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Concept Paper and Questionnaire
5th Congress of the World Conference on Constitutional Justice
on "Constitutional Justice and Peace"
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Introduction

The World Conference on Constitutional Justice unites 116 Constitutional Courts and Councils and Supreme Courts (hereinafter, "constitutional courts") in Africa, the Americas, Asia, Australia/Oceania and Europe.

It promotes constitutional justice – understood as constitutional review including human rights case-law – as a key element for democracy, the protection of human rights and the rule of law. These fundamental principles are closely linked to peace.

The 5th Congress of the World Conference in Bali in 2022 will deal with the topic "Constitutional Justice and Peace".

Definition of peace

For the purpose of the discussions at the 5th Congress, the topic of “peace” is *not* the concept of public international law that relates to interstate conflicts because they are typically out of the remit of constitutional courts.

The concept of peace is perceived in the sense of peace within the state, as the peaceful settlement of conflicts. This notion therefore refers to foremost to social peace and thus relates to all countries, on all continents.

In some countries the constitutional courts also had an essential role in pacifying the situation following internal armed conflict and some constitutions explicitly refer to peace and reconciliation as a goal to be achieved. The topic of the 5th Congress includes discussion of such experiences.

Jurisdiction of Constitutional Courts

Many constitutional courts have in common the exercise of a multiple control mission, including that of the constitutionality of norms, the settlement of disputes between state bodies and that or the regularity of the electoral processes leading to the election of the authorities producing these norms. In all these functions, constitutional courts can be an actor of regulation and stabilisation of political life and thus contribute to achieving peace.

Constitution itself as a problem, role of the constitutional judge

While conflict often originates in the political sphere and can have numerous causes, even the constitution itself can – through its provisions or the absence of provisions - lead to deficiencies, which result in conflict. In interpreting the constitution, the constitutional judge can make a positive contribution by attenuating the cause of conflict. The constitutional judge can thus contribute to pacifying the political life by favouring solutions that remain within the framework of the constitutional order.

It may also happen that a constitutional interpretation of the Court is itself challenged and provokes violent reactions.

Fundamental principles: Human Rights protection / democracy / Rule of Law

Human rights are an essential port of modern constitutions and in countries without such explicit provisions the courts have developed human rights case-law. The protection of human rights is a precondition to the settlement of conflicts and to peace. As key actors in the promotion of human rights, constitutional courts directly contribute to social peace.

The safeguarding of democratic principles by the constitutional court too contributes to peaceful relations between majority and opposition and a peaceful transition of government following elections. By ensuring the regularity of the electoral process and that state actors respect the Constitution, the constitutional court can also contribute to the reinforcement of the legitimacy of the representatives of the citizens and of their acts and make them acceptable even to those who oppose these acts.

By ensuring the respect for the rule of law, the constitutional court contributes to the citizens' trust in the law and the courts. This confidence is further enhanced by the implementation of the individual's access to the Constitutional Court (direct access or exception of unconstitutionality). This is a precondition for peaceful recourse to the courts rather than to violent action.

Preventive function

Courts are usually called to settle conflicts between the parties and their – after any appeals – final judgment settles conflict with binding force. The settlement of past conflicts also has a preventive function. The knowledge about settled case-law often allows the potentially conflicting parties to know their rights and to come to an agreement on the basis of the existing case-law, without the need to bring a new case. The very existence of the courts and the knowledge about their function to bring a final settlement therefore contributes to social peace.

Limitations

While the role of constitutional courts in achieving and maintaining peace is undoubtedly important, there are also limits to what they can achieve. As opposed to political organs, constitutional courts cannot act upon their own initiative; they are limited by referrals. They cannot offer an “ideal” solution, they are bound by the law and they only settle the conflict that was presented to them. The courts may be aware of other similar cases but without referral, they cannot settle situations for which they have no jurisdiction.

Sharing of experience

These questions relate to all courts members of the World Conference on Constitutional Justice. The participants of the 5th Congress are invited to share their experiences on the role of their courts in preventing conflict, maintaining peace and settling disputes that otherwise result in conflict.

The global dialogue in the framework of the World Conference should enable the member courts to learn from successes but also from failures of their peers and should help them preparing for similar challenges in their own country.

In addition to the special session on the stocktaking on the independence of the Courts, the topic will be sub-divided into the following five sub-topics

A. Sources and Jurisdiction

B. Application

C. Limitations of the role of constitutional courts in maintaining peace

D. Fundamental principles: the protection of human rights, democracy and the rule of law as a precondition to peace

E. Doctrine

Questionnaire, part I
"Constitutional Justice and Peace"[1]

To the extent possible, please refer to your case-law)[2]:

A. Sources and Jurisdiction

1. Does your Constitution make a specific reference to peace or to reconciliation? How has your court interpreted such provisions?

The Portuguese Constitution makes specific references to peace as an **international** phenomenon, which illustrate the commitment of the Portuguese Republic in favouring world peace.

Article 7 of the Constitution establishes the basic principles of the Portuguese Republic regarding international relations and provides in its paragraph (1) that "*in its international relations Portugal is governed by the principles of national independence, respect for human rights, the rights of peoples, equality between states, the **peaceful** settlement of international conflicts* (…)". In addition, paragraph (2) states that "*Portugal advocates the abolition of imperialism, colonialism and any other forms of aggression, dominion and exploitation in the relations between peoples, as well as simultaneous and controlled general disarmament, the dissolution of the political-military blocs and the establishment of a collective security system, with a view to the creation of an international order that is capable of ensuring **peace** and justice in the relations between peoples*". In addition, paragraph (4) of the same article provides that "*Portugal is committed to reinforcing the European identity and to strengthening the European states' actions in favour of democracy, **peace**, economic progress and justice in the relations between peoples*". Furthermore, Article 33(8) favours international peace by protecting people that are persecuted for pursuing it, when establishes that "*the right of asylum is guaranteed to foreigners and stateless persons who are the object, or are under grave threat, of persecution as a result of their activities in favour of democracy, social and national liberation, **peace** among peoples, freedom or the rights of the human person*".

[1] Prepared by Joana Fernandes Costa (Justice of the Constitutional Court) and António Manuel Abrantes (Legal Adviser at the Constitutional Court).
[2] If a case is available in the CODICES database, please indicate its CODICES identification number.

The Portuguese Constitution makes less reference to peace as a **national** phenomenon. A specific mention is made in Article 45(1), which enshrines the fundamental right to meet and to manifest, when states that *"citizens have the right to meet **peacefully and without arms**, even in places that are open to the public, regardless any authorisation"*. In addition, peace is also indirectly reflected in Article 46(4) of the Portuguese Constitution, when provides that "*armed associations, military, militarised or paramilitary-type associations and organisations that are racist or display a fascist ideology are not permitted*".

2. Has your Court been seized of draft constitutional amendments containing provisions related to peace and reconciliation?

The Portuguese Constitutional Court has never been summoned to review the constitutionality of draft constitutional amendments. Furthermore, there have never been constitutional amendments containing provisions related to peace and reconciliation.

3. Has your court a specific mandate to maintain social peace? Has your court interpreted its jurisdiction in a way as to include such a mandate?

The Portuguese Constitutional Court does not have a specific mandate to maintain social peace. Its mandate is defined in Article 221 of the Portuguese Constitution, which provides that "*the Constitutional Court is the court with the specific competence to administer justice in matters of a constitutional-law nature*". This competence comprises, in the first place, the power to review the constitutionality of norms (Article 223 (1)). In addition, the Court possesses other important powers and responsibilities, which include, *inter alia*, the competence to judge the proper observance and validity of electoral procedural acts, acting as court of last resort (Article 223(2)(c) of the Constitution) and the competence to verify the legality of the formation of political parties and coalitions, to assess the legality of their names, initials and symbols, and to order their extinction (Article 223(2)(e)).

The Court has never interpreted its jurisdiction in a way as to include a specific mandate to maintain social peace. Nevertheless, as will be explained below, some decisions that the Court has issued under its competences to review the constitutionality of norms and verify the legality

of political parties might be considered as having an indirect effect for the maintenance of social peace. Indeed, when performing these functions, the Court acts as an actor of regulation and stabilisation of political life and thus contributes to achieving peace.

4. **Has your Court encountered constitutional or legal provisions that made maintaining social peace difficult? How has your court interpreted these provisions? Has it repealed them for being unconstitutional / interpreted them in a specific way?**

The Portuguese Constitutional Court has never encountered constitutional or legal provisions that made maintaining social peace difficult.

5. **Is traditional justice a source of law and has it helped resolve conflict situations?**

Traditional justice is not a source of law in the Portuguese legal system.

B. Application

1. **Has your Court interpreted constitutional provisions relating to peace and reconciliation?**

Considering that there are no specific constitutional provisions relating to peace and reconciliation at a national level, the Portuguese Constitutional Court has never been summoned to interpret this kind of norms.

2. Does your state have a law on peace and reconciliation? If so, has it been referred to this Court for the purpose of assessing its constitutionality?´

Portugal does not have a specific law on peace and reconciliation.

However, Law 9/96, of 23 March, which granted amnesty for politically motivated offenses committed between 27 July 1976 and 21 June 1991, was designed for that purpose. Although this law has been referred to the Portuguese Constitutional Court for assessing its constitutionality, the Court concluded that it did not violate the Constitution (see below, answer to question 4).

3. Did your court adjudicate cases in which the social peace in your country was in danger? Did the judgment of your court pacify the situation / settle the conflict?

Yes, the Portuguese Constitutional Court has been summoned to adjudicate cases in which the social peace was somehow in danger. These cases were related to the period of political and social turmoil that followed the revolution of 25 April of 1974, which overthrew the dictatorship that governed Portugal since 1933.

The most paradigmatic example in this regard was provided by **Ruling 231/2004**, where the Court determined the extinction of a political party due to its violent nature. This was a landmark decision, because it was the only time where the Court issued a decision declaring the illegality of a political party. The case was centred in the political party '*Força de Unidade Popular'* (FUP), which was created a few years after the revolution of 25 April of 1974. It was proven in the proceeding that the creation of this political party was part of a broader plan aimed at overturning the regular functioning of state institutions and creating the conditions to seize power through the means of an armed uprising. In order to achieve this goal, some members of this party carried out violent actions that provoked deaths, bodily injuries, intimidation, unlawful appropriation and damage to property. In the assessment of the case, the Court noted that "*the creation of the defendant party was determined by the purposes of the self-appointed organization Projecto Global, which promoted acts of a violent nature*" (par. 14), which led it to conclude that "*from the above facts, it results that the real purpose of the defendant party is unlawful and contrary to public order and has been systematically pursued by unlawful means and contrary to public order*" (par. 15). Despite the fact that Article 18 of the Law of Political Parties does not list this circumstance as one of the causes that may determine the extinction of a political party, the Court considered that the list provided therein does not contain an exhaustive enumeration of causes

for this effect. On the contrary, the Court relied on Article 182(2) of the Civil Code, which provides that any association may be extinct by a judicial order "*when its purpose is systematically pursued by illegal or immoral means*" (subparagraph c)) or "*when its existence becomes contrary to public order*" ((subparagraph d)). By applying this provision to the case at stake, the Court concluded that *"having been proved in this proceeding that the real purpose of the defendant party is unlawful and contrary to public order and that this goal has been systematically pursued by unlawful means and contrary to public order, it is concluded that the defendant party does not respect the fundamental principles defined in the Constitution and in the law on political parties and, therefore, the conditions for the Constitutional Court to decree its extinction are fulfilled*" (par. 15).

A few years earlier**,** in its **Ruling 17/94,** the Court had already been summoned to review the legality of another political party – the '*Movimento de Acção Nacional'* (MAN). The Public Prosecutor claimed before the Court that this party had a fascist ideology and therefore violated Article 46(4) of the Portuguese Constitution, which provides that "*armed associations, military, militarised or paramilitary-type associations and organisations that are racist or display a fascist ideology are not permitted"*. In the assessment of the case, the Court started by recognizing that some characteristics of this party could eventually suggest that it displayed a fascist ideology. However, following this assertion, the Court considered that it was unnecessary to issue a final decision on this matter, because this party had already been dissolved and had ceased its activity by the time the requirement to review its legality was submitted. Consequently, the Court rejected the request, concluding that *"(…) since the organization in question does not remain active, it disappeared the danger that its existence could possibly represent for the democratic constitutional order"* (par. 20).

4. **Did your court have to address post-(armed) conflict situations in its case-law? How did it approach these questions? Was your court confronted with the need to contribute to the implementation of political conflict settlement agreements that potentially contradicted the Constitution?**

The Portuguese Constitutional Court never had to address post-armed conflict situations in its case-law. However, in its **Ruling 510/98**, the Court was summoned to review the constitutionality of a law (Law 9/96, of 23 March) aimed at contributing to the peaceful settlement of political conflicts. Indeed, this law granted amnesty for politically motivated offenses committed between 27 July 1976 and 21 June 1991, which corresponded to a period of social and political turmoil that followed the revolution of 25 of April of 1974.

In the centre of the dispute lied Article 1(1) of this Law, which granted an amnesty to the disciplinary and criminal offenses committed by terrorist organizations and its members between 27 July 1976 and 21 June 1991. Paragraph (2) of this Article made clear that the amnesty was not absolute, by excluding its application to criminal offences against life and physical integrity. As the statement of reasons that preceded this law assumed, the amnesty was primarily intended to be applied to a specific national terrorist organization of extreme-left wing known as '*Forças Populares 25 de Abril'* (FP-25), which allegedly had committed various criminal offences with a political motivation in the post-revolution period. Indeed, the legislator clearly recognized that this law was intended to achieve a peaceful settlement of a political conflict, underlining *"(…) the opportunity to approve an amnesty aimed at the political solution of the so-called FUP/FP case, whose legal complexity has made its judicial solution extremely difficult"*.

Following the approval of the law, a group of members of the parliament requested the Constitutional Court to review its constitutionality. Their claim was based in two main arguments. Firstly, the applicants argued that this amnesty did not have a general scope, since it was intended to be applied to a specific group of people (the members of the organization 'FP25') in violation of Article 164(g) of the Constitution, which provided at the time that the Parliament had the competence "*to grant generic amnesties and pardons"*. Secondly, the applicants argued that the grant of this amnesty violated the principle of equality provided in Article 13 of the Constitution, since it determined a different treatment between two groups of offenders: those who committed criminal offences with a terrorist motivation would be exempted from criminal liability and those who committed the same offences without this motivation would be criminally punished.

In the assessment of the case, the Court started by underlining that the legislator had based the grant of this amnesty in two different reasons. On the one hand, it had a corrective function towards the legal system, since the extraordinary legal complexity of the case hampered its solution on a timely manner. On the other hand, the amnesty had a pacifying function, since it aimed to appease the political and social disputes that marked the post-revolution period. As the Court pointed out, resorting to the statement of reasons that preceded the law: *"The amnesty of Law No. 9/96 also has, in second place, a* ***pacifying*** *intention. It is intended to be «a turning of the page in the political disputes about building our political system», a turning of the page that «the consolidation of the democratic regime and the climate of political stability and social peace resulting from it made advisable for a long time». The pacifying character is accentuated by the appeal to «the generosity that marked the spirit of the 25th of April in the face of the previous regime» and also «to the civic tolerance that must be the hallmark of the democrats»"* (par. 16; emphasis added). The Court further noted that the constitutional legitimacy of these two grounds

for amnesty was out of question, underlining that *"both the pacification of society after a period of politically motivated violence and the correction of the legal system are rational ends of the rule of law"* (par. 16).

Instead, the main issue in the current proceeding was related to the application of these abstract grounds for amnesty to the specific situation at stake. Regarding the first claim of the applicants, the Court stated that any amnesty is intended to be applied to a delimited circle of past situations and not an undetermined circle of future situations; considering that the controlled norm did not limit its application to a specific group of people (the 'FP-25') but rather to any person or organization that fell within its scope, there was no violation of Article 164(g) of the Constitution. The same conclusion was achieved regarding the second claim of the applicants on the alleged violation of the principle of equality. Indeed, the Court concluded that the legislator could legitimately base a different treatment between offenders in the political motivation of the offence. As the Court stated: *"(…) there is no pacifying amnesty without privileging political motivation, which is, in general, an aggravating circumstance. The contestation would have an abstract basis if the temporary circumstances underlying the pacifying amnesty, linked to the aftermath of a period of exceptional political conflict, could not reasonably justify a different treatment of the circumstance of political motivation in relation to cases of complete normality in political life. It is necessary to answer once again that the differentiation is not unreasonable, falling in the space of freedom of conformation of the legislator to give more weight to the reasons for the differentiation than to those that militate in favour of equal treatment".* (par. 16).

5. Did your Court have a role in adjudicating cases relating to peace and reconciliation as required by the Constitution?

No. As underlined in the previous answers, the Portuguese Constitution does not require the Constitutional Court to do so.

6. What is the role of 'intermediary bodies', such as civil society organisations, trade unions, employers or consumers associations, etc., for maintaining social peace as applicants to your court, as *amicus curiae* or for shaping the context in which the court operates.

Intermediary bodies play a limited role in the Portuguese system of constitutional justice.

Firstly, these bodies can only intervene as applicants to the Constitutional Court when they are parties in a specific judicial proceeding. On the one hand, the application for the assessment of the legality of political parties must necessarily be submitted by the Public Prosecutor (article 18 of the Law of Political Parties). On the other hand, the application for the abstract review of the constitutionality of norms (that is to say, the assessment of the norms regardless of their application to a specific proceeding) must necessarily be submitted by the public entities listed in Article 281(2) of the Constitution (the President of the Republic, the President of the Parliament, the Prime Minister, the Ombudsman, the Attorney General, one tenth of the Members of the Parliament or, in some cases, the representatives of the bodies of the autonomous regions). This means that these bodies can only intervene as applicants before the Court when they are parties in a specific judicial proceeding and invoke the unconstitutionality of a norm that is being applied to that proceeding. In this case, the court *a quo* must assess the constitutionality of that norm and its decision may be appealed to the Constitutional Court. However, this possibility is open to any citizen or body that is a party in a judicial proceeding and, therefore, it is not a specific power attributed to these entities due to their role as intermediary bodies.

Secondly, since the role of *amicus curiae* does not exist in the Portuguese legal system, these bodies cannot intervene in this quality in the proceedings before the Court.

7. Has your Court been asked by a Court of another country about a conflict situation?

The Portuguese Constitutional Court has never been asked by a Court of another country about a conflict situation.

C. Limitations of the role of constitutional courts in maintaining peace

1. What are the limitations of your court in contributing to peace? (e.g. acting only upon request; limitation by the scope of the request)

There are no specific limitations that affect the contribution of the Portuguese Constitutional Court to peace. However, some circumstances might eventually be regarded as indirect limitations for this effect.

Firstly, considering that the Court does not have a specific mandate to maintain social peace (but rather a general mandate to administer justice in matters of a constitutional-law nature), its activity is only indirectly linked to such a scope. Therefore, the contributions of the Court in this

regard can only be indirect (e.g. by extinguishing armed, military, militarised or paramilitary-type political parties or parties that are racist or display a fascist ideology, or by declaring the unconstitutionality of norms that harm fundamental rights).

Secondly, either in its function of assessing the constitutionality of norms or in the function of assessing the legality of political parties, the Court may only act upon request. Therefore, the Court can never start *ex officio* this type of proceedings.

2. **Have issues that were supposedly finally settled by a judgment of Court remained in a state of conflict?**

No.

3. **Has the role of your court in settling disputes and thus contributing to peace been challenged by other state powers, the media, etc.? (see also special session on the stocktaking on the independence of the courts).**

See below, answers to questions 1 and 2 of part II of the Questionnaire.

4. **Is your court confronted with a positive or rather critical attitude in society and in the media as far as the trust in reconciliation by your court and/or the judiciary in general is concerned.**

See below, answers to questions 2 and 7 of part II of the Questionnaire.

D. Fundamental principles: the protection of human rights, democracy and the rule of law as a precondition to peace

1. **Do you have case-law showing that the protection of human rights contributed to peace?**

Yes. As underlined above, the main competence of the Portuguese Constitutional Court is to review the constitutionality of norms (Article 223 (1) of the Constitution). Considering that the Portuguese Constitution enshrines a wide catalogue of fundamental rights ((1) personal rights, freedoms and guarantees; (2) rights, freedoms and guarantees concerning

participation in politics; (3) rights, freedoms and guarantees of workers; and (4) economic, social and cultural rights), the Court is summoned very often to review the constitutionality of norms that affect them. For this reason, the Court has developed a wide case law in this regard, which contributes to peace by ensuring that fundamental rights benefit from effective protection in the Portuguese legal order.

A paradigmatic example is provided by the case law of the Court regarding freedom of conscience, religion and forms of worship enshrined in Article 41 of the Constitution. Indeed, by ensuring the respect for different beliefs within society, the Court contributes to the construction of a pluralist and tolerant society, which is a pre-condition to social peace. In particular, the Court summarised the content of the freedom of religion in **Ruling 578/2014**, in which it reviewed a norm contained in a decree issued by a Regional Assembly, by stating the following: "*The fact is that, as a negative liberty, religious freedom essentially consists of a freedom to 'not do': no one is obliged to have or profess a religion, and consequently no one is obliged to receive religious education. These freedoms are enjoyed precisely by 'not acting', which means that, where this dimension is concerned, religious freedom tends to be averse to any kind of normative intervention. By modelling access to religious education in public schools in such a way as to require a negative declaration* [from a parent or guardian in order for a student not to attend such education], *the regional legislator in question is introducing the right to refuse religious education into the legal order, because if no one says anything, that education becomes a mandatory subject. In other words, an individual is henceforth required to engage in a positive behaviour in order to be able to go on enjoying a negative freedom – something that in its own right constitutes a violation of the constitutional precept which forbids any state action entailing guidance or interference with the individual bastion of 'non-exercise' in which religious freedom is reflected*".

2. Do you have case-law showing that the protection of democracy contributed to peace?

Yes, in three different ways.

Firstly, the Portuguese Constitutional Court has the competence to verify the legality of the formation of political parties and coalitions and to order their extinction (Article 223(2)(e) of the Constitution). When carrying out this control, the Court ensures, *inter alia*, the respect for Article 46(4) of the Constitution, which provides that "*armed associations, military, militarised or*

paramilitary-type associations and organisations that are racist or display a fascist ideology are not permitted". In this sense, the Court prevents the existence of parties that can undermine democracy, contributing to social peace. **Rulings 17/94** and **231/2004** are illustrative in this regard (see above, answer to question B4).

Secondly, the Court has the competence to judge the proper observance and validity of electoral procedural acts, acting as court of last resort (Article 223(2)(c) of the Constitution). When carrying out this control, the Court ensures the regularity of the electoral process and that state powers respect the Constitution. This contributes to the reinforcement of the legitimacy of the elected parties as representatives of the citizens and of their acts, making them acceptable even to those who oppose these acts, which is a pre-condition to social peace.

Lastly, the Court has the competence to review the constitutionality of norms (Article 223(1) of the Constitution). When carrying out this control, the Court has declared on some occasions the unconstitutionality of norms for contradicting the democratic principle (provided in Article 2 of the Constitution) or fundamental rights that are essential in any democratic society (eg. freedom of speech, right of access to public office, etc.), thereby contributing to social peace. The recent **Ruling 247/2021** is a paradigmatic example on this, as the Court declared the unconstitutionality of two norms of the law that regulates the election of members of the bodies of local authorities. The controlled norms prevented that the same group of citizens could present candidacies, simultaneously, to municipal bodies and to assemblies of the same municipality, which, in the view of the Court, was a violation of the right to participate in public life provided in Article 48 of the Constitution. As the Court pointed out: "*As a mechanism for the deepening of representative democracy to which the democratic rule of law is linked (Article 2 of the Constitution), the admissibility of candidacies from groups of voters constitutes, thus, another important form of political participation, in addition to political parties, based on the self-organization of citizens, which provides new modalities of intervention in public life (…), contributing to the affirmation of the satus activae civitatis resulting from the democratic principle*" (par. 8).

3. Do you have case-law showing that safeguarding the rule of law contributed to peace?

Yes. By ensuring the respect for the rule of law, the Portuguese Constitutional Court contributes to the citizens' trust in the law and the courts, which is a pre-condition to social peace. Although several examples could be mentioned in this regard, the case-law of the Court regarding the principle of the **protection of legitimate expectations** is particularly illustrative, since it

shows the importance of the Court in the protection of the citizens' trust towards actions of the state.

Despite the fact that there is no express consecration of this principle in the fundamental law, since the beginning of its jurisprudential activity the Portuguese Constitutional Court has consistently recognised its existence and constitutional dignity, as an implicit dimension of the principle of the rule of law. In general terms, the principle of protection of legitimate expectations presupposes that in its relationship with citizens, and even in its normative activity, the state must act in a way that does not intolerably or arbitrarily disrespect the minimum degrees of certainty and security that people need in order to organise and carry out their life plans. The protection of trust is thus the subjective side of the more general guarantee of legal certainty, suggesting that legitimate expectations as to the permanence of a certain legislative framework or legislative tendency should be protected.

The Constitutional Court recognised the existence of this implicit constitutional principle early on, in one of its first decisions. In **Ruling 11/83**, the Court held that "*There is no need at this point to even briefly enumerate all the elements that characterise a democratic rule of law. However, it is indisputable that those elements include the protection of citizens' trust in the actions of the state: it is certainly a fundamental legal requirement that the state does not act in such a way as to critically undermine the rights and expectations that citizens have legitimately have formed under the umbrella of the current legal system – the state should not act in a way that betrays citizens' trust*". On the basis of this premise, the Court concluded that this principle would be infringed whenever a provision inadmissibly and arbitrarily affects citizens' rights and legitimate expectations.

In 1990, the Court further densified this principle by developing its content. After saying that the principle would only be breached if the effect on citizens' legitimate expectations was both "*too burdensome*" and "*inadmissible and arbitrary*", the Court went on to develop these prerequisites, arguing that a violation of expectations would be extraordinarily onerous when "*it represents a change in the legal order which the targets of the provisions cannot reasonably expect*", and that it would be inadmissible and arbitrary "*when it is not dictated by the need to safeguard constitutionally protected rights or interests that should be regarded as prevailing (here one must call on the principle of proportionality, which has been explicitly enshrined in Article 18(2) (on rights, freedoms and guarantees) of the Constitution since its first revision*)" (**Ruling 287/90**). Based on this formulation of the principle of protection of legitimate expectations, the Court applied it in a relative uniformly manner over the ensuing years, in some cases mobilising

it as grounds for declarations of unconstitutionality (see, by way of example, Rulings 303/90 and 141/2002).

In 2009, the Constitutional Court undertook a new systematisation of the content of this principle, arguing that the two criteria which had thus far been applied in constitutional case law were essentially capable of being redefined as four different requirements or 'tests'. Basing itself on this premise, the Court then considered that "in *order for there to be a constitutional protection of 'trust', it is first of all necessary for the state (primarily the legislator) to have engaged in behaviours that are capable of generating 'expectations' of continuity among citizens; then, such expectations must be legitimate, justified and based on good grounds; thirdly, citizens must have made plans for their lives in the light of the prospect that the state's 'behaviour' would continue; and finally, it is also necessary that there be no grounds in terms of the public interest which, when weighed up, justify the non-continuity of the conduct which gave rise to the expectations*" **(Ruling 128/2009**). Since then, in constitutional case law the principle of the protection of legitimate expectations has therefore essentially been measured with reference to these four essential assumptions: 1) that the state must have engaged in behaviour which generates expectations of continuity among citizens; 2) that those expectations must be legitimate; 3) that citizens must strongly believe in the continuity of the behaviour; and 4) that there can be no prevailing public-interest reasons which would justify the change in behaviour.

In recent years, which have been signalized by the Court's intense jurisprudential activity in assessing the constitutionality of a range of austerity measures imposed by extraordinary demands for fiscal restraint (decisions commonly known as the "*the crisis judgments*"), the principle of the protection of legitimate expectations has come to assume a preponderant role in the jurisprudential line taken by the Court and has served as the basis for several declarations of normative unconstitutionality. In **Ruling 474/2013**, the Constitutional Court found the elimination of a safeguard applicable to permanent public-sector staff under which certain objective causes for the termination of the relationship were not to apply to them, to be unconstitutional because it violated the principle of the protection of legitimate expectations. Shortly thereafter, in **Ruling 862/2013**, the Constitutional Court again invoked the principle of the protection of legitimate expectations as grounds for a judgment of unconstitutionality, considering a norm that provided for a reduction of around 10% in the pensions paid by "Caixa Geral de Aposentações" (CGA) to be unconstitutional. It reached this finding after drawing a parallel between the interest of preserving a validly acquired and consolidated pension and the interest of preserving employment. In the following year, in **Ruling 575/2014**, the principle of the protection of legitimate expectations was again invoked by the Court when it found the creation of a permanent

sustainability levy on pensions above a certain amount to be unconstitutional. More recently, in **Ruling 3/2016**, the Constitutional Court once again resorted to the same principle in a finding of unconstitutionality directed at a norm that sought to change the regime under which lifelong allowances are paid to certain former political officeholders. The Court considered that this change made the latter dependent on means testing – i.e. that former officeholders claiming this benefit would have to prove they did not have sufficient income (including that of the rest of their household) without it. The Constitutional Court took the view that the fact that the state had never altered the specific nature of this subsidy – a reward for the beneficiary's commitment to public affairs – had fuelled the beneficiaries' expectations.

E. Doctrine

1. **Does your court interpret constitutional provisions in a way that contributes to social peace?**

Yes, in two different ways. Firstly, the Portuguese Constitutional Court interprets on a regular basis constitutional provisions in conjunction with other provisions and principles, taking into account their systematic insertion in the global constitutional order (e.g. interprets provisions that enshrine fundamental rights in conjunction with the constitutional principles that support them, such as the principle of human dignity and the principle of the rule of law). Secondly, the Court tends to interpret constitutional provisions that enshrine fundamental rights in a particularly protective way, assessing very carefully whether eventual restrictions to these rights meet the specific conditions provided for the effect in the Constitution. This process of interpretation of constitutional provisions contributes to social peace, as it ensures the coherence of the global constitutional system and the protection of fundamental rights within society.

2. **Has your court developed case-law that balances between legitimate interests of parties and thus contributes to social peace?**

Yes. When assessing the constitutionality of norms, the Portuguese Constitutional Court has systematically to carry out balancing exercises between colliding interests. The balancing between opposing interests favours the achievement of fair and equilibrate decisions and hence contributes to social peace.

In particular, the Court must often balance between **public** legitimate interests (that is to say, legitimate interests of the state) and **private** legitimate interests that collide with them. This is particularly notorious when the Court is summoned to review the constitutionality of norms for potential violation of citizens' fundamental rights. For instance, when the Court assesses the compatibility of the restriction with the proportionality principle provided in Article 18(2) of the Constitution, the satisfaction of the three tests that comprise this principle (suitability, necessity and proportionality in its narrow sense) presuppose a balancing exercise between the legitimate goal to be achieved and the degree of sacrifice imposed to the affected fundamental right. The Court has developed a wide and consolidated case law in this regard.

3. Has your court developed any doctrine contributing to the peaceful settlement of conflicts?

The Portuguese Constitutional Court has never developed a specific doctrine contributing to the peaceful settlement of conflicts. This may be explained by the fact that the Court has never been summoned to assess cases where the development of such a doctrine would be necessary.

Questionnaire, part II
"Stocktaking on the independence of the Member Courts"

The 2nd Congress of the World Conference on Constitutional Justice was devoted to the topic "Separation of Powers and Independence of Constitutional Courts and Equivalent Bodies".

In view of the importance of this topic and frequent threats to the independence of some Member Courts, the Bureau of the World Conference had decided to include a special stocktaking session on the independence of the Members for all future congresses. As a consequence, already the 3rd and 4th Congresses in 2014 in Seoul and 2017 in Vilnius included such a session and this will be the case for the 5th Congress in Algiers as well. The replies to the questions below will be important for the preparation for this session.

1. **Has pressure been exercised on your Court by other state powers during the consideration (examination) of cases?**
   Very seldom. A couple of cases in the last seven years. Nothing serious.

2. **Has excessive pressure been exercised on your Court by the media during the consideration (examination) of cases?**
   Sometimes. Nothing too serious.

3. **Has your Court encountered resistance from other state powers following the adoption of decisions which they disliked?**
   No.

4. **Have the decisions of your Court been duly published?**
   Yes.

5. **Are the decisions of your Court being executed? Are there special mechanisms for the execution of the decisions of your Court?**
   Yes. No.

6. **Are there problems in the execution of specific types of decisions?**
   No.

7. Have there been attacks on the Court following the adoption of decisions?

It is rare. Euthanasia is one of the few cases.

8. Have there been any legislative initiatives or actions leading to creating obstacles to the activity of your Court?

No.

9. How did your Court deal with cases of pressure from other state powers, media, etc.?

It doesn't. The court does not react to any cases of pressure.

10. Has your Court received assistance from other bodies at the national or international level? Please specify the provided assistance.

No.

11. Does your Court consider that it is prevented by judicial restraint from defending itself in the media or from seeking assistance?

Yes, absolutely.