**WORLD CONFERENCE ON CONSTITUTIONAL JUSTICE**
**2ND CONGRESS**

**Rio de Janeiro, Brazil, 16-18 January 2011**

# REPORT OF THE PORTUGUESE CONSTITUTIONAL COURT

## INTRODUCTION

The basic ideas that are inherent in the principle of the separation of powers, as formulated by Montesquieu in *De L'Esprit des Lois* and formally proclaimed in Article 16 of the 1789 Declaration of the Rights of Man and of the Citizen, remain alive and well and continue to be a valid gauge of a state's democraticity and of the extent to which it can be considered to be a state based on the rule of law. Certain key ideas are thus still unavoidable: the need for a functional and organic division of powers (albeit mitigated versions are accepted in some cases, with a given function shared by a variety of organs, on condition that its hard core is primarily attributed to only one of them); the need to avoid an excessive concentration of power in the hands of just one organ; the desirable balance between powers; and the establishment of a system of checks and balances – i.e. a reciprocal control over and by the various organs that hold power, along the lines of the teachings of the Founding Fathers.

The fact that these ideas are still current does not mean, however, that the concrete formulation propounded and supported by Montesquieu has rigidified. On the contrary, these days it is primarily a reference point, and the overall principle has developed in a number of ways since the eighteenth century. In truth, Montesquieu's formulation is not entirely unequivocal and has permitted different interpretations. Be this as it may, regardless of any concrete formulation of the principle in question (Montesquieu's or anyone else's), what matters is that the above ideas must underlie the political organisation of the state.

Constitutional justice – at the heart of which lies the control of the constitutionality of norms – is an element that is indispensable to the balance between powers, and particularly to the correct and appropriate operation of the system of checks and balances that is indissociably linked to the idea of the separation of those powers. Curiously, its initial appearance and subsequent acquisition of a position of strength led to criticisms and resistance from precisely those who felt that the possibility that the courts ("diffuse" or "American" control), or a given court ("concentrated" or "Austrian" control) could invalidate a norm created by parliament represented a violation of the principle of the separation of powers. They believed that it implied an undesirable and

inadmissible interference by the judiciary in the sphere that pertains to the legislative branch. Leaving aside the various debates which continue to be waged in relation to the advisability of this control and which have essentially been centred on the ideas of the courts' lack of democratic legitimacy and the failure to respect the principle that judges must necessarily comply with the law (principle of legality), it is clearly impossible to achieve a balanced separation of powers if judges continue to be seen as mere mouthpieces of the law. All the more so when we know just how much the legislative and executive branches have expanded, above all since the 20th century, and how important the fundamental rights and constitutional values have become to the protection of the dignity of the human person – rights and values whose effective enforcement depends on a faultless judicial protection. In other words, if a strong legislative power and a strong executive power are to be controlled and contained, an equally strong judicial power is necessary and indeed indispensable.

The growth of judicial power, particularly the expansion of the work of constitutional judges, has always been the object of criticism. It is now commonplace to hear people talk about judicial activism – actually a multiform phenomenon – which is generically condemned as a clear usurpation of functions, especially to the extent that it entails judges creating law ("judicial legislation", or "jurisprudential law"). According to these critics, constitutional judges have willingly doffed the Kelsenian robes of negative legislators – already controversial in their own right – and have embraced the role of real positive legislators, in competition, and sometimes in direct conflict, with the ordinary legislator. On all sides, in both common law (with the exception of the United Kingdom) and civil law countries, we hear people denouncing judges' creativity, as expressed and consolidated in rulings that are said to be interpretative, manipulative (additive and substitutive), exhortative and so on. In Portugal this debate has been conducted somewhat outside the spotlight of both political and academic discussions alike, perhaps thanks to the fact that the operators of constitutional justice (the Constitutional Court and the ordinary courts) have displayed an attitude that is recognised to be moderate and to tend towards self-restraint.

Nor does the agenda in this country include suppressing the Constitutional Court, despite occasional voices suggesting that its competences be transferred to the Supreme Court of Justice, as is the case in some jurisdictions (mainly in common law countries). These opinions are mostly heard during election campaigns, but to date the legislators who have revised the Constitution have never seriously envisaged this hypothesis, which therefore appears to be quite remote. In truth this political banner has above all been waved on the basis of considerations of a financial nature, and has in no way led to any diminution in the Court's competences and integrity. The Court's decisions have not been questioned – on the contrary, they are usually praised, or at least respected, by virtually all the legal theorists and the media. Nor has the Portuguese constitutional reality witnessed any attempts by the state's political powers to dominate the Court, either by changing its concrete composition or the number (either up or down) of its Justices, or by delaying the replacement of those who leave the bench for any reason, etc.

The Portuguese Constitutional Court was created in 1982, in the wake of the second revision of the existing Constitution (the original version of the current text dates from 1976). However, constitutional justice in Portugal goes back to the first republican constitution – that of 1911 – which, swimming against the prevailing tides in

the other continental European countries, enshrined a diffuse control system. This choice can be explained by the influences which the 1891 Brazilian Constitution, itself in turn influenced in this respect by the US judicial review format, had on the legislators who wrote its Portuguese counterpart. The 1933 Portuguese Constitution then added a concentrated control to the existing diffuse control system, albeit one that possessed a political nature, inasmuch as it was conducted by the parliament (National Assembly) itself. Today, under the present Constitution, both types of control – concentrated and diffuse – are still in effect, and it is possible to say that we have a "mixed-complex system" (Gomes Canotilho) that has been fully jurisdictionalised since 1982.

## I – THE INDEPENDENCE OF THE CONSTITUTIONAL COURT AS AN INSTITUTION

The senior judicial institution in the constitutional justice system is the *Tribunal Constitucional* (TC) or Constitutional Court. Its composition, organisational structure and procedures are set out in the Constitution itself and in various other legislative acts, foremost among which is the Law governing the Organisation, Modus Operandi and Procedures of the Constitutional Court (LTC). It is essential that both the most important aspects of the Constitutional Court and its Justices (e.g., their institutional position and status) and those related to its financial, administrative and regulatory autonomy be included in the constitutional text itself – i.e. that the ordinary legislator not be free to do with them as it will.

In terms of its **systemic position** in the state's organisational structure, the Constitution classifies the Constitutional Court – and indeed all the courts – as a constitutional organ or entity that exercises sovereignty. As such, it finds itself on the same level as, and equidistant from, each of the other such organs and entities, and possesses a power of normative self-organisation. The latter makes itself felt in a variety of areas – namely the financial, administrative and regulatory domains (particularly that related to the way in which the Court is organised and its work is conducted) – and contributes to the Court's autonomy. The TC's independence is also inherent in the category of an organ that exercises state power. As Kelsen used to say, a constitutional court's independence from the parliament and the executive is an obvious given, inasmuch as the fact that the latter two possess the power to create norms means that they will thus necessarily be controlled by the court. Both the Constitutional Court's autonomy and its independence (and those of its Justices) are derived from – and more than that, are a corollary of – the principle of the separation of powers, and are expressed in various constitutional and legal norms. Both are necessary conditions if the impartiality and neutrality of its decisions are to be ensured.

Given the specificity of the TC's nature and functions, the framers of the Portuguese Constitution saw fit to address it autonomously and to set it apart from the other courts in the constitutional text (Part III, Title VI). The present paper is not the most appropriate place in which to discuss the true nature of this organ of constitutional justice – e.g. whether it is a true court, or whether at the end of the day it is a political or a mixed (judicial and political) organ. Be this as it may, the jurisdictional nature of its functions is uncontroversial, at least where the control of the constitutionality of norms is concerned.

Similarly, it is possible to say without much hesitation that the fact that Constitutional Court Justices are appointed by the Assembly of the Republic (and in this sense politically) does not necessarily imply their politicisation and openness to pressure of a political (or other) kind, obviously on condition that the autonomy and independence of this organ of constitutional justice are guaranteed by both constitutional and ordinary legal provisions.

The Portuguese constitutional legislator has been particularly sensitive to this concern to guarantee the autonomy and independence of the TC as an institution, and likewise those of its Justices, to which end it has adopted various measures designed to ensure that this really is the case.

To begin with we should note the TC's **autonomy**, both in relation to the political branches of the state, with no provisions for any type of subordination (legal or other) to the parliament, the government or the head of state, and with regard to the other courts, in which respect the Constitutional Court is not incorporated into the ordinary judicial system.

In terms of its **composition**, the TC consists of thirteen Justices, all of whom are selected from among jurists, albeit six of them must be career judges. Ten are appointed by the parliament (the Assembly of the Republic), while the others are co-opted by their peers. Here we immediately have two aspects that are intended to ensure the conditions we have been talking about: on the one hand, the requirement that all the members of the Court possess legal training, and that some of them pursue the profession of judge; on the other, the fact that some – albeit a small proportion – of them are co-opted. It is also worth noting that it is the Justices who choose the President and Vice-President of the Constitutional Court.

## II – THE INDIVIDUAL INDEPENDENCE OF THE COURT'S JUSTICES

Granting autonomy and independence to the organs of constitutional justice also entails establishing a series of conditions that permit independence on the part of the people who go to make up those organs – constitutional judges. As we will see in a moment, these conditions have been enshrined in the Portuguese legal system, both in the Constitution and in other legislative acts. As such, any divisions that may be visible in some decisions – particularly those handed down by the TC, fundamentally when what are at stake are highly divisive questions – cannot be seen as constitutional judges giving way to political pressures, but rather as a reflex of the divisions that naturally exist within society itself.

**Age requirement:** There is no provision for any minimum age for the exercise of the functions of constitutional judge. Nor is there any explicit provision with regard to a maximum age, but just a note in Article 21 of the LTC to the effect that "judges of the remaining courts who are appointed to the Constitutional Court and attain seventy years of age during their term remain in office until the end of their mandate". Everything would seem to indicate that the constitutional legislator did not associate this requirement – and thus the idea of a certain degree of personal and professional maturity – with the protection of the autonomy and independence of constitutional judges.

However, it is possible to note a series of other aspects that bear witness to the concern to ensure that constitutional justice in general, and the control of the constitutionality of norms in particular, is conducted with every guarantee of independence, neutrality and impartiality. The following deserve special mention:

**Term of office of Constitutional Court Justices:** On this question of the time limit on the exercise of the functions of constitutional judge, the Portuguese Constitution combines two requisites that are usually seen as propitious to the proper exercise of those functions: a reasonably long term of office (nine years), and the preclusion of reappointment. On a somewhat different note, we should say that constitutional judges enjoy the guarantee of security of tenure.

**Removal from office:** There is no provision that would enable the parliament or any other political organ to remove any Constitutional Court Justice before the end of his/her term of office. In effect, only the TC itself can declare the end of a Justice's tenure, and then only on the grounds listed in Article 23 of the LTC: a) Death or permanent physical incapacity; b) Resignation (which must be communicated to the President of the Court in writing, but takes effect without having to be accepted); c) Acceptance of a position or commission of an act that is legally incompatible with the proper exercise of the functions of Justice of the TC; and d) Removal or compulsory retirement as a consequence of disciplinary or criminal proceedings. The Court must verify the situations envisaged in (a), (c) and (d); cases of permanent physical incapacity must first be confirmed by two medical experts appointed by the Court.

**Incompatibilities:** The Constitution says that the Justices of the TC are subject to the same incompatibilities as the judges of the other courts. The LTC is more specific: performance of the office of Constitutional Court Justice is incompatible with "the exercise of functions in or of the organs or entities that exercise sovereignty, the organs of the autonomous regions or local authority organs, and with the exercise of any other office or function of a public or private nature". The LTC (Art. 27) only makes one exception to this rule, in that it permits the "unremunerated exercise of teaching or scientific research functions of a legal nature". Associated with this question of incompatibilities, and designed to avoid any possibility that constitutional justice might be contaminated by politics, is the fact that serving constitutional judges are forbidden to exercise "any functions in political parties, political associations or foundations linked thereto", and to engage in "party political activities of a public nature". What is more, albeit there is no obligation to resign as a member of a political party, "during the period in which (a Justice) is in office the status derived from membership of political parties or associations is suspended". Lastly, we should mention that the Justices of the TC are subject to the regime governing other disqualifications that is applicable to the judges of the other courts; once again, it is the Court itself that has the competence to act in this domain.

**Immunities:** First of all, we must note that Constitutional Court Justices cannot be held liable or sued in relation to their decisions, "save only under the terms and within the limits applicable to the judges of the courts of law".

Leaving aside this particular immunity, and turning to the question of civil and criminal liability, the Justices of the TC are treated in exactly the same way as the Justices of the Supreme Court of Justice and are subject to the norms that govern the effective implementation of the latter's civil and criminal liability, *mutatis mutandis*.

More specifically, Constitutional Court Justices enjoy two types of immunity. In the event that he/she commits a crime in the exercise of his/her functions, and once criminal proceedings have been brought and he/she has been charged, the proceedings cannot go any further unless the Assembly of the Republic first decides that they can. In the case of a crime that is unrelated to the exercise of his/her functions, and once the Justice has been charged, it is up to the Court itself to decide whether he/she should be suspended in order to allow the proceedings to continue. Having said this, the Court is obliged to suspend if the crime in question was committed with intent and is punishable by a prison term with a maximum limit of more than three years.

**Disciplinary regime:** The Constitutional Court has the exclusive competence to exercise disciplinary authority over its own Justices, regardless of whether the act that is the object of the disciplinary action concerns the functions of constitutional judge (i.e. the action can involve the exercise of other functions). In such cases the TC is particularly charged with "bringing the disciplinary proceedings, appointing the respective investigator from among the members of the Court, deciding on any suspension, and definitively judging the case".

**Rights, remuneration and benefits:** As is the case with the question of liability, here too constitutional judges are subject to the regime governing the Justices of the Supreme Court of Justice, and receive the same honours, rights, categories, treatment, remuneration and benefits as they do.

As we can see, both the Constitution and the ordinary law provide for a series of rights, guarantees, prerogatives and benefits that are intended to ensure that the function of constitutional judge is exercised with autonomy, independence and impartiality, and the fact is that in many ways the status of Constitutional Court Justices is not very different to that of their counterparts at the Supreme Court of Justice.

## III – ORGANISATIONAL PROCEDURE

### 1. Organisational autonomy

Turning now to the field of the Constitutional Court's **internal organisation**, the Constitution requires that the rules governing the Court's organisation and procedures be laid down by legislative act. In more specific terms it only says that the law must determine the Court's seat, and can allow the Court to operate in chambers, albeit not for every type of review. The detailed regulations governing these rules are set out in the LTC, and also in the legislative act that organises the composition and procedures of the Constitutional Court's Secretariat and support services. Reading all these instruments enables us to conclude first of all, and despite the fact that the bulk of the competence to make the rules in this domain is in the hands of the constitutional legislator or the ordinary legislator (parliament and government), that all three grant the Constitutional Court a great deal of operational leeway (as we shall see, the same is true with regard to the Court's financial regime), inasmuch as many of the norms limit themselves to attributing a series of competences in this domain to the TC itself. Moreover, the rules that are contained in the three instruments are primarily of a technical nature (e.g. that it is possible for the Court to sit in chambers, rules on

quorums, the way in which the President and Vice-President are elected). Lastly, we should point out that the TC is responsible for regulating the purely technical aspects of the details of the way in which cases are handled. All of this means that the Court's autonomy and independence are indeed preserved.

Besides that concerning the election of the President and Vice-President, the various **internal competences** which are accorded to the TC particularly include the competence: to draw up the internal regulations needed for the Court to work properly; to approve the Court's annual draft budget; and, at the beginning of each judicial year, to set the calendar of the days and times when the Court's ordinary sessions will take place. The President of the Constitutional Court also possesses a series of important personal competences. Merely as examples, these include the competence to chair the Court's sessions and direct its work, to convene extraordinary sessions, to preside over the distribution of cases, to superintend both the Court's management and administration and its Secretariat and support services, and also to install the Court's staff and exercise disciplinary authority over them, subject to appeal to the Court itself.

### 2. Financial and administrative autonomy

The TC enjoys a reasonable degree of financial and administrative autonomy, both aspects of which help guarantee that the Court can work freely and without being subject to pressures, namely those of a political nature.

Where its **financial regime** is concerned, the Constitutional Court possesses financial autonomy, particularly with regard to the organs and entities whose activities it controls. This autonomy is fundamental to safeguarding a real and effective separation of powers and is reflected in the fact that the Court has its own (annual) budget, which in turn makes it safe from any pressures from the parliament or the government.

The Court has the competence to draw up and approve its own draft budget (it is worth noting that it is the TC's Administrative Board, whose members include the Court's President, that is responsible for preparing draft budgets). The draft must then be submitted to the Government a minimum amount of time before the latter prepares the General State Budget, which is in turn finally submitted to the Assembly of the Republic, where it is put to the vote. The law does not explicitly say that the Government can amend the draft budget submitted by the TC. As such, it has been held that this possibility does exist, but that the Government is subject to "the constitutional/political imperative of acquainting the Assembly of the Republic with the content of the TC's draft in the event that it (the Government) does not accept the latter (and particularly when the Government and the Court have not been able to agree on a solution to the difference between them)" (Cardoso da Costa).

Along the same lines, the Court is responsible for autonomously managing its own budget, including the allocation of funds from the State Budget. In addition, when it comes to executing its budget, the Court possesses "the ordinary ministerial competence pertaining to matters of financial administration".

The Court's revenues come from the State Budget and from its own sources of income (for example, the product of fines and court costs, income from the sale of works published by the Court or from services provided by its documentary support unit, and that derived from specific budgets).

The Court's actual administrative autonomy essentially takes the shape of the President of the Constitutional Court's competence to "superintend both the Court's

management and administration and its Secretariat and support services", to "install the Court's staff and exercise disciplinary authority over them, subject to appeal to the Court itself", and to "appoint the staff of the Constitutional Court's Secretariat and support services". As we said earlier, the TC's power to organise itself is not total, and the Government is responsible for regulating the organisation, composition and functioning of the Court's Secretariat and support services, by Executive Law. The TC's staff roster is established by governmental order, albeit upon a proposal from the President of the Court.

### 3. The control of norms and the applicable procedural rules

On the subject of the the constitutional control of norms, the current Portuguese Constitution provides for four pure and one mixed type of **procedure**: the preventive (a priori) abstract control; the ex-post abstract control; the concrete control; the control of unconstitutionality by omission; and the "mixed control" (a procedure in which unconstitutionality is declared on the basis of a concrete control). Active procedural legitimacy depends on the type of procedure concerned and is quite diverse. The constitutional legislator was clearly concerned to give quite a reasonable range of public entities, and to some extent citizens themselves as well, the ability to initiate the control of a norm's constitutionality, and not to leave it solely to the will of the political majority of the day. On the contrary, as we shall see, that ability has been attributed to a series of independent entities and, in some cases, to parliamentary minorities. The active procedural legitimacy in the preventive (a priori) abstract control of norms, which is quite restricted, pertains to the President of the Republic (for certain norms) and the Representatives of the Republic (with regard to regional legislative acts); in the case of a decree that is issued for enactment as an organic law, it also pertains to the Prime Minister and to one fifth of the Members of the Assembly of the Republic; citizens do not possess active procedural legitimacy, but can use their right of petition (Art. 52 of the CRP) to ask one of the entities we have just listed to request a review. The active procedural legitimacy in the ex-post abstract control of norms pertains to a number of entities: the President of the Republic, the President of the Assembly of the Republic, the Prime Minister, the Ombudsman, the Attorney General, one tenth of the Members of the Assembly of the Republic, and, in certain situations, the Representatives of the Republic to the Legislative Assemblies of the autonomous regions, the presidents of the Legislative Assemblies of the autonomous regions, and one tenth of the Members of the Legislative Assembly of the autonomous region in question (the remarks we made in relation to the initiative pertaining to citizens are equally valid here). As to the concrete control of norms, the allegation of unconstitutionality can be raised by the parties to the dispute, the Public Prosecutors' Office when it is a party, and the judge by right. The procedure for unconstitutionality by omission can be initiated by the President of the Republic, the Ombudsman, and, in certain cases, the presidents of the Legislative Assemblies of the autonomous regions (once again, the same remarks in relation to citizens apply here). Finally, the procedural initiative in "mixed control" cases (in reality, these involve the ex-post abstract control of a norm which the TC has already found unconstitutional in concrete control cases at least three times) pertains to the TC's own Justices and the Public Prosecutors' Office.

We should point out that, except in the "mixed control" format, Constitutional Court Justices do not possess active procedural legitimacy and the applicable principle is thus the principle of judicial passivity – i.e. TC Justices can only act on the initiative

of other entities. As we have seen, this does not prevent constitutional judges from considering the constitutionality of texts in which the political majority of the moment sees no sign of any unconstitutionality.

In abstract terms, this possibility might be prejudiced by the fact that the entities with active procedural legitimacy are never (with the possible exception of the appeals that the Public Prosecutors' Office is legally required to bring before the TC in concrete review cases) obliged to ask for or initiate a review before the TC or the ordinary courts, as appropriate. If we look at the most recent history of constitutional justice in Portugal, we can see that where matters involving concentrated control are concerned, the frequency of review requests has to some extent been influenced by the individuals who occupy the positions with which active procedural legitimacy is associated. However, it is relatively consensual and widely accepted that this reality has more to do with aspects linked to the occupants of those posts and their personalities than to any political pressures *per se*.

As we can see, both the **ex-post** and the **preventive** control of the constitutionality of norms are enshrined in the Portuguese legal system. The work of the constitutional jurisdiction is often considered to be permeable to the political context and circumstances; however, the problem of its "politicisation" is at its most acute with regard to preventive control. The decision to prevent a norm from entering into effect is often seen as one that has a significant political impact and, at the end of the day, as a political weapon in the hands of the entities which possess the active procedural legitimacy to initiate it. To put it another way, in preventive control cases the TC intervenes within the scope of the process of producing legislation, while that process is still underway, and this has led some people to feel that the Court participates or intervenes in, or is at least in a position to influence, the process of taking the political decision which leads to the norm (or norms) that is (are) considered unconstitutional. So far in Portugal this question of the "political nature" of the TC's work in the preventive control field, and concomitantly of the possibility of conflict between the organ that controls norms and the organs that produce them, has not been enmeshed in either legal or political debate, and has rarely been raised with any vehemence. This may be due on the one hand to the parsimony and reasonableness that the President of the Republic and the Representatives of the Republic have displayed at the moments when they have had the option to ask the TC to conduct this type of review; and on the other, to the respect that the TC's decisions have generally warranted, with the majorities in the Assembly of the Republic and the Legislative Assemblies of the autonomous regions rarely making use of their ability to overcome vetoes issued on the grounds of unconstitutionality (a power that is only valid in relation to the control of certain types of legislative act). The above remarks in relation to prior review are equally applicable to the other review procedures.

The various control proceedings are to a large extent objective, and thus do not constitute a "mere procedure between parties" (Gomes Canotilho). This objectivity is clearly visible in a number of aspects of the constitutional process.

To begin with, as we have already mentioned, with the exception of the "mixed control" (in which the initiative pertains to the Justices of the TC themselves, and to the Public Prosecutors' Office), cases can only be brought when they are initiated by the entities to which the Constitution accords active procedural legitimacy. This therefore excludes Constitutional Court Justices (*ne judex procedat ex officio*). The exception

applicable to the "mixed control" was made for pragmatic reasons, inasmuch as the fact that the prerequisite for the use of this specific procedure – that the TC has already found a given norm to be unconstitutional at least three times – has been fulfilled is only directly known to the Justices of the TC (who are responsible for the judgements in question) and the Public Prosecutors' Office (which is constitutionally obliged to appeal to the TC whenever an ordinary court applies a norm that the TC has previously held to be unconstitutional).

We can see another manifestation of this objectivity in the fact that once they have been brought, it is not possible to withdraw these cases. (Once again there are a few exceptions, with discontinuance being permitted in the concrete and the preventive abstract control of norms). This is linked to the "principle of unavailability", which means that once a request has been made and accepted, the entity that submitted it can no longer withdraw it" (Cardoso da Costa).

Finally, this objectivity is also expressed in the fact that where abstract (preventive and ex post) controls and controls of unconstitutionality by omission are concerned, rigorously speaking it is not possible to talk about the existence of an adversarial procedure, even though provision is made for the possibility of hearing the organs that issued the norm in question (entities with passive procedural legitimacy). This is because it is difficult to say that any of these procedures entails the defence of subjective rights or the implementation of a "right that is subjectively important" to the parties that are intervening in the case (Gomes Canotilho). On top of this, we should note – and this rule is common to all the control proceedings – that the procedure is conducted entirely in writing, and there is no provision for any public hearing at which the entities that are intervening might expound their arguments first-hand.

Notwithstanding the non-adversarial nature of virtually all the different control proceedings, as described above, none of this affects the transparency of the Court's work. That transparency is primarily ensured by the publication of the TC's decisions in the official gazette; and the fact is that the rulings that are published in this way are not limited to the decision itself, but also include the text of the initial request, the grounds for the decision, and any dissenting opinions. Besides which, as we have seen, the principle of *audiatur et altera pars* is legally established.

Returning to the "principle of judicial passivity", it is also appropriate to mention the principle of "congruence or appropriateness", with which it is closely associated and which is also applicable to constitutional procedure. Under this principle, when the TC considers constitutionality it must remain within the strict boundaries of what it was asked to do in the request, and it is not able to consider anything *ultra petita*. In other words, the TC can and must consider the whole request, but only that request (Gomes Canotilho), and its judgement cannot address norms which are not the object of that request. This statement, which is consensual (albeit in truth not absolutely) with regard to the concrete control of norms, is not so in relation to their abstract control. Some legal theorists admit the idea of consequential or induced unconstitutionalities, which are derived from and "justified by the link or interdependence between certain precepts and the precepts that have specifically been challenged" (Gomes Canotilho).

To change the subject a little, but without moving away from the aspects related to procedural details, it is appropriate to note that the legislative act which regulates the organisation, procedure and modus operandi of the Constitutional Court (the LTC) does

not say that the Court's rapporteurs should be anonymous. We may thus conclude that the legislator did not think that making the rapporteur's name confidential would be a factor that would dissuade possible pressures (particularly political ones) and thus a condition that is needed to guarantee the independence of Constitutional Court Justices.

Lastly, to the extent that it is related – albeit indirectly or consequentially – to the autonomy and independence of both the TC and its Justices, it is important to bear in mind the question of **publicising the Court's decisions**, particularly those concerning the control of the constitutionality of norms. These decisions must be published in the official gazette – the *Diário da República* – as laid down in the LTC. It is also worth noting that the Court's sessions are not public.

One provision that is broadly related to a requirement for transparency, and more concretely to the requirement that decisions be made public, is that it is possible to know which way each of the Justices votes. Any Justice may dissent (this measure is designed to ensure their autonomy from interference from both outside and inside the Court, and thus takes the shape of the ability to write a dissenting opinion and attach it to the Court's ruling). The fact that decisions are individually subscribed by name (Cardoso da Costa) enables citizens in general to see for themselves the extent to which the TC and its Justices are autonomous and independent.

## CONCLUSION

Like virtually all the other courts of the same kind, the Portuguese Constitutional Court was designed and created against the backcloth of the Kelsenian theses that saw the constitutional court as a "negative legislator" – i.e. an organ that restricts itself to annulling normative acts, particularly those issued by parliament, when it finds that they are contrary to the Constitution. The clear and deliberately self-restrained attitude which the Portuguese TC has thus far displayed enables us to say that the Court operates in accordance with the Kelsenian model. However, this Court does possess a certain leeway when it controls constitutionality – particularly, but not only, that permitted by the open nature of the constitutional norms (e.g. the fact that it is necessary to render a number of general clauses and indeterminate concepts that are present within those norms more concrete), and that which results from the application of the hermeneutic principle of "interpretation in accordance with the Constitution". The Court has been taking advantage of this margin for manoeuvre, and we should note that it has handed down a number of so-called "interpretative" decisions. More than this, in the opinion of some people, some of the judgements handed down by this Court can be categorised as substitutive or additive decisions. One option that is available to the Court and deserves particular mention is its ability to model the effects of the ex-post abstract control of norms, in that it can declare partial instead of total nullity, prospective (*ex nunc*) instead of retroactive (*ex tunc*) effects, and the non-revalidation rather than the revalidation of norms that were revoked by the norm the Court has just declared unconstitutional, whenever this is justified by the need for legal security, fairness or an exceptionally important public interest. The consequences of its intervention in cases involving the control of unconstitutionality by omission are more limited. In effect, even if it finds that a constitutionally significant omission exists as a result of the legislator's improper failure to act, the only thing the TC can do is to inform the wayward organ of its finding. Issuing even a simple warning and requiring the passage of legislation are both out of the question. Similarly, the Court cannot give specific indications or advice as to

the content of the norms that the legislator ought to adopt. This inability to impose a given form of action on the ordinary legislator is seen as an implementation of the principle of the separation of powers, by precluding the judicial power from interfering so markedly with the legislative power. In other words, while on the one hand the control of the constitutionality of norms is one of the forms taken by the system of interorganic controls that typically characterises the checks and balances aspect of the principle of the separation of powers (a dimension of the principle of the state subject to the rule of law), on the other hand that control cannot go beyond precisely that – an external control of the legislator's work. Otherwise it might undermine the independence, not of the Constitutional Court, but rather of the legislator, inasmuch as it is well known that the separation of powers (and compliance with and respect for that separation) is one of the guarantees of the autonomy and independence of the various constitutional organs and entities, particularly those that exercise sovereignty.