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The Portuguese Constitutional Court  
Tribunal Constitucional Portugal

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XVIth Congress of the Conference of European Constitutional Courts  
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Portuguese Constitutional Court  
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**Cooperation of Constitutional Courts in Europe-  
Current Situation and Perspectives**

**I. Constitutional Courts within the framework of Constitutional  
Law and European Law**

1. Is the Constitutional Court obliged by law to consider European law in the performance of its tasks?

The Portuguese Constitutional Court is the court with the specific competence to administer justice in matters of a constitutional-law nature<sup>3</sup>. It is entrusted with the responsibility of guaranteeing and defending the Constitution. It reviews the constitutionality of legal norms: it controls whether the norms are in conformity to the principles and rules laid down in the Constitution<sup>4</sup>. The control exercised by the Court is merely a normative one. Unlike other Constitutional Courts, Portuguese Constitutional

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<sup>3</sup> The Portuguese Constitutional Court also has some other competences, in regard to the political parties, elections, referenda and the President of the Republic.

<sup>4</sup> *Constitutional Court of Portugal*, E-book, 2013, available at [www.tribunalconstitucional.pt/tc/content/files/tc\\_ebook\\_30anos\\_en/index.html#5/z](http://www.tribunalconstitucional.pt/tc/content/files/tc_ebook_30anos_en/index.html#5/z)

Court doesn't control whether there has been a direct violation of a fundamental right. It only evaluates if norms breach any constitutional rule or principle. Since Portugal is a State member of the European Union, the Constitutional Court is constitutionally obliged to consider and respect European (and International) law in its tasks, like any other Portuguese court<sup>5</sup>. International law also binds Portuguese Constitutional Court.

In the Constitution of the Portuguese Republic, the most relevant articles concerning European and International law are article 8 and article 16 which state as follows<sup>6</sup>:

#### **Article 8**

##### **(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 come 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 come 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.

#### **Article 16**

##### **(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.

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<sup>5</sup> Portugal is a member State of the European Union since 1986.

<sup>6</sup> Constitution of the Portuguese Republic, of 1976 (amended 1982, 1989, 1992, 1997, 2001, 2004 and 2005). An English version may be found at <http://www.tribunalconstitucional.pt/tc/conteudo/files/constituicaoingles.pdf>.

According to article 8, of Constitution of the Portuguese Republic, common international Law (n. 1), international Conventions regularly ratified or approved (n. 2), norms issued by international organisations to which Portugal belongs (n. 3) and the treaties that govern the European Union and the norms issued by its institutions bind the Portuguese State (n. 4); therefore, the Portuguese Constitutional Court is constitutionally bound to follow the norms contained in them to accomplish its tasks<sup>7</sup>.

Article 8 of the Portuguese Constitution establishes the validity of these rules in internal legal order. This means, for instance, that the European Convention on Human Rights and European secondary law are incorporated into the internal legal order.

The internal validity of rules under article 8 of the Constitution has been recently admitted by Constitutional Court Decision 187/2013 regarding the 2013 State Budget Act, and by Decision 353/2012, regarding the 2012 State Budget Act: they both declared that the instruments basing the Financial and Economic Assistance Program adopted with regard to Council Regulation (EU) n° 407/2010 of 11 May 2010 establishing a European Financial Stabilisation Mechanism (EFSM) bound the Portuguese State<sup>8</sup>.

These decisions show some boundaries to the way the rights enshrined on the Portuguese Constitution can be conditioned by the rules of the European Union Law and it defines the balance that must be reached between measures taken to achieve the economic goals set by the Financial and Economic Assistance Program and the protection of the fundamental rights and principles of the Portuguese Constitution<sup>9</sup>.

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<sup>7</sup> About article 8 of the Portuguese Constitution: GOMES CANOTILHO/VITAL MOREIRA, *Constituição da República Portuguesa Anotada*, Vol. I, Coimbra Editora, 2007, p. 251-273; JORGE MIRANDA/RUI MEDEIROS, *Constituição Portuguesa Anotada*, Tomo. I, Coimbra Editora, 2010, p. 159-184.

<sup>8</sup> The Financial and Economic Assistance Program was adopted with regard to Council Regulation (EU) n° 407/2010 of 11 May 2010 establishing a European Financial Stabilisation Mechanism (EFSM). The Memorandum of Economic and Financial Policies (MEFP) was adopted with regard to article 122/2 of the Treaty on the Functioning of the European Union; Memorandum of Understanding on Specific Economic Policy Conditionality (MoU) and Technical Memorandum of Understanding (TMU) were adopted with regard to article V Section 3 of the Agreement of the International Monetary Fund.

<sup>9</sup> Roberto Cisotta/ Daniel Gallo, "Il tribunale costituzionale portoghese i risvolti social dele misure di austerità ed il rispetto dei vincoli internazionali ed europei", *Diritti umani e diritto internazionale*, Società editrice il Mulino, nr 2, vol.7, 2013, p. 465-480.

In the specific area of fundamental rights, in accordance with article 16/1, the fundamental rights enshrined in the Portuguese Constitution do not exclude any others set out in applicable international laws and legal rules.

Therefore the Constitutional Court, when analyzing a case, must take into account not only the rights directly protected by the Constitution, but also the rights of the International law, including those established in the European Convention on Human Rights<sup>10</sup>. This means that this “open clause” gives way to the creation of an open catalogue of fundamental rights, enlarging the rights constitutionally granted<sup>11</sup>.

It is important to remark that the catalogue of the envisaged fundamental rights in the Portuguese Constitution is more extensive and more detailed than the catalogue of rights of the European Convention on Human Rights or of the Universal Declaration of Human Rights<sup>12</sup>.

The Portuguese Constitution also gives protection to some of the so-called “third generation” of rights, like data protection, transparent administration and some

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<sup>10</sup> The Convention for the protection of human rights and fundamental freedoms was signed in Rome on 4 November 1950 by the members of the Council of Europe. It was ratified by Portugal by Law 65/78, 13 October. Aviso of the Ministry for Foreign Affairs, Diário da República (DR), I Série, of 2 January 1979. The Constitutional Court Decision 219/89 of 25.2.89 refers to the 2<sup>nd</sup> January 1979 as the date of entry into force of the Convention at internal level.

<sup>11</sup> JOSÉ MANUEL CARDOSO DA COSTA/CASALTA NABAIS, *A hierarquia das normas constitucionais e a sua função na protecção dos direitos fundamentais*, VIII Congress of the Conference of European Constitutional Courts, Ankara, Turkey, 1990, available at [www.tribunalconstitucional.pt/tc/textos020109.html](http://www.tribunalconstitucional.pt/tc/textos020109.html); ANTÓNIO ARAÚJO/LUÍS MIGUEL NOGUEIRA DE BRITO/ JOAQUIM PEDRO CARDOSO DA COSTA/LUÍS NUNES DE ALMEIDA, *As relações entre os tribunais constitucionais e as outras jurisdições nacionais, incluindo a interferência, nesta matéria, da acção das jurisdições europeias*, XII Congress of the Conference of European Constitutional Courts, Brussels, 2002, available at [www.tribunalconstitucional.pt/tc/textos020108.html](http://www.tribunalconstitucional.pt/tc/textos020108.html); CRISTINA MÁXIMO/LUISA PINTO/MARIANA CANOTILHO/ANTÓNIO DE ARAÚJO/CATARINA VEIGA/LUÍS MIGUEL NOGUEIRA DE BRITO/MANUELA RODRIGUES/ARTUR DE FARIA MAURÍCIO, *The Criteria of the Limitation of Human Rights in the Practice of Constitutional Justice*, XIII Congress of the Conference of European Constitutional Courts, Cyprus, Mai 2005, available at [www.tribunalconstitucional.pt/tc/textos020109.html](http://www.tribunalconstitucional.pt/tc/textos020109.html); JOAQUIM SOUSA RIBEIRO/ESPERANÇA MEALHA, *Relatório Nacional Portugal*, Congress of the presidents of Supreme Courts, Constitutional Courts and Regional Courts, Mexico, 2012, p. 11 e 13, available at [www.tribunalconstitucional.pt/tc/content/files/relatorios/relatorio\\_006\\_mexico-fr.pdf](http://www.tribunalconstitucional.pt/tc/content/files/relatorios/relatorio_006_mexico-fr.pdf).

<sup>12</sup> PEDRO MACHETE/TERESA VIOLANTE, *Princípio da Proporcionalidade e da Razoabilidade na Jurisprudência Constitucional, também em relação com a Jurisprudência dos Tribunais Europeus*, Trilateral Conference of the Constitutional Courts of Portugal, Spain and Italy, 2013, Rome, p. 38, available at [www.tribunalconstitucional.pt/tc/content/files/conferencias/ctri20131024/ctri20131024\\_relatorio\\_pt\\_vf.pdf](http://www.tribunalconstitucional.pt/tc/content/files/conferencias/ctri20131024/ctri20131024_relatorio_pt_vf.pdf); ANTÓNIO VITORINO, *Protecção constitucional e protecção internacional dos Direitos do Homem: concorrência ou complementaridade?*, XI Congress of the Conference of European Constitutional Courts, Paris, 1993, available at [www.tribunalconstitucional.pt/tc/textos020105.html](http://www.tribunalconstitucional.pt/tc/textos020105.html); ANA MARIA GUERRA MARTINS, “A protecção dos Direitos Fundamentais em Portugal e a Constituição Europeia”, *Revista de Estudos Europeus*, ano I, n.º 2, Julho-Dezembro, 2007, p. 116 e 118.

guarantees on bioethics protected by the Charter of Fundamental Rights of the European Union.

For this reason, in most cases there is no need for the Constitutional Court to use the Convention, the Charter or the Universal Declaration as an autonomous criterion of validity of norms.

As matter of fact, even if some rights in the Portuguese Constitution do not have a correspondent provision on European or on International law, the number of rights established on the international instruments that are not directly foreseen in the Portuguese Constitution is scarce (as the prohibition of debt incarceration or the right to the knowledge of the language in criminal procedure)<sup>13</sup>.

That is the reason why the Portuguese Constitutional Court has never stated that the European Convention on Human Rights norms, the Charter of Fundamental Rights of the European Union or the Universal Declaration of Human Rights norms are granted autonomous constitutional value. The Constitutional judge has the power to apply international rules and principles established in international conventions to which Portugal is party and other International and European instruments, but it has never used them as direct and autonomous representation of constitutional boundaries to be used in assessing the constitutionality of internal legal provisions<sup>14</sup>.

Even if the applicant explicitly invokes the content of these rights, the Court has never decided for the existence of an exclusive or direct violation of the International or European law. The norms of these international instruments are always employed along with the correspondent Portuguese constitutional rule or principle. Therefore, they assume a secondary role on the *ratio decidendi* of the case. That is, those International/European rules have never been used as a particular criterion to assess the constitutionality of internal legal provisions by Constitutional Court.

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<sup>13</sup> Also referring to this particular subject: CRISTINA MÁXIMO/LUISA PINTO/MARIANA CANOTILHO/ANTÓNIO DE ARAÚJO/CATARINA VEIGA/LUÍS MIGUEL NOGUEIRA DE BRITO/MANUELA RODRIGUES/ARTUR DE FARIA MAURÍCIO, *The Criteria of the Limitation of Human Rights in the Practice of Constitutional Justice*, XIII Congress of the Conference of European Constitutional Courts, Cyprus, Mai 2005.

<sup>14</sup> ANTÓNIO ARAÚJO/LUÍS MIGUEL NOGUEIRA DE BRITO/ JOAQUIM PEDRO CARDOSO DA COSTA/LUÍS NUNES DE ALMEIDA, *As relações entre os tribunais constitucionais e as outras jurisdições nacionais, incluindo a interferência, nesta matéria, da acção das jurisdições europeias*, XII Congress of the Conference of European Constitutional Courts, Brussels, 2002; JOAQUIM SOUSA RIBEIRO/ESPERANÇA MEALHA, *Relatório Nacional Portugal*, Congress of the presidents of Supreme Courts, Constitutional Courts and Regional Courts, Mexico, 2012, p. 13.

Taking advantage of the fact that the Portuguese constitutional catalogue of fundamental rights and principles is rather large, references made to international instruments like the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union and the Universal Declaration of Human Rights are quite frequently instruments to guide the court on its interpretation of rights' content. Even so, in several occasions the reference to such instruments has contributed to the enlargement of the content of a fundamental right already enshrined in the Portuguese Constitution<sup>15</sup>.

One example of what has been previously said is the Constitutional Court Decision 101/2009, on medical assisted reproductive technology<sup>16</sup>.

The applicant has invoked article 1 and article 3 of the Universal Declaration of Human Rights, but the Constitutional Court has considered that their content has been consumed by articles 1 (referring the dignity of the human person) and 24 (protecting the right to life) of the Portuguese Constitution. Therefore, the Court has taken into consideration these articles of the Constitution instead of those of the Universal Declaration of Human Rights. For that reason, the Court has explained the articles 1 and 3 of the Universal Declaration of Human Rights could only be used as an interpretation criterion, as foreseen in article 16/2 of the Portuguese Constitution.

The Court Judgment has also decided that the Universal Declaration on Human Genome and Human Rights of UNESCO<sup>17</sup> should not be considered as being internally applied, in terms of article 8/2 of the Portuguese Constitution. Although Portugal has joined the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 11 september 1974, the Universal Declaration on Human Genome and Human Rights has not been submitted to ratification. Therefore it could not legally bind the Portuguese State.

On the contrary, the Oviedo Convention (Convention on Human Rights and Biomedicine) and its Protocol have been approved, ratified and published.

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<sup>15</sup> One of the first decisions where the enlargement influence may be detected is Constitutional Court Decision 6/1982: making use of article 16 of Portuguese Constitution, it refers to article 22, article 26 and article 29 of the Universal Declaration of Human Rights in order to fix a larger content for the right to free development of personality protected by the Constitution.

<sup>16</sup> The jurisprudence of the Portuguese Constitutional Court may be accessed on its website: [www.tribunalconstitucional.pt](http://www.tribunalconstitucional.pt).

<sup>17</sup> The 29th Session of the General Conference of UNESCO adopted the Universal Declaration on the Human Genome and Human Rights, unanimously and by acclamation, on 11 November 1997.

Consequently, the Constitutional Court has decided that they were part of internal legal order. Nevertheless, it has also determined that even though some of the provisions of the Oviedo Convention and of the Protocol could be granted constitutional force by the means of the open clause enshrined in article 16/1 of the Portuguese Constitution, they wouldn't be considered an autonomous constitutional criterion. The Court Judgment 101/2009 has sustained that article 67/2 of the Portuguese Constitution<sup>18</sup> already establishes limits to medical assisted reproduction; consequently there was no need to apply the Oviedo Convention and Protocol.

Another good example is Constitutional Court judgment 185/10 where the applicant invoked that article 225/2 of the Portuguese Criminal Code was in violation of article 5/5 of the European Convention on Human Rights in addition to articles 22 (Liability of public entities) and 27 (right to freedom) of the Portuguese Constitution. The applicant intended to have the right to compensation because he was on pre-trial detention but he was considered not guilty. The suspect was considered not guilty under application of the principle *in dubio pro reo*. The Constitutional Court found that article 225/2 of the Criminal Code was not unconstitutional and it decided that it was not necessary to apply the European Convention on Human Rights because it did not add anything to the Constitution on this matter<sup>19</sup>.

In Constitutional Court Judgment 281/2011, regarding the right to a fair trial, the Court has referred to article 6 of the European Convention on Human Rights, and to the jurisprudence of the European Court on this matter. Nevertheless, it states that the parameter to determine if the right to a fair trial has been violated it is the Portuguese Constitution only, as its text embraces the Convention content on this particular fundamental right (article 20 of the Constitution).

Also in the Constitutional Court decision 360/12, on the matter of the right of the State applying for extradition, the applicant (Indian Union) considered some rules (that did

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<sup>18</sup> Article 67/2 determines: "The state is particularly charged with: e) Regulating assisted procreation in such a way as to safeguard the dignity of the human person".

<sup>19</sup> The same reasoning, underlining that no extra safeguard would result from the Convention, as the Constitution already protected the same values, can be found in Constitutional Court Decisions 160/1995 and 12/2005 (referring to article 5/5 of the European Convention on Human Rights and article 27/5 of the Portuguese Constitution), among others.

not allowed it to appeal) to be unconstitutional, since they violated article 2, article 18/1 and 2, and article 20/4 of the Portuguese Constitution and article 6 of the European Convention on Human Rights.

The Constitutional Court has considered that article 6 of the Convention had the same scope as article 20 (Access to law and effective judicial protection) of the Constitution. Therefore, both articles would give the same answer to the question to be decided by the Court, instead of adding a new criterion.

In judgment 327/2013 of the Constitutional Court (concerning the addition of new facts to the accusation after the investigation; the functioning of the Supreme Court of Justice and the fact that the appeal from the decision of dismissal of the Supreme Judicial Council is to an *ad hoc* section of Supreme Court of Justice and not to the Administrative Supreme Court) the applicant considered that the functioning of the Supreme Court of Justice violated article 32/1, 2 and 10 (Safeguards in criminal procedure) and article 20/1 and 5 (Access to law and effective judicial protection) of the Portuguese Constitution and article 6 of the European Convention on Human Rights, because there was a violation of the principle of presumption of innocence, of the right to a due process and to effective judicial protection.

The Constitutional Court did not attend to article 6 of the European Convention since it has considered that this article was not an independent criterion and that the rights established in this article were already sheltered by article 20 and 32 of the Portuguese Constitution.

The Court has considered there is enough guarantee on the fact that the law establishes objective criterion to the choice of the members of the section of the Supreme Court of Justice who are going to decide the case. Consequently, there was neither a breach of the rights of access to the courts and to appeal (in accordance with article 32 of the Constitution), nor a violation of effective judicial protection and of due process (in respect with article 20 of the Portuguese Constitution and article 6 of the European Convention).

The Court has also decided that article 6 of the Convention was not violated by the fact that the proceeds of fines were an income of court.

In the Constitutional Court decision 404/2013 it is analyzed the right to a due process and to an impartial court.

The “Santa Casa da Misericórdia” is the entity that manages the games of hazard of the State and simultaneously is the entity that is in charge of the administrative stage of the administrative infraction proceedings regarding to offenses committed in these games.

The “Santa Casa de Misericórdia” is a private legal person of public utility. For this reason it has administrative duties.

Considering that the guarantees of a due process were less protected in the administrative stage of the administrative infractions proceedings than in the judicial proceedings, the applicant pretended that this was a matter of unconstitutionality and a violation of article 47 of the European Charter of Fundamental Rights and article 6 of the European Convention on Human Rights.

The Constitutional Court has considered that article 47 of the European Charter of Fundamental Rights was not applicable since it would only be applicable when European Union Law is being applied (article 51/1 of the European Charter of Fundamental Rights).

The Court has also accepted that there was not a violation of article 6 of the European Convention on Human Rights. Although this article is usually interpreted in a way that covers administrative sanctioning procedural, in Portugal that is not necessary to make such extension, since article 32/10 of the Portuguese Constitution (Safeguards in criminal procedure) extends the rights of defense that exist in the criminal procedural to other sanctioning procedurals (“Accused persons in proceedings concerning administrative offences or in any proceedings in which sanctions may be imposed are assured the right to be heard and to a defence”)<sup>20</sup>.

It is worth to highlight that the Constitutional Court has already declared that article 16/2 of the Portuguese Constitution should be used to extend the rights enshrined in the Constitution and not to limit the fundamental rights.

This was the case of Constitutional Court Decision 121/2010 on the matter of recognition of same-sex marriage.

Following article 16/2 of the Portuguese Constitution, the Court took into consideration article 16/1 of the Universal Declaration of Human Rights. Although it characterizes marriage as contract between two persons from different sex, the Portuguese

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<sup>20</sup> Many other examples could be mentioned (among many others: Constitutional Court Decision 352/1998).

Constitutional Court has considered it was not bound for such a restrictive interpretation.

## **2. Are there any examples of references to international sources of law?**

### **a) References to European Convention on Human Rights**

In spite of the fact that the Portuguese catalogue of fundamental rights is wider than the European, the Portuguese Constitutional Court often relays on the European Convention on Human Rights to substantiate its options, to reinforce the reasoning of the decision, or to identify and explain some constitutional rights content. The Convention has never been used by the Court as an autonomous parameter of control.

Article 6 (right to a fair trial of the European Convention on Human Rights is the most invoked by the Constitutional Court. Article 8 (right to respect for private and family life) is also used several times. The following small inventory gives us some examples on such Constitutional Court decisions.

In Constitutional Court decision 424/2009, on the violation of the right to a second tier of judicial authority established by article 400/1(e) and article 432/1(c) of the Criminal Procedural Code, the Court analyzed article 32 of the Constitution and article 20/7 of the European Convention on Human Rights. In this case the applicant wanted to have the right to appeal the conviction issued by the Court of Appeal that followed an acquittal declared by the Court of First Instance. It was said by the Constitutional Court that article 20 of the Convention allows exceptions to the right of having a superior jurisdiction analyzing the cause according to the circumstances of the case. The Court decided that the rules of the Criminal Procedural Code were not unconstitutional.

In the Constitutional Court decision 281/2011, on the right to a fair trial and due process and on the impartiality of the judge, the Constitutional Court has used article 6/1 of the European Convention on Human Rights. The Constitutional Court has considered the European Court of Human Rights interpretation of article 6 of the Convention to explain the equivalent articles of the Portuguese Constitution.

The applicant considered that the decision of the Administrative Supreme Court violated article 2, article 16/2, article 18/2 and article 20/1 and 4 of the Portuguese Constitution and article 6 of the European Convention on Human Rights, because four of the judges had intervened in two different procedural moments, which would made them not impartial judges.

The Constitutional Court, in the decision 243/2013, on the protection of family life and the maintenance of family unit, had to decide if the norm supporting the refuse of the court *a quo* to accept the appeal (submitted after the dead line) was unconstitutional. The applicants alleged that there was a violation of the right to a due process and the right to appeal. The Constitutional Court used article 6 of the European Convention on Human Rights in order to interpret the concept of the right to a due process and the right to a second tier of judicial authority.

Article 8 of the European Convention on Human Rights is often used by Constitutional Court on privacy related decisions.

In the Constitutional Court decision 181/97 the applicant that had been convicted to imprisonment and deportation considered the rules that allowed deportation of foreigners - even if they had Portuguese children - to be unconstitutional. The applicant sustained that it violated articles 33/1<sup>21</sup> and article 36/6<sup>22</sup> of the Portuguese Constitution, since it was a violation of the principle of protection of family unit. The Constitutional Court has considered that the interpretation of article 8 of the European Convention on Human Rights made by the European Court of Human Rights was pertinent for the case. The Constitutional Court took into consideration the fact that the European Court of Human Rights considered the rules allowing the deportation of foreigners with family links in the country of residence to be contrary to article 8 of the Convention.

The Constitutional Court decision 232/2004 concerning the conditions of entry, residence, exit and expulsion of foreigners from Portugal also used article 8 of the European Convention on Human Rights in order to determine if the rules of the

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<sup>21</sup> "The deportation of Portuguese citizens from Portuguese territory is not permitted"

<sup>22</sup> "Children may not be separated from their parents, save when the latter do not fulfil their fundamental duties towards them, and then always by judicial decision".

Criminal Code establishing the foreigners deportation despite having Portuguese children violated or not the principle of protection of family unit and the prohibition of separating the children from their parents (article 36 of the Portuguese Constitution). The Constitutional Court analyzed jurisprudence from the European Court of Human Rights in which the European Court considered that the rules allowing the deportation of foreigners with family links in the Country of residence were contrary to article 8 of the Convention.

Moreover, article 8 of the European Convention on Human Rights was significant in decision 609/07 concerning the deadlines to contest the presumed paternity of the mother's spouse. The Constitutional Court has analyzed article 8 of the European Convention on Human Rights to assess if the deadlines to contest the presumed paternity were unconstitutional. It took into consideration the application of article 8 of the European Convention made by the European Court of Human Rights, ascertaining that there can be a deadline but it has to be large enough to allow interested parties to act. The Constitutional Court quoted the European Court of Human Rights decisions *Shofman v. Russia*, *Mizzi v. Malta*, *Znamenskaya v. Russia* e *Kroon v. Nederland*.

Also on the matter of the existence of a deadline to exercise the right to establish parenthood, the Constitutional Court Decision 401/11 invoked article 8.

Regarding its pertinence to the case, the Constitutional Court analyzed the interpretation of this article made by the European Court of Human Rights. The European Court considers that the existence of a deadline does not violate the European Convention by itself. To determine if the deadline violates the Convention, it is necessary to assess if the characteristics of the deadline allow a balance between the interests of the researcher (that has the right to know a crucial aspect of his/her personal identity) and of the person object of the investigation (that has the right to be protected from the instability that this investigation may carry).

The Constitutional Court has inspired itself on the decisions taken on the 6<sup>th</sup> of July, 2010, on the *Backlund v. Finland* case and *Gronmark v. Finland* case, and the decisions taken on the 20<sup>th</sup> of December, 2007 on the *Phinikaridou v. Cyprus*. In these decisions, the European Court analyzed the existence of deadlines to exercise the right to initiate the proceedings of recognition of fatherhood.

## b) References to other international sources of law

The Portuguese Constitutional Court also makes reference to other International sources of law such as the Universal Declaration on Human Rights<sup>23</sup>, the Charter of Fundamental Rights of the European Union<sup>24</sup>, the International Covenant on Civil and Political Rights<sup>25</sup>, the International Covenant on Economic, Social and Cultural Rights<sup>26</sup>, the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (Convention on Human Rights and Biomedicine)<sup>27</sup>, and many others. The following examples are not exhaustive.

In what concerns the **Universal Declaration on Human Rights**, the abovementioned article 16/2 of the Portuguese Constitution is particularly important as it binds the Court to make the interpretation of rules concerning human rights according to the Universal Declaration on Human Rights. As a consequence, this international instrument is frequently used.

Since the Declaration of Human Rights has inspired the catalogue of fundamental rights enshrined in 1976 Constitution, the Portuguese Constitution has given it a special role on the interpretation and integration of its rules and principles: the interpreter is bind to look for orientation on the text of the Declaration whenever it is necessary for the identification of the content of any right.

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<sup>23</sup> Resolution 217A (III) proclaimed by the United Nations General Assembly in Paris on 10 December 1948; Published in Portugal in *Diário da República*, I-A, n. 57/78, of 9 March 1978.

<sup>24</sup> Article 6 of the Treaty on the European Union “The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties”. “The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties”. The consolidated text was published in OJEU C-326, 26 October 2012.

<sup>25</sup> Adopted in New York, on 16 December 1966, approved for ratification by Law 29/78, of 12 June 1978. Entry into force in 15 September 1978. See, among other, Constitutional Court Decision 614/2003, mentioning article 14/1 and Decision 274/2013, referring article 24.

<sup>26</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) of 16 December 1966, entry into force 3 January 1976.

<sup>27</sup> Signed in Oviedo on the 4<sup>th</sup> April 1997. Entry into force in international order in 1 December 1999. Approved for ratification in Portugal on the 3<sup>rd</sup> January 2001; entry into force in Portugal in 1 December 2001.

Regarding the use of the **Charter of Fundamental Rights of the European Union**, although they are relatively scarce, there are examples of its use even before it has entered into force<sup>28</sup>. As some other international instruments, it has been used to guide the constitutional interpreter to precise constitutional rights' content, and to reinforce the reasoning of the Courts options, as well.

A reason to a less frequent use of the Charter may be found in the boundaries of its own application<sup>29</sup>. The fact that only recently this fundamental rights catalogue has been formally integrated into European Constitutional law may also explain it (article 6 of the Treaty on the European Union)<sup>30</sup>. Even so, the general justification also applies: being so large, the catalogue of fundamental rights of the Portuguese Constitution has been enough to offer sufficient and direct protection.

The following Court decisions are good examples of the use of such instruments.

The Convention on Human Rights and Biomedicine, along with the European Convention on Human Rights and the Universal Declaration of Human Rights, was analyzed by the Portuguese Constitutional Court, in its decision 101/2009, on the constitutionality of the draft law regarding medical assisted reproduction.

In the Constitutional Court judgment 179/2012, concerning a draft law that could violate the principle presumption of innocence by reverting the burden of proof in criminal process (on the matter of illicit enrichment by civil servants), the Court used, in addition to article 32 of the Portuguese Constitution, article 6/2 of the European

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<sup>28</sup> Proclaimed in 2000, the Charter has only become legally binding on the EU with the entry into force of the Treaty of Lisbon, in December 2009. See, among others: Constitutional Decision 90/2001; Constitutional Court Decision 614/2003.

<sup>29</sup> Article 51: 1. "The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties".

2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

<sup>30</sup> Article 6: "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties". On the subject: MOURA RAMOS, *O Tratado que estabelece uma Constituição para a Europa e a posição dos tribunais constitucionais dos Estados-membros no sistema jurídico e jurisdicional da União Europeia*, Conferência Tripartida dos Tribunais Constitucionais de Portugal, Espanha e Itália, Novembro 2003, p. 18.

Convention on Human Rights, article 11/1 of the Universal Declaration of Human Rights and article 14/2 of the International Covenant on Civil and Political Rights.

Constitutional Court decision 274/2013, on social security benefits for children, makes reference to Universal Declaration of Human Rights (article 25/2), to the European Charter of Fundamental Rights (article 24), to the International Covenant on Civil and Political Rights (article 24), to the International Covenant on Economic, Social and Cultural Rights (article 10/3), and to the United Nations **Declaration on the Rights of the Child**.

In some occasions, in order to reinforce logical and argumentative reasoning, Portuguese Constitutional Court also takes into consideration some other sources like European Council recommendations and resolutions, European institutions resolutions and directives, and some other international instruments.

This is the case of Constitutional Court Decision 20/2012 which makes reference to the **Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules** to sustain that a prisoner shall have the right to appeal to an independent authority<sup>31</sup>

In Constitutional Court Decision 494/2003, having to refer to the prohibition of taking advantage of inside information, the Court took into consideration the reasons presented for such prohibition in **Directive 89/592/CEE**, 13 November 1989<sup>32</sup>, of the Council of European Communities.

Most of the times, European Directives are referred by the Court to explain the context of norm of a Portuguese legal text submitted to the Court<sup>33</sup>.

**Decision 1982/2006/CE of the European Parliament and Council**, of 18 December 2006, and **Resolution of the European parliament** of 7 September 2000 (on human cloning) were referred in Constitutional Court Decision 101/2009: it has reviewed some

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<sup>31</sup> Adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies.

<sup>32</sup> JOCE *n. L 334/30*, 18 november 1989.

<sup>33</sup> That is the case of some recent decisions: Decision 2/2013 and Decision 78/2013.

norms on assisted medical reproductive technology in order to determine whether they were in conformity with the Constitution.

Decision 397/2012 on legal drugs control and smart shops, makes reference to the **World Health Organization Framework Convention on Tobacco Control**<sup>34</sup>.

Constitutional Court also indicates some United Nation Conventions. Among many others, Constitutional Court Decision 144/ 2004 refers to the 34/180 **Convention on the Elimination of all Forms of Discrimination against Women** (Resolution adopted by the General Assembly on 18 December 1979)<sup>35</sup>, and to the **Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Other**, of 21 March 1950<sup>36</sup>. Both instruments were quoted in connexion with article 1 of the Portuguese Constitution which declares that Portugal is a sovereign Republic, based on the dignity of the human person.

Moreover, very often the Portuguese Constitutional Court studies other legal systems from a comparative perspective.

The Constitutional Court decision 121/2010, on the matter of recognition of same-sex marriage, is a good example of the variety of sources the Constitutional Court may take into consideration. In this decision, the Court analyzed the evolution of the concept of marriage in several countries and in the European legal order, aiming to determine if the same-sex marriage was unconstitutional. Furthermore, the Portuguese Court took into consideration the fact that the European Council had issued two **recommendations** (1470 [2000] and 1974 [2000]) in which it called for the equal treatment of homosexual couples. The recommendation 1974 recommends the inclusion of sexual orientation discrimination in the catalogue of factors of prohibited discrimination. And, in 2007, the **Resolution** 1547 suggested that the States should fight discrimination of people based on sexual orientation and that the States should recognize same-sex marriage.

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<sup>34</sup> On 21 May 2003, the 56th World Health Assembly, unanimously adopted the WHO Framework Convention on Tobacco Control.

<sup>35</sup> Approved for ratification in Portugal by Law 23/80, 26 de July 1980; Entry into force in Portugal: 3 September 1981.

<sup>36</sup> Parliament Resolution 31/91, of 6 June 1991.

The Constitutional Court has also analyzed **resolutions of the European Parliament** that call to the recognition of same-sex marriage (JO C 115, 26/04/1993, JO C 132, 28/04/1997, JO C 377, 29/12/2000, JO C 65 E, 14/03/2002, and JO C 38 E, 12/02/2004).

This particular decision also had in mind the European Convention on **Human Rights**, although the Convention still considers that marriage is a contract between two persons of different sex. Nevertheless, the Court found relevant that the Convention forbids discrimination based on sexual orientation.

It was also considered the fact that the **European Charter of Human Rights** recognizes the right to marriage, without distinguish the gender of the couple (article 9) and the prohibition of discrimination based on sexual orientation (article 21).

Accordingly with article 16/2 of the Portuguese Constitution, the Court also took into account article 16/1 of the **Universal Declaration of Human Rights** that defines marriage as contract between two persons from different sex.

The Court considered that the same-sex marriage was not unconstitutional.

The Constitutional Court decision 216/2010, regarding the unconstitutionality of the inexistence of the right to legal aid of legal persons operating for profit, considered the right to access to the courts a fundamental right, established not only in the Portuguese Constitution (article 20) but also in **the European Convention on Human Rights** (article 6) and the **Universal Declaration of Human Rights** (article 10). The Court also took into account the **European Council Recommendation (93)1** and **Resolution (78)8** regarding the need to ensure the right to justice to persons in a situation of poverty. The Constitutional Court has concluded that the situation of a legal person is not comparable to the situation of a natural person and that the fact that there is no legal aid for legal persons operating for profit was not unconstitutional.

The Constitutional Court has analyzed article 30 of the **Charter of Fundamental Rights of the European Union** on the decision 474/2003 to enhance the importance of the principle of job security.

And the Constitutional Court decision 207/2010, on the matter of the right to a fair trial and due process and to the impartiality of the judge, took into account article 6/1 of the European Convention on **Human Rights**, article 10 of the **Universal Declaration of**

**Human Rights**, article 47 of the **European Charter of Human Rights** and article 14 of **International Covenant on Civil and Political Rights**.

### **3. Are there any specific provisions of constitutional law imposing a legal obligation on the Constitutional Court to consider decisions by European Courts of Justice?**

There is no obligation established in the Portuguese Constitution forcing the Portuguese Constitutional Court to consider or to follow the jurisprudence of European courts. Regardless this absence, the Court often looks for *ratio decidendi* inspiration on European decisions. European Courts jurisprudence is also taken into account as an element which reinforces the reasoning of a national decision. Most frequently, European Courts jurisprudence gives guidance on fundamental rights' interpretation: it constitutes a source of interpretation which helps to define the content of rights<sup>37</sup>.

In several occasions the European case law is invoked by the appellant. But its use by Constitutional Court does not depend on whether the parts have raised and argued some grounds based on it.

The absence of specific provision of constitutional law imposing an obligation to consider decisions by European Courts of Justice doesn't avoid their significant role. The following example illustrates it.

The Portuguese Constitutional Court often refers to the jurisprudence of the European Court of Human Rights in the matters of guarantees of a fair trial and due process. Having a more complete densification than the correspondent article of the Portuguese Constitution, article 6 of the Convention has guided the Constitutional Court, for several years, to develop its jurisprudence on access to law and effective judicial protection

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<sup>37</sup> ANTÓNIO VITORINO, *Protecção constitucional e protecção internacional dos Direitos do Homem: concorrência ou complementaridade?*, IX Congress of the Conference of European Constitutional Courts, Paris, 1993; JOAQUIM SOUSA RIBEIRO/ESPERANÇA MEALHA, *Relatório Nacional Portugal*, Congress of the presidents of Supreme Courts, Constitutional Courts and Regional Courts, Mexico, 2012, p. 13.

(article 20 of the Portuguese Constitution). Consequently, the jurisprudence of the European Court has influenced the revision of the Portuguese Constitution. From only two paragraphs, establishing the right to access to law and courts and the right to legal information and advice, to legal counsel, it has been amended and now has got four paragraphs. Paragraph 4 literally establishes the right to a fair process on article 20, a direct influence of the jurisprudence of the European Court of Human Rights on article 6 of the Convention<sup>38</sup>.

It is interesting to note that until now there has been no internal Court Decision submitted to full revision in consequence of a European Court of Human Rights decision. Whenever there is a violation of the Convention, only certain sums are granted, in order to the just satisfaction of the applicant<sup>39</sup>.

In what concerns the relation between the Constitutional Court and the European Court of Justice the reference for a preliminary reference procedure deserves some words<sup>40</sup>.

European Law imposes a duty on national courts to make preliminary references to the European Court of Justice, requesting certification on validity and interpretation of European Law<sup>41</sup>.

As the legal system of the European Union is decentralized, national judges have to assess if the rules they are applying violate European Union Law. When a national judge has some doubt about the interpretation of a European rule, he must ask the European Court of Justice to provide him/her with the correct interpretation (preliminary reference procedure). The validity of some acts may be questioned as well.

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<sup>38</sup> JOAQUIM SOUSA RIBEIRO/ESPERANÇA MEALHA, *Relatório Nacional Portugal*, Congress of the presidents of Supreme Courts, Constitutional Courts and Regional Courts, Mexico, 2012, p. 14.

<sup>39</sup> JOÃO MADUREIRA, *The impact of the European Convention on Human Rights in the Legal and Political Systems of Member States over the Period 1953-1998 – Portugal*, Gabinete de Documentação e Direito Comparado, available at <http://www.gddc.pt/direitos-humanos/sist-europeu-dh/ce-convencao-dh/cons-europa-european-conv-dh.html>.

<sup>40</sup> FRANCISCO PEREIRA COUTINHO, *Os Tribunais Nacionais na Ordem Jurídica da União Europeia*, Coimbra Editora, Coimbra, 2013; FAUSTO QUADROS/ANA MARIA GUERRA MARTINS, *Contencioso da União Europeia*, 2.ª Edição, Almedina, Coimbra, 2007, p. 67-134; FRANCISCO PEREIRA COUTINHO, “Os juízes Portugueses e o reenvio prejudicial”, *20 anos de Jurisprudência da União Europeia sobre casos portugueses*, Instituto Diplomático, Lisboa, 2011, p. 13-52; ANA MARIA GUERRA MARTINS, *Manual de Direito da União Europeia*, Almedina, Coimbra, 2012, p. 539-547.

<sup>41</sup> FRANZ C. MAYER, *The European Constitution and the Courts: adjudicating European Constitutional Law in a Multilevel System*, Walter Hallstein Institut Paper 15/03, October 2003, <http://www.whi-berlin.eu/documents/whi-paper1503.pdf>, p. 3.

This practice may only take place when the rules are relevant to the decision of the cause. The system is a fundamental contribution to a homogeneous interpretation of European law (article 19/1 TEU)<sup>42</sup>.

The preliminary reference procedure is established in article 267 of the Treaty on the Functioning of the European Union (for example article 234 of the Treaty establishing the European Community). This article empowers the European Court of Justice to preliminary decide the interpretation of the treaty and the validity and interpretation of the acts adopted by the Institutions of the European Union.

Many portuguese courts often use the preliminary reference procedure, referring a question to the European Court of Justice. When a Portuguese court uses the preliminary reference procedure, it is obliged to follow the Court of Justice decision. The decision on the interpretation or on the validity issued by the Court of Justice binds every Portuguese court, including the Constitutional Court<sup>43</sup>.

The Portuguese Constitutional Court has never questioned the European Court of Justice on the bases of the preliminary reference system yet.

Despite having never used the preliminary reference procedure, the Portuguese Constitutional Court has already recognized that referring a question to the European Court of Justice is one of its duties and it recognizes the importance of the system.

The preliminary reference procedure is to be used only if the interpretation of the European rule is relevant to the decision of the case (article 267 of the Treaty on the Functioning of the European Union). The preliminary reference procedure has not yet been used by the Portuguese Constitutional Court because, in the decisions in which the applicant has invoked the need for an interpretation of a rule by the European Court of Justice, the rule was not considered relevant to the decision of the case<sup>44</sup>.

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<sup>42</sup> Article 19/1 of the Treaty on the European Union states: "The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed".

<sup>43</sup> FAUSTO QUADROS/ANA MARIA GUERRA MARTINS, *Contencioso da União Europeia*, 2.ª Edição, Almedina, Coimbra, 2007, p. 114-118. ANTÓNIO ARAÚJO/LUÍS MIGUEL NOGUEIRA DE BRITO/ JOAQUIM PEDRO CARDOSO DA COSTA/LUÍS NUNES DE ALMEIDA, *As relações entre os tribunais constitucionais e as outras jurisdições nacionais, incluindo a interferência, nesta matéria, da acção das jurisdições europeias*, XII Congress of the Conference of European Constitutional Courts, Brussels, 2002; CATARINA SARMENTO e CASTRO, *Modelos de Justiça Constitucional*, IV Ibero-American Conference on Constitutional Justice, Sevilla, 2005, available at [www.tribunalconstitucional.pt/tc/textos020309.html](http://www.tribunalconstitucional.pt/tc/textos020309.html).

<sup>44</sup> ANA MARIA GUERRA MARTINS, *Manual de Direito da União Europeia*, Almedina, Coimbra, 2012, p. 565.

In the Constitutional Court ruling 163/90, the applicant wanted the Constitutional Court to assess the constitutionality of article 678/1 of the Civil Procedural Code (that limits the right to appeal accordingly with the value of the process). The applicant also required the European Court of Justice to interpret article 168-A of the EEC Treaty, concerning the obligation of a second tier of judicial authority. The Constitutional Court recognized its obligation to use the preliminary reference procedure and the importance of this system for the existence of a uniform interpretation of the European Law. However, it has refused to send the question to the European Court of Justice. The Constitutional Court has considered that the national judge has to evaluate the relevance of the appeal to the European Court of Justice, considering the importance of the law to the decision of the cause. And in the case under analyses it was considered that actually the applicants did not question the interpretation of the treaty rule and that the rule was not pertinent to the solution of the case.

Recently, the Constitutional Court Decision 391/12 has refused the applicant's demand to refer a question of European law to the European Court of Justice for a preliminary reference, so as to enable the Portuguese Court to decide on the basis of that ruling on the interpretation of European Law<sup>45</sup>. The applicant wanted the Constitutional Court to analyze the constitutionality and legality of a deliberation of the Parish Assembly ("Assembleia de Freguesia") that approved the realization of a local *referendum* regarding the aggregation of parishes. The applicant also intended the European Court of Justice to evaluate the topic under analyze because he considered that the Portuguese Courts were misinterpreting article 4/6 of the European Charter of Local Self-Governance. The Constitutional Court considered that the preliminary reference proceedings could only be used if there was a doubt regarding the interpretation of a European rule relevant to the solution of the case. The Court evaluated the pertinence of the question. It came to the conclusion that the issue being submitted to *referendum* did not fit the matters that could be used in a local *referendum*, and, therefore, that the

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<sup>45</sup> Some other cases of non submission to the European Cour of Justice may be mentionned: Constitutional Court Decision 659/99; Constitutional Court Decision 182/2000; Constitutional Court Decision 240/2000; Constitutional Court Decision 278/2000; Constitutional Court Decision 323/2000; Constitutional Court Decision 226/2004; Constitutional Court Decision 606/2004; Constitutional Court Decision 511/2005; Constitutional Court Decision 512/2005; Constitutional Court Decision 513/2005; Constitutional Court Decision 224/2006; Constitutional Court Decision 273/2007; Constitutional Court Decision 211/2009;

question being asked could not be addressed to the European Court of Justice. Consequently, the Portuguese Court did not submit the question to the European Court of Justice.

The most recent Decision refusing to refer a preliminary question to the Luxembourg Court was Constitutional Court Decision 406/2013. Once more, the Court invokes that the question raised by the appellant was not pertinent to the legal solution of the case.

The absence of the use of the preliminary reference procedure did not avoid the use of European Court of Justice jurisprudence.

These mentions to European Court of Justice case law are not made in the context of a preliminary question but they are considered relevant. Most of the times, they are used like mere *obiter dicta*, to highlight a way of thinking or a logical reasoning of a decision.

Being scarce, the allusion to European Court of Justice case law made by the Portuguese Constitutional Court already reveals the willingness for a cooperation relationship between courts.

However, it should be stressed that by mentioning European Court of Justice case law, the Constitutional Court is not, by himself, replacing the European Court on the interpretation of European Law. Right the opposite: in order to assess constitutionality of internal sources of law, confronting them with constitutional rules and principles, the Court is looking for inspiration on the interpretation or balance already made by the European Court<sup>46</sup>.

In an indirect way, it contributes to spread a common interpretation of common principles and rules. On the other hand, by using European case-law to get inspiration for the interpretation of internal legal rules, the Constitutional Court, as other Constitutional Courts, somehow contributes to the recognition of its importance.

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<sup>46</sup> Pointing out this problem: FRANZ C. MAYER, *The European Constitution and the Courts: adjudicating European Constitutional Law in a Multilevel System*, Walter Hallstein Institut Paper 15/03, October 2003, <http://www.whi-berlin.eu/documents/whi-paper1503.pdf>, p. 20.

The authority of the case law of the European Court of Justice regarding the interpretation and validity of European norms suffers no contestation. Portuguese Courts have always declared that European Court of Justice jurisprudence on the interpretation or on the validity of an European Union norm is mandatory. However, the comprehension of the obligation's extension to follow the decision of the Luxembourg Court differs. According to some studies, Portuguese administrative courts' case law considers it to be mandatory in a double sense: not only for the court that has used the preliminary question procedure, but also for every other court<sup>47</sup>. Administrative Supreme Court is the Portuguese court using it more often<sup>48</sup>. But other jurisdiction's case law tends to consider that the European Court of Justice jurisprudence on the validation or interpretation of European law only binds the court that has made use of the preliminary reference procedure (sometimes every court acting on the same case). The Constitutional Court has never decided on such matter.

All things considered, one could say that the increasing use of European Courts jurisprudence made by Constitutional Courts across Europe, and the growth of the reference to several International and European sources of law have been contributing to strength an European common ground, namely concerning fundamental rights and principles, among other.

The intensification of the citation of foreign law of the jurisprudence of other Constitutional Courts, the increasing number of quoted decisions of the European Courts, the growth of informal interactions, are largely justified by social, economic, cultural and political globalization, which reflects the arising of common issues across Europe, and around the World. The search for common trends and cooperation between courts leads towards a globalization of rights and principles' understanding.

The Charter of Fundamental Rights of European Union, by entrenching the rights and principles resulting from the common constitutional traditions of EU countries and other international instruments, along with the rights and freedoms enshrined in the European Convention on Human Rights and all the rights found in the case law of the Court of

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<sup>47</sup> FRANCISCO PEREIRA COUTINHO, *Os Tribunais Nacionais na Ordem Jurídica da União Europeia*, Coimbra Editora, Coimbra, 2013, p. 399-402.

<sup>48</sup> FRANCISCO PEREIRA COUTINHO, *Os Tribunais Nacionais na Ordem Jurídica da União Europeia*, Coimbra Editora, Coimbra, 2013, p. 369.

Justice of the EU has decisively contributed to prove the important value of common grounds.

#### 4.

### **Is the jurisprudence of the Constitutional Court influenced in practice by the jurisprudence of European courts of justice?**

The European Court of Human Rights exercises a strong influence in the Portuguese Jurisprudence and it has already led the Portuguese Constitutional Court to change its own procedural practices.

Following the *Feliciano Bichão v. Portugal* case (2007), the Portuguese Constitutional Court changed its previous practices concerning the right to a fair trial. Portugal, and indirectly the Constitutional Court, has deserved censure by the Strasbourg Court on behalf of the Court proceedings which did not include the notification to the applicant of the response of the Public Prosecutor to its allegations. The Portuguese Constitutional Court followed the jurisprudence from the European Court of Human Rights and it has recognized that defendant has the right to have access to the public prosecutor's written opinion and to make allegations after the public prosecutor's allegations if the public prosecutor adds new facts.

Apart from these changes to its own procedures, many examples on the influence of the European Courts on the Constitutional Court jurisprudence could be mentioned.

The Portuguese Constitutional Court revised its previous practices (concerning the right to a fair trial, to an impartial court and to adversarial proceedings) after the Strasbourg Court decided that the right to a fair trial includes the right to be given the opportunity to make his point of view known, that is, the right to make a full answer and defense, on the *Lobo Machado v. Portugal* case (1996). On that particular case, the Strasbourg Court has considered that the need of a full answer and defense was more serious than

usual due to the presence of the public prosecutor in the Supreme Court's private sitting<sup>49</sup>.

The European Court of Human Rights jurisprudence on article 6 of the Convention is certainly the most invoked by applicants and by the Portuguese Constitutional Court.

However, the influence of the jurisprudence of the European Court of Human Rights on the jurisprudence of the Constitutional Court is quite visible in some other areas.

The jurisprudence of the Strasbourg Court has great impact on the matter of the right to privacy: its case-law based on article 8 of the Convention of Human Rights is frequently used to guide the determination of the legal requirements for the interception of phone calls during a criminal investigation. Article 8 is also often referred on marriage or family issues like parenthood.

Very often, in both cases (and in many other) the jurisprudence of the European Court of Human Rights plays a determinant role on Constitutional Court jurisprudence<sup>50</sup>.

The fact that the references to the jurisprudence of the Luxembourg Court are not as frequent as those of the Strasbourg Court is a sign of their (still) relatively modest impact on the Portuguese Constitutional Court jurisprudence. However, it is possible that the still recent entry into force of the Charter, containing the rights found in the case law of the Court of Justice, in the European Convention on Human Rights and other extracted from common constitutional traditions of European countries and other international instruments, will increase the European Court action on fundamental rights issues and, therefore, will influence fundamental rights protection on European member States jurisprudence.

On the other hand, the incorporation of the previous case-law of the European Court on the Charter must also be seen as indicator of its importance<sup>51</sup>.

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<sup>49</sup> Decisions of the Portuguese Constitutional Court 345/1999 and 412/2000.

<sup>50</sup> MARIA JOSÉ RANGEL DE MESQUITA, *A Actuação Externa da União Europeia depois do Tratado de Lisboa*, 2011, Almedina, p.109-112.

<sup>51</sup> MOURA RAMOS, *O Tratado que estabelece uma Constituição para a Europa e a posição dos tribunais constitucionais dos Estados-membros no sistema jurídico e jurisdicional da União Europeia*, Conferência Tripartida dos Tribunais Constitucionais de Portugal, Espanha e Itália, Novembro 2003, p. 18.

## **5. Does the Constitutional Court in its judgments regularly refer to the jurisprudence of the European Court of Justice and/or to European Court of Human Rights? Which are the most significant examples?**

The Portuguese Constitutional Court very often refers to the jurisprudence of the European Court of Human Rights and/or to European Court of Justice. Many examples have already been mentioned along the text. Some more can be added, in an exemplificative catalog.

The Constitutional Court decision 113/95 on the admissibility of an extradition, the applicant alleged that the time limit of 5 days (established in article 57/1 of the Decree-Law 43/91) to present a defense was unconstitutional since it was too short and it was different from the time limit of the Public Prosecutor, hence violating right to adversarial proceedings and “equality of arms”. The Constitutional Court attended to jurisprudence from the European Court of Human Rights, wherein it was taken into account a wider concept of due process that includes the right to adversarial proceedings (article 6). The European Court considered that if the time line to present the defense was not enough to prepare it, the right to a due process was violated.

The Constitutional Court recognized this dimension of the right to a due process; however it has considered that in the case at stake the applicant already had opportunity to present his/her defense.

The Portuguese Constitutional Court uses case law of the European Court of Human Rights, based on article 8 of the Convention, to justify the legal requirements for the interception of phone calls during a criminal investigation, namely authorisation and following by a judicial authority. The Constitutional Court frequently mentions European Court of Human Rights decisions like *Valenzuela Contreras v. Spain* (1998), *Klass and others v. Germany* (1978), *Malone v. United Kingdom* (1984), *PG and JH v. United Kingdom* (2001), *Prado Bugallo v. Spain* (2003), *Kruslin v. France* (1990) and *Huvig v. France* (1990). They have been followed, among other, by Constitutional Court Decisions 407/97, 347/01 and 528/03<sup>52</sup>.

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<sup>52</sup> CRISTINA MÁXIMO/LUISA PINTO/MARIANA CANOTILHO/ANTÓNIO DE ARAÚJO/CATARINA VEIGA/LUÍS MIGUEL NOGUEIRA DE BRITO/MANUELA RODRIGUES/ARTUR DE FARIA MAURÍCIO, *Os critérios da*

Also on the case-law on the right to family life, in the particular matter of foreigners' expulsion, the Constitutional Court invokes article 8 of the European Convention on Human Rights. Following the European Court on *Moustaquim v. Belgium* (1991) and *Beldjoudi v. France* (1992) cases, the Portuguese Court has decided (Decision 39/88 and Decision 452/95) that the expulsion of foreigners cannot cause the division of parents and children or the expulsion of the children (when minors and at the parents' charge), in order to follow the expelled parent<sup>53</sup>.

After the European Court of Human Rights decided - on the case *Fox, Campbell and Hartley v. United Kingdom* - that the individual has the right to know the reason he/she is being arrested, the Portuguese Constitutional Court affirmed this right in its decisions. For example in judgment 607/03, the Constitutional Court took into account the European Courts of Human Right's interpretation of article 5/2 of the European Convention on Human Rights on the right of everyone who is arrested to know the reason of the arrest.

In the aforementioned decision of the Constitutional Court 101/2009 on medical assisted reproductive technology the Constitutional Court has also considered the jurisprudence of the European Court of Human Rights. It has analyzed the *Odièvre v. France* case (on the right to respect for privacy and family life - article 8).

In the decision 121/2010, concerning same-sex marriage, important references were made to the European Court of Human Rights' decisions about the right to respect for private and family life (article 8) and about the prohibition of discrimination (article 14): *Dudgeon v. United Kingdom*, of 22 october 1981, *Mata Estevez v Spain*, of 3 may 1983, *Norris v. Ireland*, of 26 october 1988, *Modinos v. Cyprus*, of 22 april 1993, *A.D.T. v. United Kingdom*, of 31 july 2000, *Smith and Grady v. United Kingdom* and *Lustig-Preen and Beckett v. United Kingdom*, both of 27 september 1999, *Salgueiro da*

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*limitação de direitos humanos na aplicação da justiça constitucional*, XIII Congress of the Conference of European Constitutional Courts, Cyprus, Mai 2005.

<sup>53</sup> CRISTINA MÁXIMO/LUISA PINTO/MARIANA CANOTILHO/ANTÓNIO DE ARAÚJO/CATARINA VEIGA/LUÍS MIGUEL NOGUEIRA DE BRITO/MANUELA RODRIGUES/ARTUR DE FARIA MAURÍCIO, *Os critérios da limitação de direitos humanos na aplicação da justiça constitucional*, XIII Congress of the Conference of European Constitutional Courts, Cyprus, Mai 2005.

*Silva Mouta v. Portugal*, of 21 december 1999, *L. e V. v. Austria* and *S. and L. v. Austria*, both of 9 january 2003, *Karner v. Austria*, of 24 july 2003, *Baczowski and others v. Poland*, of 3 may 2007, *E.B. v. France*, of 22 january 2008, were analysed by the Constitutional Court.

In what concerns the right to marry (article 12 of the European Convention on Human Rights) the Court has mentioned *Rees v. United Kingdom*, of 10 october 1986, *Cossey v. United Kingdom*, of 27 september 1990 and *Sheffield and Horsham v. United Kingdom*, of 30 july 1998, *Christine Goodwin v. United Kingdom*, of 11 july 2002.

In the abovementioned Constitutional Court decision 207/2010, on the matter of the right to a fair trial and due process and to the impartiality of the judge, the Court has also considered the European Courts of Human Right's tests to determine the court's impartiality (subjective and objective impartiality). The subjective impartiality is presumed until is proved otherwise. The objective impartiality (the judge not only has to be impartial but also to appear to be impartial) is determined based on several factors, including the previous exercise of functions in the same case.

The Court analyzed some decisions from the European Court of Human Rights in which it considered that there was infringement of the right to a due process given the previous intervention of the judge (the *Piersack* case, the *De Cubber* case and the *Oberschlick* case) and some decisions in which it was considered that there was not a violation of that principle by the previous intervention of the judge (the *Nortier* case, the *Ringeisen* case, the *Diennet* case and the *Lindon, Otchakovsky-Laurens and Jul* case).

The Constitutional Court concluded that the impartiality of the judge must be assessed in the specific case.

In the case under analyses one of the judges had decided the cause in the Supreme Court of Justice and in the Constitutional Court. However, when he first decided the case, the question that was being decided was different (the appeal to the Constitutional Court was based only on the fact that the decision of the Supreme Court was a "surprise decision"). For this reason the Court considered that the right to fair trial and due process was not being violated by the previous intervention of the judge.

In the decision 281/11, concerning the right to a fair trial, on the matter of impartiality of judges, the Court has referred to article 6 of the European Convention on Human Rights, and to the jurisprudence of the European Court.

The Constitutional Court has attended the two tests of impartiality of judges (subjective and objective) that the European Court of Human Rights uses in several decisions, for example in the *Saraiva de Carvalho v. Portugal* case.

The Court has analyzed the intervention of the four judges and it has considered that the second time they have participated in the process they have decided a different matter. The second time they intervene it was in an opposition claim. The Court considered that the impartiality principle was connected with the objective of the appeal (that is to have a different judge deciding the case).

In the case, the appeal (opposition claim) had a very particular goal (to solve a conflict of decisions of the superior courts on the same legal issue) and it did not aim to appreciate the merits of the case. For this reason the Court considered that there was not a violation of the Constitution. The Court has analyzed the different roles of the judge and, among other, the Constitutional Court has mentioned *Procola v. Luxembourg* case, of 28 September 1995; *Hauschildt v. Denmark* case, of 24 May 1989, *Morel v. France* case, of 6 June 2000, and *Warsicka v. Poland* case, of 16 January 2007.

The Constitutional Court Decision 20/2012 quoted the European Court of Human Rights decision *Stegarescu e Bahrin v. Portugal* case to conclude that a prisoner shall have the right to appeal to an independent authority<sup>54</sup>.

In the Constitutional Court judgment 444/2012, on the matter of the impartiality of the judge, the Court analyzed jurisprudence from the European Court of Human Rights, in order to assess if a previous procedural intervention of a judge could lead to a prohibition to decide the case due to lack of impartiality. The Constitutional Court took once more into consideration the tests of impartiality that the European Court of Human Rights uses (subjective impartiality and objective impartiality). The Constitutional Court considered the *Hauschildt v. Denmark* case, in which the European Court said that the previous intervention in the case did not mean that the judge was not impartial (that assessment has to be done in the concrete case); in the *Hauschildt v. Denmark* case

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<sup>54</sup> European Court of Human Rights Decision of 6 April 2010.

the judge did not pass the test of objective impartiality (the judge did not appear to be impartial).

The above-mentioned Constitutional Court Decision 187/2013 regarding the 2013 State Budget Act has invoked article 1 of the Protocol 1 of the European Convention on Human Rights<sup>55</sup> to discuss pension reductions. Consequently, *Decision Grudic v. Serbia*, of 17 April 2012, was also referred.

The Portuguese Constitutional Court, in the decision 340/2013, on the right to silence and the privilege against self-incrimination, analyzed article 6 of the European Convention on Human Rights and article 14 of the International Covenant on Civil and Political Rights as well as articles 18, 25, 32 and 34 of the Portuguese Constitution. There is not an express provision of the right to silence and the privilege against self-incrimination in the Portuguese Constitution, but it is considered that these rights are included in the content of article 32 of the Portuguese Constitution (on safeguards in criminal procedures).

The Constitutional Court studied jurisprudence of the European Court of Human Rights in which it is considered that the right to silence is included in article 6 of the European Convention on Human Rights.

The Constitutional Court has also analyzed some decisions of the European Court of Human Rights (*Funke v. France* case, *Saunders v. United Kingdom* case and *J.B v. Switzerland* case) that were similar with the case under consideration.

In the aforementioned decision 404/2013 the Constitutional Court analyzed jurisprudence from the European Court of Human Rights. The Constitutional Court attended to the broad concept of due process that is used by the European Court in the *Ringeisen* decision, the *Konig* decision, the *Baraona v Portugal* decision<sup>56</sup>, *Neves e Silva v Portugal* decision<sup>57</sup>, the *H. v. France* decision and *Vallée v. France* decision.

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<sup>55</sup> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law".

<sup>56</sup> Of 8 July 1987, Application 10092/82.

<sup>57</sup> Of 27 April 1989, Application 11213/84.

The references to the Court of Justice of the European Union are less frequent than the references to the European Court of Human Rights, but in some cases the jurisprudence of the European Court of Justice is used.

In the abovementioned decision 121/2010, on same-sex marriage recognition, the Court took in due count some decisions of the **European Court of Justice**. That is the case of the decision C-249/96, *Lisa Jacqueline Grant v South-West Trains Ltd*, Judgment of the Court of 17 February 1998, on equal treatment of men and women, which analyzed the refusal of travel concessions to cohabitantes of the same sex; and of the (joint) Decision C-122/99 P and Decision C-125/99 P, *D and Kingdom of Sweden v Council of the European Union*, Judgment of the Court of 31 May 2001, referring to household allowance and registered partnership under Swedish law; Decision C-267/06, *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen*, on equal treatment in employment and occupation, and discrimination based on sexual orientation, concerning the survivors' benefits under a compulsory occupational pensions scheme and the refusal because the persons concerned were not married and were same-sex partners.

Even though these decisions did not recognize the right to same-sex marriage, the Portuguese Constitutional Court considered these decisions of the European Court of Justice in which the European Court has decided against rules of European States that had discrimination based on sexual orientation.

References have also been made to European Court of Justice in decisions on the right to respect for private and family life. Following European Court case-law, the Constitutional Court Decision 232/2004 has established that the expulsion of foreign citizens from national territory must observe the principles of proportionality and necessity.

The Constitutional Court has also considered the position of the European Court of Justice regarding freedom to choose an occupation. Decision 144/2004 of the Constitutional Court has highlighted the fact that the European Court case-law admits that prostitution may be considered an economic activity of self-employed persons, but

also highlighted that this does not prevent member States from out-lawing activities that favour prostitution<sup>58</sup>.

In the Constitutional Court Decision 461/2011 the Court had to decide if the companies or people questioned by the Competition Authority were obliged to reveal complete and truthful information and documents to the Competition Authority to avoid the application of a fine.

The Constitutional Court has analyzed the decision of the European Court of Justice *Orkem v. Commission*, of 18 October 1989, and decision *Commission v. SGL Carbon e. o.*, of 29 June 2006 in order to evaluate the reach of the duty of cooperation of companies when the Commission exercises its supervision powers and the consequences to the right of defense that could arise from the cooperation duty.

The Constitutional Court has used the same reasoning based on the proportionality of the restriction of the right to defense reflected on the jurisprudence of the European Court of Justice. Like the European Court of Justice, the Constitutional Court has considered “the duty of cooperation must be guaranteed, but it is limited by the rights to defense of the companies”<sup>59</sup>.

## **6. Are there any examples of divergences in decisions taken by the constitutional Court and the European courts of justice?**

The Portuguese Constitutional Court tends to follow the jurisprudence of the European Courts. In some circumstances it is necessary to adapt the decision because of the particularities of the Portuguese system and of the particular case. The minor differences are, most of the times, mere apparent dissonances.

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<sup>58</sup> CRISTINA MÁXIMO/LUISA PINTO/MARIANA CANOTILHO/ANTÓNIO DE ARAÚJO/CATARINA VEIGA/LUÍS MIGUEL NOGUEIRA DE BRITO/MANUELA RODRIGUES/ARTUR DE FARIA MAURÍCIO, *Os critérios da limitação de direitos humanos na aplicação da justiça constitucional*, XIII Congress of the Conference of European Constitutional Courts, Cyprus, Mai 2005.

<sup>59</sup> PEDRO MACHETE/TERESA VIOLANTE, *Princípio da Proporcionalidade e da Razoabilidade na Jurisprudência Constitucional, também em relação com a Jurisprudência dos Tribunais Europeus*, Trilateral Conference of the Constitutional Courts of Portugal, Spain and Italy, 2013, Rome.

In regard to the European Court of Human Rights, some notes on article 6 could be interesting.

In some cases concerning the right to a fair trial - especially on the matter of the right to respond after the Public Prosecutor allegations - the applicant invokes article 6 of the Convention and previous decision of the European Court of Human Rights.

However, considering the concrete case the Constitutional Court decided that there was not a violation of that principle.

For example judgment 342/2009 by the Portuguese Constitutional Court in which the applicant wanted the joint approach of article 146/1 of the Procedural Code of the Administrative Courts and of article 201/1 of the Civil Procedural Court to be considered unconstitutional, since it violated the proportionality principle and the right to a fair trial. This interpretation prevented the applicant to respond to the public prosecutor allegations. To sustain his allegations the applicant invoked article 6 of the European Convention on Human Rights and the decision of the European Court of Human Rights on the *Lobo Machado v. Portugal* case. The Constitutional Court decided that the rules must be interpreted according to the specific case. In the case being analyzed there was not a violation of the right to a fair trial because the Public Prosecutor's allegations did not have any alterations.

Also in Judgment 527/11 the Constitutional Court uses the article 6 of the European Convention on Human Rights and the *Feliciano Bichão v. Portugal* case in order to ascertain if the omission of responses by the defendant after the public prosecutor's allegations is a violation of the right to a fair trial. The Court decided that it was not unconstitutional since the Public Prosecutor's allegations did not add anything to what was previously been said.

A very recent European case-law should, however, be stressed. The European Court of Human Rights' Decision of 8 October 2013 (*da Conceição Mateus e Santos Januário v. Portugal*), has made some consideration on Portuguese Constitutional Court recent jurisprudence on State Budget Act 2012<sup>60</sup>.

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<sup>60</sup> Available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-128106>.

Two pensioners eligible to receive social security benefits under the public sector pension scheme, including holiday and Christmas subsidies (13<sup>th</sup> and 14<sup>th</sup> full month pension to be paid, respectively, in July and December) have asked for the condemnation of Portuguese State, given the fact that they did not receive 13<sup>th</sup> and 14<sup>th</sup> full month pension. According to the Strasbourg Court, the pensioners have complained about the impact of the reduction of their holiday and Christmas subsidies on their financial situation and living conditions without invoking any particular provision of the Convention. The Court took it as an allegation of a breach of their right to the protection of property.

The Strasbourg Court Decision has analyzed the application, and has declared it inadmissible on the grounds that it was manifestly ill-founded.

On the contrary, the Constitutional Court, in its previous decision (353/2012), had considered that there was a breach of the Portuguese Constitution given the fact that those legal measures imposed a special sacrifice on some category of people, in violation of principle of proportional equality. Nevertheless, the Portuguese Court has decided that its decision would not have any effect during 2012, regarding the exceptional financial circumstances.

It deserves to be highlighted that to achieve its decision, the Strasbourg Court has taken into account that, in practical terms, the fact that the Court has decided that its own decision did not take effect in 2012, it “meant that the cuts could be implemented in 2012”. Another important reason was that “these measures were adopted in an extreme economic situation, but unlike in Greece, they were transitory”.

On the other hand, the European Court took into special account the potential violation of article 1 of the Protocol n° 1 (the right to the peaceful enjoyment of their possessions). Having in mind that Portugal had “requested financial assistance from European Union, the euro area Member States and the International Monetary Fund”, and that it was “an extreme economic situation”, the European Court has considered that the interference with the enjoyment of the right of property was pursuing a legitimate aim in the public interest. On the other hand, in the assessment of proportionality of measures taken by the State, the European Court has decided that the essence of the right to property was not infringed: “while a total deprivation of entitlements resulting in the loss of means of subsistence would in principle amount to a violation of the right of property, the imposition of a reasonable and commensurate reduction would not”. Regarding the fact that no equivalent cuts were made in the private sector, the Court has

maintained the same solution: “the legislator remained within the limits of its margin of appreciation”, the applicants did not bear a disproportionate and excessive burden”, “in the light of the exceptional economic and financial crisis” and given” the limited extend and the temporary effect of the reduction”.

7.

### **Once it is taken into account by the Constitutional Court, is European case-law cited by other Courts?**

Other national courts use case-law from the European Courts of justice too. As the Constitutional Court, other national courts also reflect on their jurisprudence the logical reasoning and interpretations made by European courts, on a regular base.

All Portuguese courts, in all judicial branches, make use of it, particularly in most complex issues, either in criminal, civil, social or administrative matters.

The use of European courts of justice jurisprudence by other national courts is partially a result of the influence of the Portuguese Constitutional Court. By referring to the jurisprudence from European courts, the Portuguese Constitutional Court becomes an important factor in the use by other Portuguese courts of the judgments of the European Court of Justice and the European Court of Human Rights.

Having realized that the Constitutional Court frequently calls for European courts decisions on its arguments and reasoning, national courts - which also have powers concerning violations of the constitutional law – tend to use European jurisprudence too.

On the other hand, as Constitutional Court decisions are mandatory (although, in some circumstances, only in the particular case submitted to the Court), whenever it has took into account European courts of justice jurisprudence, it will have an indirect impact on national courts that will have to obey such decisions.

8.

## **Are there any examples of decisions by European courts of justice influenced by the jurisprudence of national Constitutional Courts?**

The influence of the Portuguese Constitutional Court in the decisions of the European courts of justice is scarce, but still some decisions may be underline. For instance, the European Court of Human Rights took into account Portuguese jurisprudence from the Constitutional Court in the following cases<sup>61</sup>:

Regarding the system of payment of compensation following nationalization and expropriation in the sphere of the agrarian reform, on the *Almeida Garrett, Mascarenhas Falcão and others v. Portugal* case (2000), the European Court of Human Rights took into account decisions 39/88 and 425/95 of the Constitutional Court.

In the *Saraiva de Carvalho v. Portugal* case (2000) the European Court of Human Rights made a reference to the distinction between indictment and “despacho de pronúncia” made by the Constitutional Court when it decided the case (Constitutional Court decision 219/89).

In the *Lopes Gomes da Silva v. Portugal* case regarding the violation of the right of freedom of expression, the European Court of Human Rights made a reference to the Constitutional Court position regarding the existence in the Constitution and in the Convention of certain limits to the exercise of freedom of expression.

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<sup>61</sup> CRISTINA MÁXIMO/LUISA PINTO/MARIANA CANOTILHO/ANTÓNIO DE ARAÚJO/CATARINA VEIGA/LUÍS MIGUEL NOGUEIRA DE BRITO/MANUELA RODRIGUES/ARTUR DE FARIA MAURÍCIO, *Os critérios da limitação de direitos humanos na aplicação da justiça constitucional*, XIII Congress of the Conference of European Constitutional Courts, Cyprus, Mai 2005.

## II. Interactions between Constitutional Courts

### 1. Does the Constitutional Court, in its decisions, refer to the jurisprudence of other European or non-European constitutional courts?

Often the Portuguese Constitutional Court considers the decisions of other European and non-European Courts. The most quoted countries are France, Spain, Germany, Belgium, and Italy<sup>62</sup>. The CODICES, the InfoBase on Constitutional Case-Law of the Venice Commission, is a very important tool to enhance mutual case-law acknowledge. The following cases may give an idea of the interactions between Portuguese Constitutional Court and other constitutional courts:

On the decision 341/86, concerning a fair compensation for expropriation the Constitutional Court considered jurisprudence from the Italian Constitutional Court and German Federal Constitutional Court.

The Decision 479/94 of the Portuguese Constitutional Court, regarding the obligation of caring the identification document, analyzed the law of other countries and jurisprudence from the French Constitutional Court.

The Constitutional Court decision 288/98 on the matter of the decriminalization of the abortion analyses in a deep way the jurisprudence of the German, Austrian, Belgian, Spanish, Finnish, French, Greek, Dutch, Irish, Italian, Luxembourg, English and Swedish Constitutional Courts.

The Constitutional Court in the decision 376/2005, on the matter of awarding grants to parliamentary groups, attended to the German Constitutional Court jurisprudence. The German Constitutional Court prohibits the provision of public funding to political parties but accepts the provision of grants to the parliamentary groups because these

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<sup>62</sup> ROMANO ORRÙ, “Uno Sguardo Esterno sulla Giurisprudenza Costituzionale Portoghese”, *XXV anos de jurisprudência constitucional portuguesa/Colóquio comemorativo do XXV Aniversário do Tribunal Constitucional*, Oct. 2008, pages 440-473, Coimbra Editora.

groups are necessary to the parliamentary activity and are a part of the organic structure of the State.

Constitutional Court Decision 101/2009, on assisted reproductive technology, has extensive reference to European countries legal rules as well.

Also in the abovementioned decision 121/2010, on the right to same-sex marriage, the Portuguese Constitutional Court considered the Law from Denmark, England, Germany, Switzerland and France (that only allowed same-sex civil-union) and Nederland, Belgium, Spain, Norway and Sweden (that allowed same-sex marriage). The Court also took into consideration countries in which the same-sex marriage was decreed by the courts (United States of America, South Africa and Canada). And it analyzed jurisprudence from the German Constitutional Court and from the French Arbitration Court.

Constitution Court Decision 397/2012, on legal drugs and “smart shops”, also makes reference to some other countries law, giving some general idea about the legal rules on that issue in some European countries.

## **2. If so, does the Constitutional Court tend to refer primarily to the jurisprudence from the same language area?**

The Constitutional Court does not primarily tend to refer the jurisprudence of countries of the same language area.

## **3. In which fields of law does the Constitutional Court refer to the case-law of other European and non-European constitutional courts?**

There is a wide range of areas in which the Constitutional Court recurs to the jurisprudence of other Constitutional Courts. Nevertheless, it is possible to say that the jurisprudence of other constitutional courts is very often used in the field of Criminal

Law and guarantees of criminal proceedings. The Constitutional Court tends to use comparative law as well. The citation of foreign legal solutions grows as the globalization of problems tends to develop. The identification of common topics makes way to the search for some common trends<sup>63</sup>.

#### **4. Have decisions of the constitutional Court noticeably influenced the jurisprudence of foreign Constitutional Courts?**

Besides being from time to time influenced by foreign constitutional courts, Portuguese Constitutional Court has occasionally been an influence to other constitutional courts jurisprudence. There are some examples of Portuguese Constitutional Court decisions that have influenced foreign jurisprudence.

The Constitutional Court of Russia, for example, took into consideration jurisprudence from the Portuguese Constitutional Court in the matters of bank secrets, supervisory review of acquittal and *reformation in pejus* and national, religious and national and religious political parties<sup>64</sup>.

Another example of a Court that is influenced by the Portuguese constitutional jurisprudence is the Brazilian Federal Supreme Court that in several decisions quotes the Portuguese Constitutional Court. For instance the Portuguese Constitutional Court ruling 39/84 is used several times by the Brazilian Federal Supreme Court. In this decision the Portuguese Constitutional Court considers unconstitutional a part of the law that abolished the Portuguese health system because that would be a violation of the prohibition of taking a step backwards in the consecration of fundamental rights

The Brazilian Federal Supreme Court decision, on the matter of the right to a health system (judgment SL 47 AgR / PE), took into account the position adopted on judgment 39/84 of the Portuguese Constitutional Court concerning the prohibition of taking a step backwards in the consecration of fundamental rights. And in a decision of the Brazilian

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<sup>63</sup> Romano Orrù, "Informal judicial cross fertilization and the system of conferences between Constitutional Courts and equivalent bodies", <http://www.juridicas.unam.mx/wccl/ponencias/12/206.pdf>, last accessed 19 october 2013,

<sup>64</sup> Sergey A. Belov, "Using of foreign constitutional precedents by the Russian Constitutional Court: explicit citations and implicit influence", *Instituto de Investigaciones Jurídicas Web*, available on: <http://www.juridicas.unam.mx/wccl/en/g12.htm>, last access on 21 Set. 2013

Federal Supreme Court concerning the right to education (judgment ARE 639337/Agr SP) the same Portuguese decision is used.

In some other occasions, foreign courts adopt comparative law approaches and make references to Portuguese Law. A relatively recent example is the mention made by German BvR 420/09, from 21<sup>st</sup> of July 2010, on parental custody. Among other European solutions, the decision points out the Portuguese Civil Code rule.

Not only legal rules, but the Constitution itself is sometimes quoted. The Constitutional Court of the Republic of Lithuania, on a decision of 25 October 2011 (case 36/2010 and others), refers to article 282 n. 3. of the Portuguese Republic Constitution. In the decision 732, of 9<sup>th</sup> of July 2012, from the Romania Constitutional Court, a dissenting opinion refers to Portuguese Constitution rules on Ombudsman.

## **5. Are there any forms of cooperation going beyond the mutual acknowledgement of Court Decisions?**

The Portuguese Constitutional Court believes that the international dialogue and cooperation is of the most significant importance and, as a result, it participates in a series of international conferences and it is a member of the European Commission for Democracy Through Law, of the Council of Europe, known as “Venice Commission”.

Portugal is a part of the “Trilateral Conference of the Constitutional Courts of Portugal, Spain and Italy”, the “Conference of the European Constitutional Courts”, the “Conference of the Constitutional Courts of the Portuguese Speaking Countries”, the “Ibero-American Conference on Constitutional Justice”, and the “World Conference on Constitutional Justice”.

One of the purposes of these conferences is the exchange of information, experiences and jurisprudence.

In the websites of the “Conference of the Constitutional Jurisdiction of the Portuguese Language Countries”, “Euro-lex” and of the “Venice Commission”, it is possible for the Constitutional Courts of other countries to have access to the Portuguese Constitutional Courts decisions, which may assist constitutional courts from other countries to be inspired by Portuguese jurisprudence.

### **III. Interactions between European Courts in the jurisprudence of Constitutional Courts**

#### **1. Do references to European Union Law or to decisions by the Court of Justice of the European Union in the jurisprudence of the European Court of Human Rights have an impact on the jurisprudence of the Constitutional Court?**

We cannot find any case-law of the Portuguese Constitutional Court where references to European Union Law or to decisions by the Court of Justice of the European Union in the jurisprudence of the European Court of Human Rights have had an impact.

#### **2. How does the jurisprudence of constitutional courts influence the relationship between the European Court of Human Rights and the Court of Justice of the European Union?**

We are not aware of any situation where the jurisprudence of the Portuguese Constitutional Court might have influenced the relationship between the European Court of Human Rights and the Court of Justice of the European Union.

#### **3. Do differences between the jurisprudence of the European Court of Human Rights, on one hand, and the Court of Justice of the European Union, on the other hand, have an impact on the jurisprudence of the Constitutional Court?**

The references to the European Court of Justice and to the European Court of Human Rights made by the Portuguese Constitutional Court scarcely reflect the differences and the relations between these two European Courts. Even if some differences may be noticed, consequences have not yet been taken from it.