP). The Portuguese concrete review model is mixed – 'diffuse at the base and concentrated at the summit' – because every court is competent to refuse to apply norms that are contrary to the Constitution (Article 204, CRP), with those decisions then subject to appeal to the Constitutional Court, which has the last word on the question of constitutionality.*
> *Private entities only have access to the Constitutional Court in concrete review cases, using the format of the appeal on the grounds of (un)constitutionality in which they are entitled to challenge decisions of other courts on questions of constitutionality that have arisen in an action that has gone to court. Concrete reviews essentially occur following two major types of court decision: those in which a court refuses to apply any norm on the grounds of its unconstitutionality, and those in which it does apply a norm that has been alleged to be unconstitutional during the proceedings.*
> […]"

[6] http://www.tribunalconstitucional.pt/tc/content/files/relatorios/relatorio_006_mexico-pt.pdf

The effects of Constitutional Court decisions vary depending on the type of review.

In prior review cases, if the Court finds a norm contained in any decree of international agreement to be unconstitutional, the President of the Republic or the Representative of the Republic, as appropriate, must veto the act and send it back to the organ (the Assembly of the Republic, or the Legislative Assembly of the Autonomous Region, respectively) that passed or approved it. In that case, the decree cannot be enacted or signed unless that organ expunges the norm the Court has found unconstitutional or, in appropriate cases, confirms it by both a two-thirds majority of those of its Members who are present and an absolute majority of those who are in full exercise of their office (Article 279[1] and [2], CRP). It is thus possible for a legislative organ to force the passage of a norm which the Constitutional Court has found unconstitutional, but to date this has only happened once in the Court's history (Ruling no. 190/87) and then, after the norms in question had been passed by the requisite majority and entered into force, the Court found them unconstitutional with generally binding force (Ruling no. 151/93). Similarly, in prior review cases, if the Court finds a norm included in a treaty to be unconstitutional, that treaty can only be ratified if the Assembly of the Republic approves it by both a two-thirds majority of the Members who are present and an absolute majority of those who are in full exercise of their office (Article 279[4], CRP).

In an abstract review situation, a declaration of unconstitutionality or illegality with generally binding force has effect from the moment at which the norm in question entered into force, and causes the revalidation of any norms which that norm may have repealed or revoked. If, however, the unconstitutionality or illegality is because the norm infringed upon a later constitutional or legal norm, the declaration only has effect from the date on which the latter entered into force (Article 282[1] and [2], CRP). In addition, decisions in cases that have already been judged are not affected, unless the Constitutional Court decides otherwise, which it can do when the subject matter of the norm is criminal, disciplinary or a mere social administrative offence and the content of the more recent norm is less favourable to the accused than that of the older one (Article 282[3], CRP). When legal certainty, reasons of fairness or an exceptionally important and duly justified public interest are at stake, the Court can also restrict the scope of the effects of the unconstitutionality or illegality (Article 282[4], CRP).

Concrete review decisions only have effect in the case in which they are handed down, where they are binding with regard to the question of normative unconstitutionality

that was brought before the Constitutional Court, but only limit the court *a quo* in relation to that specific situation and case. Having said that, the Public Prosecutors' Office can request the abstract review of any norm which the Constitutional Court has found unconstitutional or illegal in at least three concrete cases (Article 281[3], CRP). Article 80(3), LTC, also allows the Court to find that a given norm should be interpreted 'in accordance with the Constitution', but this mechanism has rarely been used (see Rulings nos. 35/08 and 651/05) and is not entirely consensual among constitutional scholars.

It is also worth mentioning the so-called *additive decisions*, which are brought about with reference to the parameter of equality in cases in which a given norm confers a legal position on a certain group of people or entities and unconstitutionally excludes others. In some (rare) cases the Constitutional Court has found that its decision in this regard also implies the inclusion of the unduly excluded group (see Rulings nos. 449/87 and 359/91).

In addition to the legal force awarded to them by law, Constitutional Court decisions tend to influence the case law of the other courts, which frequently refer to them and seek to follow and adapt to their essential content.

Similarly, the various legislative bodies keep a close eye on constitutional case law, modifying norms in the light of findings of unconstitutionality (e.g. see Ruling no. 23/06, on time limits for bringing paternity investigations, which was behind an amendment to the Civil Code by Law no. 14/2009 of 1 April 2009), passing or approving regimes in accordance with certain decisions (see Ruling no. 107/88, which was expressly referred to in the exposé of reasons for Executive Law no. 64-A/89 of 27 February 1989), revising the Constitution itself in the wake of positions taken by the Court (see Ruling no. 474/95 and the subsequent amendment of Article 33, CRP, in the 1997 constitutional revision), or legislating following a declaration of unconstitutionality by omission (Rulings nos. 182/89 and 474/02 and Laws nos. 10/91 of 29 April 1991 and 11/2008 of 20 February 2008 respectively).

It is thus possible to say that the effective impact of constitutional case law goes beyond its formal legal force.

Besides the norms contained in legislative acts, it has been admitted that the Constitutional Court can (in concrete review cases involving appeals against decisions of other courts) hear allegations of the unconstitutionality of regulatory acts, on condition that they have external effects on private entities (Rulings nos. 1058/96 and 32/02).

For concrete review purposes, an administrative act only constitutes a *norm* if, in addition to its external efficacy, it possesses a minimally general nature (Rulings nos.

783/96 and 353/07). However, there is nothing to prevent questions of normative unconstitutionality that are relevant to the determination of an administrative act's validity and efficacy from being raised during the course of a challenge against that act before the courts.

16. Has your Court developed case-law concerning access to ordinary / lower courts (e.g. preconditions, including, costs, representation by a lawyer, time limits)?

The Constitutional Court has generated a huge body of case law on the right of access to the courts. The following are just a few examples:

a) Ruling no. 844/14: a norm contained in Article 13(1) of, and a Table attached to, the Code of Procedural Costs (CCP), in the version set out in Executive Law no. 323/2001 of 17 December 2001, were held unconstitutional for breach of the principle of proportionality, to the extent that they led to the charging of court costs that were unrelated to the complexity of the case and placed no limit on the value of the suit used to calculate the court fee (also see Rulings nos. 179/14, 826/13, 604/13, 421/13 and 266/10).

b) Ruling no. 218/14: a norm contained in Article 66(2) of the Code of Judicial Costs (CCJ, approved by Executive Law no. 224-A/96 of 26 November 1996) was found unconstitutional when interpreted in such a way as to allow the court costs owed by an expropriated party to intolerably exceed the amount of the compensation deposited with the court.

c) Ruling no. 675/16: a norm deduced from Article 46(4) and (5) of the Regime governing the Imposition of Sanctions in the Energy Sector (RSSE) approved by Law no. 9/2013 of 28 January 2013 was found unconstitutional when interpreted to mean that appeals seeking to judicially challenge final decisions in which the Energy Services Regulatory Entity (ERSE) found a party guilty of an infraction in administrative offence proceedings were as a rule merely devolutive, with any suspensive effect dependent on both the provision of a bond and the confirmation that execution of the original decision would cause considerable loss to the appellant (also see Ruling no. 674/16).

d) Ruling no. 591/16: the part of a norm contained in Article 7(3) of Law no. 34/2004 of 29 July 2004, with the text given to it by Law no. 47/2007 of 28 August 2007, whereby for-profit legal persons were refused legal aid without any consideration of their concrete economic situation, was found unconstitutional.

e) Ruling no. 461/16: a normative interpretation deduced from Article 24(5)(a) of Law no. 34/2004 of 29 July 2004 was deemed unconstitutional when considered to mean that a time limit interrupted by application of paragraph (4) of the same Article began upon notification of the lawyer appointed to represent the notified party, when that party had applied for legal aid and was still unaware of the appointment of counsel because he/she had not yet been notified of it.

f) Ruling no. 193/16: a norm deduced from Article 103 of the Law governing the Protection of Endangered Children and Young Persons approved by Law no. 147/99 of 1 September 1999 meant that, in proceedings designed to promote the rights of and protect a child or young person which might lead to imposition of the measure involving his/her placement in the care of a person selected for his/her adoption, or of an institution with a view to his/her subsequent adoption, as provided for in Article 35(1)(g) of the Law with the text given to it by Law no. 31/2003 of 22 August 2003, it was not mandatory for the parents of the child or young person to be represented by counsel from the moment at which the date of the judicial debate referred to in Article 114(3) of the same normative act was set. This norm was found unconstitutional.

g) Ruling no. 195/15: a norm contained in Article 721-A(1)(c) and (2)(c) of the Code of Civil Procedure (CPC) approved by Executive Law no. 44,129 of 28 December 1961, with the text given to it by Executive Law no. 303/2007 of 24 August 2007, when interpreted such that the appellant in an application for an exceptional appellate review had to attach a certification that the ruling which serves as grounds for the appeal had transited *in rem judicatam* as a requirement for being able to lodge the appeal, failing which the application would be summarily rejected, was found unconstitutional for violating the right to fair process enshrined in Article 20(4) of the Constitution.

h) Ruling no. 781/13: the Court declared the norms contained in Article 8(1) and (2) of the Law governing the Sports Arbitration Tribunal, when conjugated with

the norms included in Articles 4 and 5 of the same Law, as approved in annexe to Law no. 74/2013 of 6 September 2013, unconstitutional with generally binding force on the grounds that they were in breach of the right of access to the state courts.

i) Ruling no. 243/13: a normative interpretation deduced from Article 685(2) of the Code of Civil Procedure inferred that the time limit for appealing against a judicial decision to apply the child/youth promotion and protection measure involving placing a minor in the care of the person selected to adopt him/her or of an institution with a view to his/her subsequent adoption began on the day on which the decision was read out, on condition that the interested parties were present at the reading, even if they were not represented by a lawyer during the proceedings and they asked for, but were not given, a copy of the decision on the day on which it was read out. The Court found this interpretation unconstitutional.

j) Ruling no. 545/12: a normative interpretation deduced from Article 70(1)(a) of the Code of Administrative Procedure, such that if the Post Office distributes the post daily in the place where a notified party lives, sending a letter by normal (i.e. unregistered) post sufficed to notify that party of a decision to cancel legal aid taken on the grounds of the provisions of Article 10 of Law no. 34/2004 of 29 July 2004, was held unconstitutional because it was in violation of Articles 268(3) and 20(1) of the Constitution.

k) Ruling no. 20/12: a norm contained in Article 200 of the Code governing the Execution of Freedom-Depriving Penalties and Measures (CEPMPL, approved by Law no. 115/2009 of 12 October 2009) was found to be unconstitutional when interpreted such that an administrative decision to continue holding an inmate under a security regime could not be challenged.

17. Has your Court developed case-law on other individual rights related to the rule of law?

See answers to questions 1, 2, 3, 4, 12 and 18.

18. Is the rule of law used as a general concept in the absence of specific fundamental rights or guarantees in the text of the Constitution in your country?

Constitutional scholars tend to answer this question in the affirmative. For example, J. J. Gomes Canotilho and Vital Moreira (*op. cit.*, p. 206) take the view that *"it is not entirely impossible to derive* [from the *Estado de direito* principle] *norms with no direct expression in any other constitutional provision, on condition that they present themselves as an immediate and unrefusable consequence of that which constitutes the core of a democratic state based on the rule of law – i.e. the protection of citizens against despotism, arbitrariness and injustice (primarily on the part of the state)."*

Along the same lines, the Constitutional Court has accepted that certain active legal positions pertaining to citizens can be directly rooted in the aforementioned principle. To give just a few examples: the right to compensation for injuries and losses derived from breaches of rights (Rulings nos. 363/15, 55/16 and 676/16); the extension of the presumption of innocence to the whole of the public law under which sanctions can be imposed (Ruling no. 674/16); the finding that it is impossible for a legislative rectification to once again qualify as an administrative offence a certain form of conduct from which that classification has already been removed retroactively (Ruling no. 490/09); the finding that it is impossible to deny the right to a pension to public servants who requested it in a timely manner through official channels, simply because those channels failed to convey the request by a certain deadline to the body with competence to take the decision (Ruling no. 211/08); in general, the prohibition on the arbitrary deprivation of acquired rights and on the unjustified retroactive deprivation of rights – namely the right of appeal against court decisions (Ruling no. 71/87); the principle that official acts must be publicised (Ruling no. 234/97); the principle of an adversarial process (Ruling no. 582/00); and the principle that forms of conduct which can lead to the imposition of sanctions must be determinable (Ruling no. 76/16).