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# 2019 Global Review of Constitutional Law

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Editors

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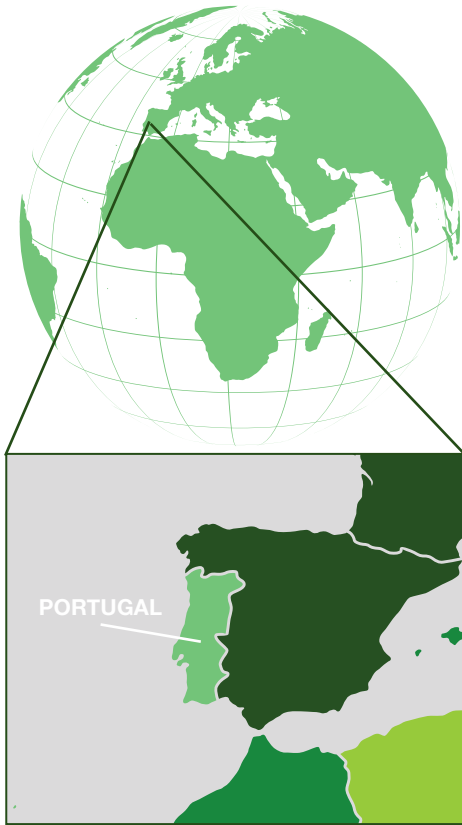
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## **372 SUMMARY**



# Portugal

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## I. INTRODUCTION

2019 was a year marked by political change and social contestation. On the political quadrant, we saw the end of the highly publicized *geringonça* (contraption), due to the lack of consensus between the Socialist Party and its previous left-wing allies. We now have a minority socialist Government that will have to seek the support of other parties when necessary. The Portuguese Parliament also became more fragmented in the 2019 legislative elections, with the election of Parliament members by parties that, until then, had not achieved representation (in particular, a radical right-wing party was able, for the first time in our democracy, to elect one member of Parliament).

The social field was also very active, with the summoning of several strikes in different professional sectors. Strikes by the drivers of dangerous goods transport vehicles were particularly felt, which led the Government to invoke administrative emergency powers. But discontent was also very acute among health professionals, teachers, and even policemen. And since the Government did not correspond to their demands, this scenario is likely to repeat itself in the next year.

For its part, constitutional jurisprudence focused, once again, on the matter of family rights (revisiting its landmark decision on surrogacy, but also its previous rulings on paternity proceedings), while reaffirming the rights to citizenship and personality development, as well as to privacy and the protection of communications.

## II. MAJOR CONSTITUTIONAL DEVELOPMENTS

### 1. *European elections and low turnout rate*

In the 2019 European elections, the turnout rate increased in 20 of the 28 EU states.<sup>1</sup> By contrast, the turnout rate in Portugal was very disappointing, scoring merely 31.40% and leaving the remaining 68.60% to abstention.<sup>2</sup> The centre-left Socialists (PS) won the 2019 European Parliamentary (EP) elections with 33.4%. This result was quite surprising and marked the first time that a sitting Government won a European election.

Notwithstanding the new measures that were introduced to boost voting in Portugal (such as advanced voting, pilot experiences with electronic voting, or postal voting abroad), abstention rates in the Portuguese 2019 EP elections hit record levels.<sup>3</sup> Further studies

<sup>1</sup> <http://www.europarl.europa.eu/news/en/headlines/eu-affairs/20190523STO52402/elections-2019-highest-turnout-in-20-years>

<sup>2</sup> See <https://election-results.eu/>

<sup>3</sup> Catarina Santos Botelho, 'European Elections: The Silence of the Lambs and the Dangerous Political Resignation – The Portuguese Perspective', in *DCU Brexit Institute Blog*, 03/06/2019, available at: <http://dcubrexitinstitute.eu/2019/06/european-elections-the-silence-of-the-lambs-and-the-dangerous-political-resignation-in-portugal/>

are being held to try to understand the reasons behind abstention rates and to put forward possible solutions to overcome endogenous and exogenous electoral problems.<sup>4</sup>

## 2. Legislative elections

In the 2015 legislative elections, the colligation PàF (Portugal à Frente) – which gathered the center-right party PSD (Social Democratic Party) and the conservative CDS-PP (Popular Party) – won by 39%. However, as the colligation PàF was not able to pass its governmental program by the Parliament, it was dismissed just twenty-eight days after its nomination, making it the shortest Government ever in the Portuguese constitutional democracy.<sup>5</sup>

Aiming at stability, the President of the Republic then nominated a Government drawing on the Socialist Party (which was the second most voted party) after the other left-wing parties – the coalition of the Communist Portuguese Party (PCP) and the Greens (‘Os Verdes’), and the Left Bloc (BE) – clarified that they would provide parliamentary support.

This arrangement was regarded abroad with some curiosity. Would it last? Would it be repeated with the same partners or with new ones? Or would the socialists secure an absolute majority in the following elections and govern without allies?

This unprecedented arrangement, that many believed would fade away soon at the first political impasse, surprisingly lasted through the four-year parliamentary term. It became known, not without a pejorative connota-

tion, as ‘contraption’ (*geringonça*). This contraption was not a coalition, but instead a post-electoral alliance that was even written and made public. Naturally, the agreement benefited both parties: the communists-greens and the Left Bloc would support the minority socialist Government while at the same time ensuring the implementation of some of their political initiatives. During the legislature, the Government was able to sustain the delicate balance between complying to eurozone budget commitments and partially reversing austerity measures.

Four years later, and as some predicted, ‘the likelihood of a potential *geringonça 2.0*’ highly depended on the electoral result for the PS.<sup>6</sup> And, in fact, the political landscape changed in the 2019 legislative elections, which resulted in political fragmentation. The communists and the Green Party ‘Os Verdes’, as well as the PSD and the CDS-PP, lost a considerable number of votes. In turn, the People, Animals and Nature Party (PAN) had an excellent result and two new right-wing parties (the radical right ‘CHEGA’ and the liberal ‘Iniciativa Liberal’) entered the Portuguese Parliament as well as the new left-wing party ‘LIVRE’.

Immediately after the elections, the Prime Minister (PM), António Costa (of the Socialist Party), considered renewing the *geringonça* with one or more parties. However, after meetings with the other left-wing parties represented in the Parliament, the PS decided that it would govern as a minority Government and seek support from the other parties when necessary.<sup>7</sup>

## 3. Social contestation

During 2019, social contestation against the Government, through strikes and demonstrations, was intensified. Several professional sectors contested governmental policies:

a. *Drivers of dangerous goods transport vehicles* complained about low wages and poor working conditions. Their several strikes impacted public transportation, airports, factories, and petrol stations.<sup>8</sup> The PM, António Costa, argued that these strikes jeopardized essential social needs and, therefore, invoked emergency powers.

b. *Doctors, joined by nurses*, protested during a two-day national strike that gathered a high level of support amongst health professionals of the public health system. Apart from salary revindications, doctors argued for a stronger National Health Service (SNS), suggesting measures such as ensuring a family physician for every citizen, decreasing waiting lists, offering longer appointments, and so on. As far as nurses were concerned, they demanded better working conditions, the recognition of the health sector’s dignity for the benefit of patients and health professionals, an earlier retirement age, and career progression.<sup>9</sup>

c. *Teachers* reinforced the strikes that were held in 2018. They argued for retroactive pay raises (going back almost a decade), less working hours per week, and the protection of the profession’s dignity.<sup>10</sup>

<sup>4</sup> See João Cancela and Marta Vicente, Portugal Talks – Abstensão e participação eleitoral em *Portugal: diagnóstico e hipóteses de reforma* (Portugal Talks 2019), available at: [https://www.pttalks.pt/wp-content/uploads/2019/11/Estudo\\_Portugal-Talks\\_Abstensão-e-Participação-Eleitoral-em-Portugal\\_2019-1.pdf](https://www.pttalks.pt/wp-content/uploads/2019/11/Estudo_Portugal-Talks_Abstensão-e-Participação-Eleitoral-em-Portugal_2019-1.pdf)

<sup>5</sup> Catarina Santos Botelho, ‘Portugal: The State of Liberal Democracy’, in Richard Albert, David Landau, Pietro Faraguna & Simon Drugda (eds.), *2017 Global Review of Constitutional Law*, I.CONnect and the Clough Center for the Study of Constitutional Democracy at Boston College, 2018, pp. 230-234.

<sup>6</sup> Celso Gomes, ‘Portuguese Election: What comes after the Geringonça?’, available at: <https://europeelects.eu/2019/10/05/portuguese-election-what-comes-after-the-geringonca/>

<sup>7</sup> José Santana Pereira, ‘Goodbye “Geringonça”? The 2019 Legislative Elections in Portugal’, available at: <https://www.enainstitute.org/en/publication/jose-santana-pereira-goodbye-geringonca-the-2019-legislative-elections-in-portugal/>

<sup>8</sup> <http://www.marsecreview.com/2019/05/fuel-tanker-drivers-threaten-new-strike-in-portugal/>

<sup>9</sup> <https://www.theportugalnews.com/news/first-of-doctors-strikes-sees-three-quarters-walking-out/50170>

<sup>10</sup> <https://www.theportugalnews.com/news/teachers-threaten-strike-in-october/51161>

d. Members of the *Public Security Police* (PSP) and the *Republican National Guard* (GNR) manifested outside the Parliament and demanded better working conditions and higher salaries.<sup>11</sup>

As a global answer to these revindications, the Government stressed the need for financial responsibility and sustainability as well as maintenance of the country's credibility abroad.

### III. CONSTITUTIONAL CASES

#### 1. *Ruling 465/19: Medically assisted procreation (surrogacy)*

Under an anticipatory review of constitutionality, the Portuguese Constitutional Court (PCC) analyzed Article 2 of Bill no. 383/XIII, which intended to introduce changes to Act no. 32/2006 (the diploma that regulates medically assisted procreation).

This provision reintroduced Article 8 § 8 of that same Act, which had been previously subjected to constitutional review and declared unconstitutional. Therefore, the present judgement revisited the reasoning behind that first decision (Judgement 225/2018).

Article 8 § 8 (in articulation with Article 14 § 5 of Act no. 32/2006) allowed surrogates to revoke their consent, but merely until the beginning of the medically assisted procreation treatments. In Judgement 225/2018, the PCC stated that such a rule was incompatible with the fundamental rights to personality development and to reproductive self-determination.

To substantiate this decision, the PCC stressed that these procedures are only admissible, with respect to these rights, because the surrogate has given her consent. In fact, the highly personal nature of the obligations stemming from this contract demands

that they should only be complied with voluntarily. And such volition must be ensured in all phases: the contract's conclusion, the implementation of medically assisted pregnancy techniques, the pregnancy, the birth, and the child's relinquishing to the beneficiaries.

Therefore, one must ensure that the consent is truly informed, encompassing this process's full extent, which can be put into question since the consent was given even before the pregnancy itself. In fact, during surrogacy, the woman's body, as well as her psychological and emotional well-being, undergo several changes. Pregnancy is a complex, dynamic, and unique process, during which there is the creation of a bond between the pregnant woman and the fetus. The possibility to revoke consent is the only insurance that each of these phases is truly voluntary and, therefore, still an expression of the surrogate's right to personality development.

This means that the surrogate must be allowed to deviate from this contract because she has decided either to terminate the pregnancy (in accordance with the law), or to pursue her own parenting project. To try to enforce this contract against her will would entail the surrogate's instrumentalisation, encroaching her self-determination and dignity. These considerations are equally valid if the surrogate is no longer willing to give the child up. However, in this case, the decision must rest on the child's superior interest, which demands a case-by-case analysis.

In the present judgement, the PCC concluded by stating that Article 2 of Bill no. 383/XIII intended to reintroduce the exact same solution that had been previously censured, without there being any supervening circumstances that would justify the reopening of this debate. Therefore, it considered this arti-

cle to be equally unconstitutional for breaching the fundamental rights to personality development and to raise a family.

#### 2. *Ruling 464/19: Meta-data*

The PCC analyzed the constitutional compliance of Articles 3 and 4 of Act no. 4/2017 (which regulates the special procedure to access telecommunications and Internet data by information officers of the Portuguese Internal Intelligence Service and the Portuguese External Intelligence Service) by means of a subsequent abstract review of constitutionality.

Article 3 allowed the access to baseline data and equipment location data in order to gather necessary information to safeguard national defense and homeland security, and to prevent acts of sabotage, espionage, terrorism, proliferation of weapons of mass destruction, and highly organized criminality. Article 4 allowed the access to traffic data; to provide the necessary information to prevent acts of espionage and terrorism.

In both cases, such access was dependent on the previous authorization of one of the criminal sections of the Portuguese Supreme Court to ensure an appraisal between the relevance of the request and the safeguard of fundamental rights (Article 5 of Act no. 4/2017).

In this judgement, the PCC promoted an interjurisdictional dialogue, considering EU law and the jurisprudence of the EUCJ as well as the ECHR and the jurisprudence of the ECtHR. To this effect, the PCC considered that, in abstract, a restriction to fundamental rights on this matter would be admissible according to both Article 15 § 1 of Directive 2002/58/EC<sup>12</sup> and Article 8 of the ECHR, assuming a few conditions were met.

<sup>11</sup> <https://www.telesurenglish.net/news/Portugal-Police-Demand-Better-Working-Conditions-Higher-Wages-20191121-0006.html>

<sup>12</sup> It should be noted that on Judgement *Tele2* (joined Cases C-203/15 and C-698/15), the EUCJ stated that the directive should be interpreted as precluding national legislation governing the protection and security of traffic and location data and, in particular, access of the competent national authorities to the retained data, where the objective pursued by that access, in the context of fighting crime, is not restricted solely to fighting serious crime, where access is not subject to prior review by a court or an independent administrative authority, and where there is no requirement that the data concerned should be retained within the European Union (point 2 of the ruling). Furthermore, when no longer liable to jeopardize the investigations, the persons affected should be notified of these procedures, to enable them to exercise their right to a legal remedy (par. 121).

The PCC also differentiated between the data concerning intersubjective communication and the data that does not relate to any communication but only identifies the subjects (their name, address, phone number) and the equipment location data as well as the traffic data that only involves the communication between the subjects and a machine, such as website consultation.

The applicants only called upon the infringement of Article 34 § 4 of the Portuguese Constitution, which enshrines the fundamental right to inviolability of one's home and to privacy of correspondence. However, the PCC, under Article 51 § 1 of the Law of the Constitutional Court, which allows the Court to consider other provisions, decided to also take into account Articles 26 § 1 and 35 §§ 1, 3, and 4 of the Portuguese Constitution. In fact, baseline data, which does not concern communications *per se*, according to the PCC's jurisprudence, is not encompassed by the right to confidentiality of communications, but instead, by the right to privacy (Article 26) and to informative self-determination (Article 35).

Taking that into account, and regarding Article 4, the PCC made a distinction between data that concerns intersubjective communication and data that does not. Concerning the first category, the Court stated that such an access is unconstitutional. In fact, the Portuguese Constitution only allows for restrictions on the contents of Article 34 within criminal procedures. And since that is not the case, where information officers are concerned, the Portuguese legislator did not respect the constitutional choice.

Still on Article 4 but considering now the data that does not involve an intersubjective communication, the PCC found that this norm did not state objective criteria for the selection of the citizens affected by these measures. In fact, a mere suspicion of involvement, in any way, in the preparation or execution of terrorist attacks or serious crimes would allow the state to target a large number of people without them being aware,

and therefore, without allowing them to subsequently ask for the destruction of those materials and the accountability of those involved in such an access.<sup>13</sup>

In sum, the PCC declared the unconstitutionality, with general binding effects, of Article 4 due to the violation of Article 34 § 4 of the Portuguese Constitution concerning the access to traffic data that involves intersubjective communication, and also due to the violation of Articles 26 § 1, 35 §§ 1 and 4, and 18 § 2 of the Portuguese Constitution regarding the access to traffic data that does not involve intersubjective communication. In turn, the PCC considered that the choices enshrined in Article 3 were both adequate and necessary due to the inexistence of less harmful means to achieve the same results. However, this did not apply to the part that mentioned the usage of this data to safeguard national security and homeland security due to the lack of determinability of these concepts. For this reason, Article 3 was declared unconstitutional, with general binding effect, on the part it bestowed on information officers access to baseline data and equipment location data to gather the necessary information for the safeguard of national defense and homeland security due to the breach of Articles 26 § 1 and 35 §§ 1 and 4, as well as Article 18 § 2 of the Portuguese Constitution. This ruling does not apply to the part of Article 3 that allows access to this data in order to provide the necessary information to prevent acts of sabotage, espionage, terrorism, proliferation of weapons of mass destruction, and highly organized criminality.

### *3. Ruling 497/2019: Portuguese Citizenship*

This judgement was issued under a constitutional review applied to a concrete case. It concerned Article 6 § 1, d) of Act no. 37/81, the Nationality Law (version of 2015), according to which, in case of naturalization, the applicant cannot have been convicted of a crime punishable by a penalty of up to three or more years of imprisonment. The applicant in question had been given a one-year suspended sentence for robbery, which is punishable

by up to eight years of imprisonment.

Meanwhile, this rule was modified in a way that would allow the applicant to obtain Portuguese citizenship. But since the citizenship acquisition takes effect from the moment it is bestowed onwards, the PCC deemed it necessary to analyze this matter.

The PCC emphasized that the right to citizenship has a fundamental nature (it is enshrined in Article 26 § 1 of the Portuguese Constitution) comprised of not only the right to retain it, but also the right to acquire it when legal conditions are met. Therefore, these requirements must be adequate, necessary, and proportional, ensuring the assessment of the applicant's bond to the Portuguese community. The imposition of criteria unrelated to this evaluation shall be considered disproportional.

In this case, the applicant came from a Portuguese-speaking country, had been living in Portugal since he was a minor, and had completed here at least one cycle of education. He was convicted to a very light sentence, and the court even determined that this conviction should not be transcribed to his criminal record.

The PCC also noted that suspended sentences are limited to reduced penalties (related to petty and average criminality) and they can only be bestowed when the offender's life circumstances and behavior (before and after the crime), as well as the events surrounding the crime, make it possible to conclude that the mere reproach and threat of imprisonment are sufficient. The requirements to prevent the sentence's transcription to the offender's criminal record are even narrower. Hence, Article 6 § 1, d), by imposing a condition merely based on abstract penalties, prevents the consideration of factors that objectively reflect the offender's bond to the Portuguese community. Therefore, there is a breach of Articles 26 § 1 and 18 § 2 of the Portuguese Constitution, since this is not a necessary imposition, as the access to Portuguese citizenship could lie on less burdensome requirements.

<sup>13</sup> The PCC considered, furthermore, that the demand for a clearer and more precise regime is in line with the requirements established in the EUCJ and ECtHR's jurisprudence.

By thwarting the weighting of circumstances that allowed for a lighter sentence, the provision at hand also infringes Article 30 § 4 of the Portuguese Constitution, according to which no conviction shall entail, as a necessary effect, the loss of any civil, professional, or political rights.

#### 4. Ruling 394/19: Dismissal of paternity proceedings

Articles 1873 and 1817 § 1 of the Civil Code rule that a claim for the establishment of paternity may be brought at any time until the child reaches the age of majority.<sup>14</sup> However, the right to seek paternity recognition by judicial decision lapses ten years after the person has attained the age of majority.<sup>15</sup>

Last year, and in dissonance with previous constitutional jurisprudence, the PCC, in a concrete review case, stated that Articles 1873 and 1817 § 1 of the Civil Code violated Articles 18 § 2, 26 § 1, and 36 § 1 of the Constitution on the grounds that the protection of the interests pertaining to the investigating party should not be limited, and that, even if it were allowed, such a restriction was not justified due to the lack of proportionality among the various conflicting interests.<sup>16</sup>

According to Article 79 § 1 of the Law of the Constitutional Court, since in this concrete review ruling the Court decided ‘there has been unconstitutionality (...) in a manner different to what was previously adopted for the same rule by any of the Court’s sections’ (in the case, contrary to Ruling 401/2011), ‘an appeal can be made on this decision before the Court’s plenary, compulsory for the

state Attorney when he intervenes in the case as appellant or respondent’.<sup>17</sup>

Recently, on Ruling 394/19, the Plenary of the PCC ruled that the imposition of a ten-year limit, present in Articles 1873 and 1817 § 1 of the Civil Code, was not unconstitutional.<sup>18</sup> The Court held that ‘the constitutional problem raised by the legal expiry periods for the exercise of the right of action does not lie in the possibility of its existence but in the restrictive intensity of its effects. It is accepted, therefore, that the state, through the legislator, can establish expiry periods for the exercise of the right of action in general, which means setting (temporal) limits to effective judicial protection’.<sup>19</sup>

In his dissenting opinion, Manuel da Costa Andrade, the president of the PCC, sustained that ‘from the point of view of the values and interests at stake, the filing of the paternity investigation action always arrives at the right time and in good time. Never too soon, never too late. (...) It is thus clear that personal identity, a very personal value of eminent dignity that pontificates in the teleological horizon of the right to the recognition of paternity, does not see its axiological density and weight progressively faded and reduced over time’.

#### IV. LOOKING AHEAD

In September and October 2020, there will be elections in the autonomous regions of Azores and Madeira. In 2020, the Parliament will debate the following issues: (a) legalization of euthanasia; (b) legalization of cannabis; (c) legalization of prostitution;

(d) prohibition of bullfighting; (e) policies to increase fertility rates; (f) policies to attract citizens to rural land in the desertified areas of Portugal; (g) measures to improve the fight against corruption; and (h) legislation on shared parenting (shared physical custody) after separation and divorce.

#### V. FURTHER READING

Benedita Menezes Queiroz, ‘The Impact of EURODAC in EU Migration Law: The Era of Crimmigration?’ (2019), III (1) *Market and Competition Law Review* 157

Catarina Santos Botelho, ‘Constitutional narcissism on the couch of psychoanalysis: Constitutional unamendability in Portugal and Spain’ (2019), 21 (3) *EJLR* 346

Catarina Santos Botelho, ‘Is there a middle ground between constitutional patriotism and constitutional cosmopolitanism? The Portuguese Constitutional Court and the use of foreign (case) law’, in Giuseppe Franco Ferrari (ed.), *Judicial Cosmopolitanism – The Use of Foreign Law in Contemporary Constitutional Systems* (Brill/Nijhoff, 2019)

Gonçalo Almeida Ribeiro, *The Decline of Private Law – A Philosophical History of Liberal Legalism* (Hart Publishing, 2019)

João Cancela and Marta Vicente, *Portugal Talks – Abstenção e participação eleitoral em Portugal: diagnóstico e hipóteses de reforma* (Portugal Talks, 2019)

<sup>14</sup> Act no. 14/2009, of 1 April 2009, which amended the text of Article 1817 § 1 to its current version.

<sup>15</sup> Article 1817 § 3 of the Civil Code adds a supplementary three-year period, in addition to the general ten-year time limit, within which paternity proceedings can be filed.

<sup>16</sup> Ruling 488/2018, of 4 October 2018 < <http://www.tribunalconstitucional.pt/tc/acordaos/20180488.html> > accessed January 2020. See Catarina Santos Botelho, ‘Portugal’, in Richard Albert, David Landau, Pietro Faraguna & Simon Drugda (eds.), *2018 Global Review of Constitutional Law*, I.CONnect and the Clough Center for the Study of Constitutional Democracy at Boston College, 2019, pp. 243-247, pp. 246-247.

<sup>17</sup> < <http://www.tribunalconstitucional.pt/tc/en/tclaw.html> > accessed January 2020.

<sup>18</sup> Ruling no. 394/19, of 3 March 2019 < <http://www.tribunalconstitucional.pt/tc/acordaos/20190394.html> > accessed January 2020.

<sup>19</sup> Par. 2.2.3.

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