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Portugal

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I. INTRODUCTION

In 2022 we witnessed a significant change in the Portuguese political landscape, since the parliamentary elections gave absolute majority to the Socialist Party, but also provided the “populist radical right” ‘CHEGA’¹ with an unprecedented level of expression.

In the meantime, a constitutional amendment, initiated, precisely by the radical-right CHEGA, is currently underway and, if successful, it will allow a revision of the Constitution (for the first time in almost twenty years) that will affect several domains. While on the streets, tensions ran high, since several workers (mostly of the education, health, and transport sectors) went on strike and participated in demonstrations to show their discontent and to demand an increase in salaries and better working conditions.

Finally, this year was also marked by interesting rulings concerning metadata, the general elections, Covid-19 measures, and security of employment.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

1. General elections and the quality of democracy

In December 2021, and after weeks of strained negotiations, the Parliament rejected the proposal for the 2022 State’s budget. The impromptu *geringonça* – a post-electoral alliance, which started in 2015, between the Socialist Party (PS) and its allies, the Communist Party (PCP) and the Left Block

(BE) – collapsed. Afterwards, the President of the Republic, Marcelo Rebelo de Sousa, decided to dissolve the Parliament and to schedule general elections.² General elections took place on 30 January 2022. In 2019, the Socialist Party (PS) had won the parliamentary elections (108 seats in the 230-seat parliament) and formed a minority government, with the parliamentary support of its left-wing allies. Again, in 2022, the PS won the elections, but this time with an absolute majority (120 seats). This came as a surprise since several opinion polls predicted a tie between the socialists and the social democrats. Turnout rate increased 2.9% (from 48,6% in 2019 to 51,5% in 2022).

Perhaps aiming at stability, the results foretell a smoother application of the EU pandemic recovery funds. However, in his victory speech, the Prime minister António Costa promised that “an absolute majority doesn’t mean absolute power”. Concerns on the quality of democracy in Portugal are valid. In fact, according to the V-DEM reports on democracy, since 2021, Portugal has been downgraded from a liberal democracy to an electoral democracy. Still and as the report states, the downgrading of Portugal should be “interpreted with caution”.³

It is important to stress that the parliamentary weight of parties changed. In the left, the Communist Party (PCP) lost 6 seats (from 12 seats in 2019 to 6 seats), the Left Block (BE) lost 14 seats (from 19 seats in 2019 to 5 seats), the People, Animals and Nature Party (PAN) lost 3 seats (from 4 seats in 2019 to just 1 seat) and Livre maintained the one seat. In the right, the social democrats (PDS) lost 2 seats (from 79 in 2019 to 77), the right

popular party (CDS-PP) surprisingly didn't elect a single member of Parliament (went from 18 seats in 2015 and 5 seats in 2019 to 0 seats), the liberals (IL) won 7 seats (from just 1 seat in 2019 to 8 seats) and the "populist radical right" 'CHEGA' won 11 seats (from just 1 seat in 2019 to 12 seats).⁴ Populist radical right is no longer an alien reality to Portuguese politics. On the contrary, by 2022, CHEGA's anti-system agenda has reached significant parliamentary representation: it has "emerged as the third most important parliamentary party, sending shock waves through the political system".⁵

2. Constitutional amendment initiative

Seventeen years after the last amendment, in 2005, the constitutional amendment process began its path by the end of 2022. On 12 October, the radical right 'CHEGA' initiated a constitutional amendment procedure. In Portugal, the initiative to amend the Constitution pertains only to the members of Parliament, and once a project of amendment is presented, any other projects must be submitted within the next thirty days.⁶ After some hesitation on whether the centre parties should follow the initiative of a radical right party or abort the process, all the parties ended up submitting their own constitutional amendment projects.⁷

In the left, the socialists (PS) proposed to change 20 articles and to add one new article, the Communist Party (PCP) suggested changing 69 articles, revoking 5 articles, and adding 6 new articles, the Left Bloc (BE) recommended changing 41 articles and adding one more article, and the People, Animals and Nature Party (PAN) advised changing 21 articles. In the right, the social democrats (PDS) proposed to change 71 articles, to revoke 5 articles and to add 4 new articles, the liberals (IL) suggested changing 38 articles, revoking 14 articles, and adding 6 new articles, and the radical right 'CHEGA' recommended changing 61 articles and revoking 5.⁸

The most contested articles for discussion are, in a decreasing order, the following: 64 (health), 66 (environment and quality of life), 149 (constituencies), 9 (fundamental tasks of the state), 35 (use of information technology), 59 (workers' rights), 65 (housing and

urbanism), 74 (education), 7 (international relations), 33 (deportation, extradition and right of asylum), and 49 (right to vote).⁹

3. Social contestation

During 2022, social contestation against the Government, through strikes and demonstrations, was intensified. The number of strike notices (1087) reported to the Minister of Labor increased 25% since the previous year, and is the highest number since 2013, just before the severe economic and financial crisis.¹⁰ Several professional sectors contested the governmental policies:

Since October 2022 onwards, several unions of *teachers and school staff* complained about low salaries and inflation, deficient career progression, increased bureaucracy, and poor working conditions. Not having achieved their goals, the strikes are intended to continue through 2023.

Health professionals of the public health system argued for better salaries and working conditions, as well as for an improved National Health Service (SNS).

Public transportation (in particular, train workers and tram workers) engaged in strikes against inflation and the cost of living.

Ground handling company employees completed a three-day strike in August at the main airports, which caused severe distress for passengers. The employees complained of low salaries and poor career progression.

III. CONSTITUTIONAL CASES

1. Ruling no. 268/2022 (*Metadata retention*)

The Constitutional Court was asked by the Portuguese *Ombudsman* to rule on the constitutionality of some provisions of Law no. 32/2008, of 17 July, which transposed Directive 2006/24/EC into national law. The provisions obliged providers of electronic communications to retain the metadata of all users for a period of one year. Plus, the law enabled the competent authorities to access the metadata provided when there were reasons to believe the data was essential to investigate, detect, and prosecute serious criminal offences.

A first question concerned the relevance of EU law in abstract constitutional control. Even though Directive 2006/24/EC was declared invalid by the Court of Justice (of the European Union), measures regarding data retention are still within the scope of EU law, particularly under articles 7 and 8 of the Charter of Fundamental Rights of the EU and article 15 of Directive 2002/58/EC. Yet, premised on the assumption that the incompatibility of national law with EU law does not generate unconstitutionality, the Court concluded that EU law might play an *indirect role* in the proceedings. Effectively, constitutional norms related to data protection should be interpreted in a way *consistent* with EU law, including with the proportionality analysis carried out by the Court of Justice in two very important rulings, *Tele2* and *La Quadrature du net*.¹¹ In an interesting separate opinion, several Justices asserted that the Court perverted the function of the principle of harmonious interpretation and that EU law (and the so-called European standard of proportionality) should apply directly to the case by virtue of the first part of Article 8, no. 4 of the Constitution.

The second point of interest had to do with the constitutional parameters involved. In line with previous case-law (Rulings no. 403/15 and 464/19), the Court restated that retention of metadata, which includes basic data and traffic data, does not amount to a restriction of the right to the inviolability of communications (Article 34 of the Constitution), but rather to a restriction of the right to privacy (Article 26) and the right to informational self-determination (Article 35). Not all Justices agreed with the exclusion of Article 34 from the relevant norms of control.

A straightforward violation of Article 35, no. 1, emerged from the fact that the law did not require the data to be stored in the European Union. As to the proportionality analysis, following closely the Court of Justice's judgments listed above, the conclusions were two-folded. As to the retention of basic data, the Court concluded that the one-year retention period looked indispensable for carrying out complex and time-consuming criminal investigations. As to retention of traffic data, which represents a more serious invasion of

privacy than the conservation of basic data, the Court figured that the restriction did not meet the requirements of proportionality in a strict sense, since it affected people who are under no suspicion of criminal activity.

The General Public Prosecutor sought to obtain the nullity of the Ruling, invoking that the Court should have limited the retroactive effects of the declaration of unconstitutionality. The request was rejected, though, for lack of legitimacy (Ruling no. 382/2022).

2. Ruling no. 133/2022 (*Repetition of general elections*)

At the end of 2021, following the Parliament's refusal to approve the 2022 State's budget, the President dissolved the Parliament and scheduled general elections for 30 January 2022. Portugal has a proportional electoral system, which comprises two electoral districts for emigrants: the district of Europe voters and the district of outside of Europe voters. Together they elect four members of the Parliament. Portuguese living abroad are allowed to vote in presence or by post in the general elections. In the latter case, the Minister for Home Affairs will send them (without charge) the ballot paper as well as two envelopes (one green, another white). In turn, the voter shall place the ballot paper inside the green envelope and both the green envelope, and a copy the voter's identification shall be placed in the white envelope and sent by post before the election day (Article 79-G of the Electoral Law for the Assembly of the Republic, hereinafter "LEAR").

The Constitutional Court, which is the last resort court on electoral matters (Article 223, no. 1, c), of the Constitution), received an appeal by a political party concerning the decision of the General Assembly of the Electoral District of Europe to void the votes of 151 polling stations of the Europe district, given that the envelopes with the ballot papers were not accompanied by a photocopy of the voter's identification document.

The Court was asked to rule on the validity of the General Assembly's decision. The appellant invoked a 2019 deliberation of the National Election Commission (an indepen-

dent administrative body) on the interpretation of Article 106-I of LEAR, the provision that regulates the procedure to follow once the electoral correspondence arrives to the General Assembly. According to the Commission, the non-inclusion of the voter's identification document in the white envelope does not affect the validity of the vote. Indeed, the votes are discharged (identified on the electoral papers) based solely on the elements available on the back of the envelope, *i.e.*, before opening the white envelope.

The Constitutional Court rejected the argument. It explained that the inclusion of the voter's identification document in the white envelope seeks to ensure the authenticity of the vote, preventing a situation where another person rather than the voter manages to cast a ballot. Hence, the only reasonable interpretation coming out of Article 106-I of LEAR is to say that the discharge of the vote occurs after the opening of the white envelope and after the confirmation of the voter's identity. The argument that the mandatory inclusion of the identification document amounts to *coercion on the voters* was also rejected by the Court. In effect, not only are electors free *not to vote*, but Portuguese living abroad are not required to vote by post, as voting in consulates and embassies is allowed as well.

Finally, since the invalid ballots were put in the ballot box alongside the valid ones, and the number of votes declared void was by large greater than the votes validly casted, the Court declared that the *overall results of the turnout* might have been compromised and ordered the repetition of the electoral acts in the affected polling stations, following Article 119 of LEAR.

3. Ruling no. 466/2022 (*Deprivation of liberty*)

There is now a growing jurisprudence related to the Covid-19 pandemic, addressing the following subjects: distribution of powers between the Parliament and the Government in the definition of criminal offences during the state of emergency and the state of calamity; constitutionality of the provisions that determined a period of compulsory confinement or prophylactic isolation concerning passengers arriving on certain flights;

constitutionality of provisions determining a mandatory confinement period for citizens subject to active surveillance by the health authorities; and procedural effects of legal measures adopted within the context of the Covid-19 pandemic.¹²

Amongst several rulings on fundamental rights, we will highlight one that followed a distinct path on a subject concerning fundamental rights theory. In Ruling no. 466/2022, the Constitutional Court was called to decide an appeal filed against a decision handed down by a Criminal Investigation Court which, granting a request for *habeas corpus* presented by the applicant, had refused to apply provisions establishing the mandatory confinement. When compared to previous jurisprudence, this decision can be considered innovative, as the Court went beyond a mere organic review of constitutionality and ruled on the substantive constitutional conformity of the provisions under review.¹³ Thus, after deeming mandatory isolation as an encroachment on the personal freedom guaranteed by Article 27, no. 1, of the Constitution, the Court argued that these measures entailed an actual deprivation of liberty and not a mere restriction to that right. The Court then concluded, by majority, that the measures contained in the provisions under review were forms of deprivation of liberty not authorized by Article 27, no. 2 and 3, of the Constitution, and therefore deemed them substantively unconstitutional.¹⁴

4. Ruling no. 0939/15.9BEPRT 0620/17 (*Security of employment*)

This ruling, delivered by the Supreme Administrative Court (SAC), analysed Article 92, no. 2, of Act no. 59/2009¹⁵, a provision according to which fixed-term employment contracts of civil servants cannot be converted to contracts of indefinite duration – meaning that they will always terminate at the end of their last renewal.

In the case, the appellant had been hired, through a fixed-term employment contract, to work on the municipal pools. This contract had been successively renewed, from November 2000 until November 2013, when the employer decided to prevent any further

renovations and provoked the end of the employment relation. The appellant believed that her contract should have been converted and argued that the aforementioned prohibition is in violation of EU law, since Directive 1999/70/EC forbids an excessive use of fixed-term contracts.

The SAC referred to the Court of Justice (of the EU) for a preliminary ruling, asking whether the national regime was in violation of the Directive. In return, the Court of Justice¹⁶ stated that the Directive should be interpreted as opposing the legislation of a Member State which absolutely forbids, in the public sector, the conversion of successive fixed-term contracts into open-ended contracts, when there are no other effective measures in place to prevent and punish the abusive celebration of successive fixed-term contracts.

Following this ruling, the SAC set out to determine whether, in comparison with the private sector, the legal regime provided an equally effective answer to this kind of situation in the public sector. However, it ascertained that the only consequences, regarding the abusive celebration of successive fixed-term contracts, were the nullity of such agreements and the possible civil, disciplinary, and financial responsibility of the involved organs or services' head officers. Which was deemed to be neither equivalent to the solutions present in the private sector (since, in that context, the Portuguese Labour Code imposes the conversion of such contracts to contracts of indefinite duration), nor effective to prevent this scenario. In fact, not only the responsibility of head officers is triggered regarding the State (and not the affected workers), but also the feebleness of the legal regime is clear, as highlighted not only by this case, but also by other similar situations found in case-law, and by the several processes of integration of precarious workers that have been lately promoted in the public sector. For this reason, the provision under analysis was ruled to be in violation of Directive 1999/70/EC.

Finally, the SAC also debated whether the conversion of these contracts to contracts of indefinite duration was in violation of Arti-

cle 47 of the Portuguese Constitution, which enshrines the right of all citizens to, equally and freely, access the public sector, usually through the means of an open tender. The Court stated that the equal access to public employment cannot supersede the right to security of employment and that a deviation to the aforementioned rule should occur when imposed by the protection of good faith, protection of trust, and proportionality. In sum, a restriction of Article 47 of the Constitution was deemed adequate (making it unnecessary to invoke the primacy of EU law). Therefore, the appellant's employment contract was considered to have converted to a contract with indefinite duration, and her dismissal was ruled unlawful.

5. Ruling no. 468/2022 (*Private property*)¹⁷

Once again following the initiative of the Portuguese *Ombudsman*, the Constitutional Court was called to analyse Article 168-A, no. 5, of Act no. 2/2020 (which approved the 2020 State's Budget) in relation to the rights to property and to private economic initiative.

This provision determined that, given the pandemic context and regarding lease agreements for stores in shopping centres, until 31 December 2020, tenants were exempted from paying the minimum part of the rent (in fact, these rents are divided in two segments: a minimum, *i.e.*, fixed part, that relates to the concession of the space and the provision of associated services, and another part, variable, dependent on the shop's business volume).

The Court noted that, unlike the emergency measures directed at housing and general non-housing rental agreements, where tenants were given a moratorium, in this case there was an actual exemption of payment of part of the rent. And since the rights that arise from contracts are part of the creditor's patrimony and, therefore, covered by the constitutional guarantee of ownership, this measure was considered to restrict the right to property.

The Court acknowledged that the State's intervention aimed at aiding the tenants of shopping centres, whose activity was undoubtedly affected by the pandemic, and that it was adequate to that effect. However, it

breached the principle of proportionality – since any restriction must be deemed necessary, indispensable to achieve the envisaged goals – given that there were other avenues at the State's disposal to achieve the same purpose (such as credit lines, moratoria, etc.), overburdening shopping centres' proprietors. Furthermore, the principle of proportionality in a strict sense was also affected, since the sacrifice imposed to the owners of shopping centres was considered greater than the benefits afforded to their tenants.

Still, given the provision laudable teleology and the nature of its defect, the Court decided to merely declare a partial unconstitutionality, through a “reductive” decision. In effect, such decisions will be possible when it is clear that the legislator prefers a partial measure to its complete elimination; when the removal of the rule creates a void incompatible with the prohibition of legislative deficit; when the extent of the reduction is provided by a subsequent or contemporary rule, applicable in the same or a similar domain; and, finally, when the avenues to remedy legal gaps are insufficient.

Therefore, inspired by the new legal rule enshrined in the States' budget for 2021, the Court declared that the provision under analysis is unconstitutional only when it exempts the tenants from paying the fixed part of their rent beyond a rent's reduction that is proportional to the reduction of the monthly business volume, up to fifty per cent of its value, when their establishments have a drop in their business volume (considering the volume of the same month of 2019, or, in its absence, the average business volume of the six months previous to the Presidential Decree no. 14-A/2020¹⁸, or of a smaller period, if applicable).

IV. LOOKING AHEAD

At the beginning of 2023, the Constitutional Court issued a judgement upholding the unconstitutionality of the diploma on euthanasia (Ruling no. 5/2023), on the grounds of the lack of precision of its norms. The decree has returned to the Parliament, which

for the second time in a row (see Ruling no. 123/2021) sought to address the faults voiced by the Court. Although the President of the Republic vetoed the renewed decree, the Parliament overrode the veto by an absolute majority and forced the President to sign the legislation. Yet, it is not clear whether the Constitutional Court will have the chance to rule on the constitutionality of the new Act, this time via an *ex post* review.

Lastly, it is yet to be seen whether the constitutional amendments under discussion in the Parliament will manage to solve some of the unconstitutionality detected in Rulings dealing with interference with communications, data retention, and mandatory confinement during the Covid-19 pandemic.

V. FURTHER READING

Gonçalo de Almeida Ribeiro, ‘What is constitutional interpretation? ICON 1-32 (2022).

Jorge M. Fernandes, Pedro C. Magalhães, and António Costa Pinto, *The Oxford Handbook of Portuguese Politics* (Oxford University Press, 2022).

Manuel Fontaine Campos, Catarina Santos Botelho, and Bruno Mestre, ‘The European Social Charter’s applicability by national courts’ in *The Academic Network on the European Social Charter and Social Rights*, Stefano Angeleri & Carole Nivard (eds), *The European Social Charter: A Commentary*, Vol. I (Brill Nijhoff, 2022).

Evidence’, *Oxford Research Encyclopedia of Politics* (Oxford University Press, 2022).

Marta Vicente, ‘Should arbitrators “live” in public law arbitration? The case for a more demanding standard of independence and impartiality’ (2022) 9 *e-Publica* 55.

Nuno Garoupa and Catarina Santos Botelho, ‘Judicial Dissent in Collegial Courts: Theory and Evidence’, *Oxford Research Encyclopedia of Politics* (Oxford University Press, 2022).

References

1 See Riccardo Marchi and André Azevedo Alves, ‘The right and far-right in the Portuguese democracy (1974-2022)’, in Jorge M. Fernandes, Pedro C. Magalhães & António Costa Pinto (eds.) *Oxford Handbook of Portuguese Politics*, Oxford University Press, 2022, 102-118, 103.

2 See Ana Teresa Ribeiro and Catarina Santos Botelho, ‘Portugal’, in Richard Albert, David Landau, Pietro Faraguna, Simon Drugda & Rocio De Carolis (eds.), *2021 Global Review of Constitutional Law*, Università degli Studi di Trieste and The Program on Constitutional Studies of the University of Texas at Austin, 2022, 284-288.

3 ‘Democracy Report 2022 – Autocratization Changing Nature?’, V-DEM Institute, University of Gothenburg, Gothenburg, 2022, 14-15.

4 Results available at: www.pordata.pt.

5 Riccardo Marchi and André Azevedo Alves, cit., 116.

6 Article 285 of the Portuguese Constitution.

7 The projects are all available, in Portuguese, in the following links: <https://www.parlamento.pt/ActividadeParlamentar/Paginas/IniciativasLegislativas.aspx>

8 See ‘Apresentação Comparada dos Projetos de Revisão Constitucional – 12.º Processo de Revisão Constitucional’, *Divisão de Informação Legislativa Parlamentar, Assembleia da República*, 2022, 9.

9 *Ibid.*

10 Source, in Portuguese: <https://www.dgert.gov.pt/relacoes-laborais/greves/greves-greves>.

11 *Tele2 Sverige AB*, joined cases C-203/15 and C-698/15, Judgment of the Court (Grand Chamber), 21 December 2016, ECLI:EU:C:2016:970; and *La Quadrature du Net*, Joined Cases C-511/18, C-512/18 and C-520/18, Judgment of the Court (Grand Chamber), 6 October 2020, ECLI:EU:C:2020:791.

12 We follow closely ‘Rulings of the Constitutional Court of Portugal related to the Covid-19 pandemic’, Portuguese Constitutional Court, 2022, available at the website of the Portuguese Constitutional Court: <https://www.tribunalconstitucional.pt/tc/en/acadres.html?do=acadres&wano=2022&wid=6936>

13 ‘Rulings of the Constitutional Court of Portugal related to the Covid-19 pandemic’, cit., 20.

14 *Ibid.*

15 This diploma enshrined the legal regime of the employment contract of civil servants and was revoked by Act no. 35/2014 (which contains the new legal regime applicable to civil servants), which kept the same rule in Article 63, no. 2.

16 Process 135/20, of 30 September 2020, *JS v Câmara Municipal de Gondomar*.

17 This was a controversial ruling, with several dissenting opinions.

18 Which declared the state of emergency due to the pandemic.