PORTUGUESE CONSTITUTIONAL COURT

"Problems of Legislative Omission in Constitutional Jurisprudence"

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1. The question of legal gaps in legal theory

1.1.

Generically speaking it is possible to argue that a legal gap exists in those instances in which it is found that the "framework of legal rules does not provide for a given case"[2]. Such a lack of provision for a given case (omission), which is reflected in silence on the part of the legislative authorities (the absence of *interpositio legislatoris*), can be the result of a variety of factors, such as the incompleteness of the legal system, the indeterminacy or lack of normative density of certain rules, or, quite simply the lack of a need for regulations. As Baptista Machado says, "however diligent and careful it may be, no legislative authority is able to foresee all the relationships in the life of society that warrant oversight by the law. There are even situations which it is not possible to predict when a law is drawn up, along with others which, albeit predictable, escape the legislative authorities' foresight. What is more, where some issues that are foreseen are concerned, the legislative authorities may not want to take the decision to regulate them directly, because they do not feel qualified to establish a sufficiently defined, general abstract set of rules"[3].

To be a bit more specific, it is possible to observe several types of legal gap. To summarise the various formats that are mentioned by Portuguese legal theorists, we have cases of *'lacuna legis'*, *legislative* omissions, extra-legal situations or spaces that are free of laws, and the indeterminacy of rules. In general legal theory the most prominent form of legal gap is the *'lacuna legis'*; in the specific case of Constitutional Law "pride of place" goes equally to both the *'lacuna legis'* and legislative omissions.

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[1] In this report, unless otherwise stated, when we talk about the Constitution of the Portuguese Republic ("CRP" for short) of 2 April 1976, we mean the text that resulted from the amendments made by Constitutional Laws nos. 1/82 of 30 September 1982, 1/89 of 8 July 1989, 1/92 of 25 November 1992, 1/97 of 20 September 1997, 1/2001 of 12 December 2001, 1/2004 of 24 July 2004, and 1/2005 of 12 August 2005.
We also refer to the Law governing the Organisation, Operation and Procedure of the Constitutional Court (Law no. 28/82 of 15 November 1982, as amended by Laws nos. 143/85 of 26 November 1985, 85/89 of 7 September 1989, 88/95 of 1 September 1995, and 13-A/98 of 26 February 1998) as the "LTC".
The Portuguese Constitutional Court Rulings that we quote herein can be found (in Portuguese) on the Court's website at www.tribunalconstitucional.pt.

[2] OLIVEIRA ASCENSÃO, *O Direito. Introdução e Teoria Geral. Uma perspectiva luso-brasileira*, Coimbra, 1995, p. 425.

[3] J. BAPTISTA MACHADO, *Introdução do direito e ao discurso legitimador*, Coimbra, 1990, pp. 192-3.

1.1.1. *Lacuna legis*

The bulk of Portuguese legal theory has employed a concept of *'lacuna legis'* which is somewhat derived from German legal theory, and which it defines as an "incompleteness of the rule-making system that goes against the latter's plan", or, to put it more simply, an "incompleteness that goes against a plan" (*planwidrige Unvollständigkeit*)[4, 5].

There are different types of *'lacuna legis'*, which we will describe below. However, we should note from the start that there can be a degree of conceptual overlap between them.

On the more generic level of general legal theory, various Portuguese authors have sought to classify the different types of *'lacuna legis'*.

Baptista Machado begins by distinguishing between two: 'gaps in laws', and 'gaps in the Law'.

The former, which are also known as 'regulatory gaps', occur in situations in which there is an absence of legal regulation. They may take the form of 'real', 'collision', or 'teleological' gaps. 'Real' gaps (otherwise known as gaps 'at the level of the rules', or 'level one' gaps) arise when a rule cannot be applied unless it is accompanied by another legal determination that is in fact not included in the law (for example, a rule which sets a deadline for the practice of an act and which cannot be applied because the law does not provide for a way of counting the time until the deadline). 'Collision' gaps come about as a consequence of the contradiction between two legal rules which, inasmuch as they cannot both be applied simultaneously, cancel each other out, so to speak – thereby leading precisely to the existence of a gap. Lastly, unlike 'real' gaps, the case of 'teleological gaps' (or 'level two gaps') is not that of the application of a rule which requires a legal determination that the law does not contain, but rather the application of the teleology of a rule or complex of rules which leads to

[4] On the general theoretical level, see OLIVEIRA ASCENSÃO, *op. cit.*, p. 427, J. BAPTISTA MACHADO, *op. cit.*, p. 194, and F.J. PINTO BRONZE, *Lições de Introdução ao Direito*, Coimbra, 2002, pp. 881-2.
On the legal/constitutional level, see J.J. GOMES CANOTILHO, *Direito Constitucional*, as above, p. 1235, and JORGE BACELAR GOUVEIA, *Manual de Direito Constitucional*, vol. I, Coimbra, 2005, p. 668.

[5] Castanheira Neves considers this concept of a gap to be excessively simplistic. Talking about the concept that has been adopted by virtually all the other legal theorists, he criticises the "insistent loyalty to the ideological postulates of legal positivism and its legalism, inasmuch as it not only does it continue to attribute the full ownership of, and ability to intervene (albeit in potential terms) in, the legal world to the legislative authorities, but it also considers that the limits of the law itself are determined (if not explicitly, at least implicitly) by the extent of the positive/legal framework. (…) this view of gaps is contradicted by the demands of concrete/real legal life, with the historicity that is essential to it and the imperatives of the very fulfilment of the law's specific rule-making validity function, which the law and its positive rule-making system must necessarily serve". See A. CASTANHEIRA NEVES, *Metodologia Jurídica. Problemas fundamentais*, Coimbra, 1993, pp. 216-7.

the realisation that a gap exists and to the need to fill it (this being the field in which it is appropriate to resort to analogy). 'Teleological gaps' can be 'patent' (there is no rule that applies to the case), or 'latent' or 'hidden' (when there is a general rule that appears to apply to the case, but in fact the latter calls for special or even exceptional treatment).

'Gaps in the Law' result from the absence of a framework provided by the Law as a whole – in this respect, the latter is also taken to mean the whole range of extra-legal principles and values. These shortcomings can only be overcome by resorting to supra-legal principles and evaluations (a "development of the law that goes beyond the actual framework of the law, or *ultra legem*")[6].

Oliveira Ascensão refers to 'gaps in foresight' and 'legislative gaps'. In the former there is a "failure to foresee a case that ought to be legally regulated"; in the latter "foresight exists, but the corresponding legal effects have not been legislated for"[7].

The same author also mentions 'hidden' gaps and 'technical' gaps. The former occur when "there are apparently generic rules that seem to cover a whole sector. However, a restrictive interpretation of them means that no explicit provision has been made for an exception or limitation which the intention of the law indicates ought to exist". Hidden gaps also exist in situations in which "the matter has been provided for, but an abrogative interpretation leads to the elimination of the contrasting precepts, or of the precept for which no meaning is found". Technical gaps arise "when the law imposes a purpose, but the process or body that is indispensable to achieve it does not exist"[8].

Pinto Bronze uses different criteria to distinguish between various types of *'lacuna legis'*. First of all, we have the dichotomy that results in the existence on the one hand of 'normative', 'foresight' or 'authentic' gaps, and on the other of 'regulatory', 'legislative' or 'unauthentic' gaps. The former occur "when the intervention of the courts does not suffice on its own to make it viable to apply a given legal rule to a given case, for which it is necessary to have 'a new provision that is currently lacking in the law', and it is thus at least sometimes necessary for the legislative authorities 'to take a new decision', 'in order to overcome this lack of legislative policy' ". The latter, "which do not render the strict application of the law unviable", do however affect it "(inasmuch as, compared to the plan underlying the law, they

[6] See J. BAPTISTA MACHADO, *op. cit.*, pp. 194-9.
[7] OLIVEIRA ASCENSÃO, *op. cit.*, p. 428.
[8] OLIVEIRA ASCENSÃO, *op. cit.*, pp. 429-30.

can lead to real denials of justice), and can possibly be overcome by the courts, if their decision reveals – as it should – 'the intention […] and […] the teleology of the law' ".

Then we have the distinction between 'gaps in laws' and 'gaps in the Law'. On the subject of the former Pinto Bronze begins by noting that they represent a generic concept which encompasses all the types that have already been listed. Conceptually he says that they are gaps that "occur whenever the 'regulatory level' of a given law, looked at in isolation, or in terms of its 'own teleology', prove incomplete or inadequate, whereupon judicial jurisprudence is under a special duty to integrate them". The latter "reflect censurable omissions on the part of the legislative authorities, which must be 'the first' to be called on to overcome them".

If we focus now on 'gaps in the Law', Pinto Bronze says that from a normative point of view they can be 'patent' (when the plan underlying the law or its teleology mean that it ought to provide regulation "for a given number of cases" and yet this is not so) or 'hidden' (when the law does provide such regulation, but the latter proves to be inadequate in practical/normative terms and should therefore be the object of a restriction – for example in the form of a 'teleological reduction')". From a 'chronological perspective' such gaps can be classified as 'initial' and 'subsequent' "(depending respectively on whether the legislative authorities to which the omission can be attributed or which can be censured for it, were aware of the omission or not) – in the overall light of the direction in which the current law is moving, particularly with regard to the interpellant requirements that are summarised in normative principles and the legally significant issues that innovatively derive from the dynamism of historical/social reality"[9].

If we look specifically at Constitutional Law, Gomes Canotilho talks about 'autonomous' and 'heteronymous' constitutional gaps. The former arise "when we discover the absence of a legal discipline in the legal-constitutional complex, but it can be deduced from the regulatory plan of the constitution and the teleology of the constitutional regulations". 'Heteronymous' gaps "result from a failure to fulfil the orders to legislate and the constitutional requirements that are concretely set out in the constitution". As we shall see, the latter type of gap corresponds to the concept of constitutionally significant legislative omissions (see **1.2.2** below). Turning our attention back to 'autonomous' gaps, these constitute true 'regulatory' gaps and can be subdivided into two groups. There can be gaps at

[9] See F.J. PINTO BRONZE, *op. cit.*, p. 883.

the level of the rules themselves, "when a given constitutional precept is incomplete and it is necessary to complement it so that it can be applied"; regulatory gaps can also exist "when what is at stake is not an incompleteness of a rule, but rather that of a given set of regulations as a whole"[10].

Also on the constitutional level, Jorge Miranda defines gaps by comparison with the legal format of 'legislative omission' (with which they should not be confused), saying that they are "constitutionally significant situations that *have not been foreseen*" [in the Constitution itself]. He lists 'intentional' and 'unintentional', 'technical' and 'teleological', 'original' and 'supervening' gaps, but does not go on to define these concepts more precisely[11].

Bacelar Gouveia defines a legal-constitutional gap *('lacuna legis')* as "the absence of a solution that is required by Constitutional Law, within its specific regulatory scope". Generically speaking, he points to the composite nature of the notion of *'lacuna legis'*, which is composed of two elements: the objective element, which consists of an "incompleteness or absence of a rule that is applicable to a given concrete, individual situation, which has no direct normative solution"; and the finalistic element, which consists of an "incompleteness that goes against the plan of the branch of the Law in question, inasmuch as if the situation in question had been foreseen, the law would not have consented to the incompleteness and would have laid down the missing guidelines, thereby preventing such a thing from occurring"[12].

1.1.2. The extralegal situation[13], or that of 'spaces which are free of laws'

To Oliveira Ascensão, the term extralegal situation concerns those cases that are not regulated by the law simply because they do not possess a specific legal importance; more precisely, because they do not need to be legally regulated[14]. Along the same lines, Bacelar Gouveia defines an extralegal situation as one "in which no rule or principle has been established, nor does it seem necessary to do so, inasmuch as the case is one that does not belong within the regulatory scope of the Law". Moving on to the constitutional level, and deducing the format from a comparison with that of *'lacuna legis'*, he argues that no legal-

[10] See J.J. GOMES CANOTILHO, *Direito Constitucional*, as above, p. 1236.
[11] JORGE MIRANDA, *Manual*, II, Coimbra, 2003, pp. 270 and 274.
[12] JORGE BACELAR GOUVEIA, *Manual*, as above, pp. 668-9.
[13] OLIVEIRA ASCENSÃO, *op. cit.*, pp. 426-7.
[14] *Ibid.*

constitutional gap exists "if a given hypothesis is not matched by a rule because it does not warrant one (…), either because it is not at all legally relevant, or because its solution should only be found at the level of another branch of the Law"[15].

It would seem that this 'extralegal situation' format can be said to be similar to that which Castanheira Neves and Gomes Canotilho (following the path set by German legal theory) call " 'free legal spaces' or 'spaces that are free of laws' (*rechtsfreie Räume*)" [16]. In relation to the latter, Castanheira Neves tells us that "one must ask to what point human reality, particularly that of human/social relations (…), is the object of the law or must be considered to be intentionally affected by the law; nor must one fail to ask what aspects, domains or areas of that reality should be excluded or deemed to be excluded from legal rule-making". As he says, "that which is essentially at stake is knowing both when and under what terms the law should affect human life, or to what extent it is possible to require and is justifiable that human life be affected by the law, as well as its practical/constitutive extent". Inasmuch as the theorists agree that there are life situations for which the current law does not provide applicable normative solutions – "and which thus require a decision-making judgement that autonomously creates legal rules" – this inevitably leads us on to the following question: "what is the criterion that will enable us to know when we are in the presence of such a case and are not already in the domain of a space which is free of laws?" [17]. It is possible to say that at this point we are in the 'domain of the a-legal', or, if we prefer, that we are faced with areas of reality in relation to which there is a "deliberate renunciation of direct regulation"[18].

Jorge Miranda transposes the notion of extralegal or extra-constitutional situations (a notion which, as he points out, is sometimes referred to as a situation in which there are 'absolute gaps') onto the constitutional plane, and says that it corresponds "to situations which are left to political decision-making or the discretion of the ordinary legislative authorities"[19]. As we shall see below, when looked at in this way Jorge Miranda's extralegal situation is similar to Gomes Canotilho's idea of the indeterminacy of constitutional rules.

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[15] JORGE BACELAR GOUVEIA, *Manual*, as above, pp. 668-9.
[16] A. CASTANHEIRA NEVES, *op. cit.*, pp. 207-8, and J.J. GOMES CANOTILHO, *Direito Constitucional*, as above, p. 1236.
[17] See A. CASTANHEIRA NEVES, *op. cit.*, pp. 207-8 and 213.
[18] A. CASTANHEIRA NEVES, *op. cit.*, pp. 216 and 224.
[19] JORGE MIRANDA, *Manual*, II, as above, p. 270.

1.1.3. The indeterminacy of laws

Gomes Canotilho calls attention to the circumstance that in the field of constitutional law we find, "with more intensity than in other areas of the law, the idea of intentional indeterminacy and the incompleteness of rule-making". Unlike in the case of the various forms of *'lacuna legis'*, this incompleteness is not contrary to the regulatory plan underlying the constitution. Rather, it was the constitutional legislative authorities that deliberately opted not to impose rules on certain areas of social existence and relegated the regulation thereof to infra-constitutional sources ("it may be that the constitution itself intentionally abstains from regulating certain areas of social life" [20]). In this way they wanted to leave the ordinary legislative authorities a free space in which to make rules, allow political dispute and enable constitutional rules to be adapted to the evolution of the constitutional reality[21]. In Constitutional Law the indeterminacy of a large number of constitutional rules is thus reflected in silence on the part of the constitutional text.

As regards the indeterminacy of constitutional rules, it is possible to infer without much margin for error that indeterminate rules are more often found in constitutions which give the ordinary legislative authorities an important role to play in social and economic inclusion and integration and which concomitantly possess a large number of rules that more or less concretely set purposes and goals for the State – and particularly for the ordinary legislative authorities.

Lastly, it is appropriate to note that the lack of normative density in constitutional rules which results from their indeterminacy should not be confused with that which would result from the presence of indeterminate concepts in the text of a constitution. It might be possible to say that the use of indeterminate concepts and general clauses is more common in Private Law than in Constitutional Law. Whatever the case may be in this respect, the truth is that they are also present in the text of our Constitution (for example, those concerning 'real equality', 'efficiency of the public sector', 'just distribution of income and wealth', or an 'effective link to the Portuguese community'[22]), and their fulfilment must bear in mind the various principles, values and interests that possess constitutional significance. Jorge Miranda points this out when he also notes that notwithstanding the fact that in such cases the legislative authorities enjoy quite a reasonable margin for manoeuvre when they come to

[20] J.J. GOMES CANOTILHO, *Direito Constitucional*, as above, p. 1236.
[21] In this precise sense, see J.J. GOMES CANOTILHO, *Direito Constitucional*, as above, p. 1236.
[22] Indeterminate concepts taken respectively from Articles 9, 81, 103 and 121 of the CRP.

make the ensuing rules, they cannot " *'transfigure the concept in such a way that it covers essential aspects which are qualitatively different from those which characterise the legal-normative intention behind it'*; and that which is said about the legislative authorities is even more true of the interpreter"[23]. Again on the subject of indeterminate concepts, Cardoso da Costa calls attention to the preponderant role that falls to the Constitutional Court when they come to be fulfilled[24].

1.2. Legislative omissions

1.2.1. The issue of unconstitutional legislative omissions has been of moderate concern to Portuguese legal theorists, inasmuch as on the one hand Article 283 of the 1976 Constitution does provide for the existence of a control of unconstitutionality by omission[25] – the only issue before the Constitutional Court in such cases – but on the other hand there have not been many occasions on which the Court has actually had the opportunity to exercise this type of control[26].

Underlying this type of control of unconstitutionality by omission is the delicate question of reconciling the ordinary legislative authorities' political autonomy (and their corresponding freedom to make legal rules) with the need to ensure that those authorities are subordinated to the constitution, on the basis of the latter's supremacy within the legal order (whether or not one recognises that the constitution possesses a directive, or even just a

[23] See JORGE MIRANDA, *Manual*, II, as above, p. 262.
[24] JOSÉ MANUEL CARDOSO DA COSTA, *"A jurisdição"*, as above, p. 67.
[25] Under the 1976 Constitution, in Portugal there is a "mixed/complex" control (Gomes Canotilho). Following a tradition that comes from the 1911 Constitution (the first republican constitution), the current Constitution enshrines a concrete, diffuse control (along US lines). All the courts are responsible for controlling whether rules comply with the Constitution, and they must not apply those which they deem unconstitutional (Art. 204 of the CRP). The decisions of ordinary courts on the subject of unconstitutionality can be appealed to the Constitutional Court in those cases provided for, and under the terms set out, in the Constitution and the Organisational Law governing the Constitutional Court. In addition to this concrete, diffuse control there is also a preventive and successive abstract control of rules, and a control of unconstitutionality by omission, which are in the hands of the Constitutional Court.
[26] As a way of revitalising this type of control, Jorge Miranda proposes the possibility of a second concrete, diffuse route for cases to go to the Constitutional Court. Pereira da Silva displays his perplexity at the fact that the issue of legislative omissions is excluded from the scope of concrete, diffuse control. As we shall see later on (see 4.7 below), although the Constitution does not provide for this possibility, in a certain sense it is already a reality in our jurisprudential practice.
See JORGE MIRANDA, *Manual de Direito Constitucional*, vol. VI, Coimbra, 2001, p. 294, and JORGE PEREIRA DA SILVA, *Dever de legislar e protecção jurisdicional contra omissões legislativas. Contributo para uma Teoria da Inconstitucionalidade por Omissão*, Lisbon, 2003, p. 17.

programmatic, nature[27]). More specifically, what is at stake is the reconciliation of the legislator's freedom to make legal rules on the one hand, with the duty to legislate which the constitution imposes in certain cases on the other. The fundamental issue to be borne in mind is thus the determination of the sources of the duty to legislate[28]. The backcloth to this question is the principle of the separation of power.

The solution to this question – at the end of the day, the question of the degree to which the legislative authorities are subordinated to (or in the specific case of that which is of interest here, bound by) the text of the constitution – must be found in the constitutional text itself, and more specifically in the precision of its rules. To put it another way, this question should be seen as a technical-legal problem and thus addressed from a normative point of view, and should not be seen as a political – or at least exclusively political – issue.

1.2.2. The existence of a legislative omission means that there is a non-execution of the constitution, a disobedience in relation to an obligation that is set out in the rules laid down by the constitutional text. The legislators who wrote the Portuguese Constitution did not single out a concept of unconstitutional legislative omission. However, by limiting the scope of the Constitutional Court to cases in which the legislative measures needed to lend operability to rules that are not executable in their own right have not been made, they insinuated that it is not just any silence on the part of the legislative authorities that should be taken into account for the purposes of deciding that an unconstitutionality by omission exists.

On this basis Portuguese legal theory distinguishes between legislative omission on the one hand, and unconstitutional, or constitutionally significant, legislative omission on the other [29]. The distinction between them involves the type of constitutional rules towards which the legislative authorities have been disobedient or displayed inertia or passivity. This means that the majority of writers associate this topic with that of the typology of constitutional rules, and seek to establish their own classification, so as to then determine which types give rise to a constitutionally significant omission if the ordinary legislative authorities do not

[27] JOSÉ MANUEL CARDOSO DA COSTA, *"A jurisdição constitucional em Portugal"*, Coimbra, 1992, p. 32.
[28] In this exact sense, see J. PEREIRA DA SILVA, *op. cit.*, p. 15.
[29] J.J. GOMES CANOTILHO, *Direito Constitucional*, as above, pp. 1033-35; JORGE MIRANDA, "Inconstitucionalidade por omissão", in *Estudos sobre a Constituição*, vol. 1, Lisbon, 1977, pp. 341-2, and *Manual de Direito Constitucional*, vol. VI, Coimbra, 2001, p. 283; JORGE BACELAR GOUVEIA, *Manual*, as above, p. 671; LUÍS NUNES DE ALMEIDA, "El Tribunal Constitucional y el contenido, vinculatoriedad y efectos de sus decisiones", in *Revista de Estudios Politicos*, no. 60-61, April-September 1988, p. 867.

comply with them[30]. Among Portuguese legal theorists this way of looking at the issue of legislative omissions is criticised by Pereira da Silva, who considers this approach to be exclusively proceduralist and in that sense reductive, because it is incapable of covering the full legal scope of the legislative omission format. In his opinion, to a large extent this proceduralist perspective reverses "the natural order of the factors involved, inasmuch as it constructs the format of legislative omission – which is to be found in the substantive field – in the light of one of the terms of a classification of constitutional rules, merely because the latter is present in a rule of a procedural nature. Like the procedural rule that it is, Article 283 is not intended to define the material format of a legislative omission, and nothing permits the conclusion that the legislative authorities are only guilty of an omission when they do not issue the rules needed to implement constitutional rules which are not executable in their own right (…); the Article restricts itself (…) to establishing a means of controlling (which is placed in the hands of the Constitutional Court) a particular form of omission on part of the legislative authorities. There is nothing in its text which would enable us to deduce that there are no other means of jurisdictionally controlling the legislative authorities' omissions, or that there are no other forms of legislative omission"[31].

1.2.3. We should make a number of observations on the subject of constitutional rules whose breach can lead to a constitutionally significant omission.

First of all, it is important to reiterate the idea that the legislators who wrote the Constitution did not lay down or provide any criterion for determining which rules are not executable on their own.

In addition, it is important to call attention to the fact that it is not possible to determine the existence of an unconstitutionality by omission in relation to the constitutional system as a whole; this is something that must be gauged in relation to a specific rule whose non-executability undermines fulfilment of the terms of the Constitution[32].

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[30] L. NUNES DE ALMEIDA, *"El Tribunal Constitucional"*, as above, p. 865; GOMES CANOTILHO, *Direito Constitucional*, as above, pp. 1034-5 and 1172-3; JORGE MIRANDA, *"Inconstitucionalidade"*, as above, pp. 333 and 335, and *Manual*, VI, as above, p. 287, and *Manual*, II, as above, pp. 244 *et seq*., especially from p. 251 onwards; VIEIRA DE ANDRADE, *op. cit.*, pp. 381-2; PEREIRA DA SILVA, *op. cit*., p. 23.

[31] See J. PEREIRA DA SILVA, *op. cit.*, p. 14.

[32] In this precise sense, JORGE MIRANDA, *"Inconstitucionalidade"*, as above, pp. 341-2, and *Manual*, VI, as above, p. 284; and J. C. VIEIRA DE ANDRADE, *Os direitos fundamentais na Constituição Portuguesa de 1976*, Coimbra, 2001, p. 380.

So, as we mentioned earlier, virtually all the literature seeks to establish a classification of the constitutional rules that place a duty to act on the legislative authorities, in accordance with the degree of binding force they feel each rule possesses.

There is a difference of opinion among legal theorists about what are normally called 'programmatic rules'. While the great majority (Gomes Canotilho, Vital Moreira, Vieira de Andrade and Manuel Afonso Vaz) expressly deny that the breach of a programmatic rule can give rise to an unconstitutionality by omission, Jorge Miranda takes a somewhat different position. He admits the possibility that when a non-executable rule, be it preceptive or programmatic, is not made operable by the legislative authorities, it can bring about an unconstitutionality by omission. He does recognise, however, that this does not occur on the same terms for the two categories. In the case of a non-executable preceptive rule, "the unconstitutionality arises (…) as soon as the constitutional rule enters into force, or as soon as the deadline for the legislative authorities to complement it is reached. When it comes to programmatic rules, the unconstitutionality occurs when the legislative authorities remain passive in the face of the economic and social conditioning factors on which the rule's effective implementation is dependent, and do not seek to adapt or promote them; or, in an extreme case, when those conditioning factors are already in place but the legislative authorities do not issue the appropriate prospective guidelines in the service of the constitutional goals"[33].

Lastly, another issue at stake here is whether the rules whose breach gives rise to an unconstitutionality by omission are just constitutional rules, or constitutional principles as well. In this respect it seems that there is now a reasonable consensus among Portuguese legal theorists – although the truth is that this consensus applies more to the acceptance of the general possibility than to the terms on which it should be accepted. Gomes Canotilho and Vital Moreira feel that it is clear that unconstitutionality by omission "should cover at least the case of failure to fulfil principles that are explicitly stated by the constitutional text". However, in their view the question is more problematical when it comes to the "case of unwritten principles – that is to say (…) principles which are implicitly deduced from constitutional rules, but are not explicitly laid out in the constitution. Where these are concerned, it is already possible to accept the use of a review of unconstitutionality by action

[33] JORGE MIRANDA, *Manual*, VI, as above, p. 287. Also see *Manual*, II, as above, pp. 255-6. J. PEREIRA DA SILVA, *op. cit.*, pp. 31 and 33 adopts a position close to that taken by Jorge Miranda.
See J. C. VIEIRA DE ANDRADE, *op. cit.*, p. 383; J. PEREIRA DA SILVA, *op. cit.*, pp. 21-3.

in order to control their breach"[34]. Jorge Miranda believes that a constitutional rule which is not executable in its own right must almost always be a 'preceptive rule'; he argues that "one should not exclude the possibility, however, that a problem of legislative executability may arise in the case of certain principles"[35]. Pereira da Silva says that in the great majority of cases, increasing the precision of constitutional principles by legislative means involves the general duty to legislate. However, he accepts "that it is only when faced with a specific situation that it is possible to determine whether or not a given constitutional principle requires the legislative authorities to act in such a way as to 'consolidate the rules' in a particular sense"[36].

1.2.4. From all this we can safely conclude that the Portuguese legal system operates with a legal and not a naturalistic concept of legislative omissions[37]. The fact is that it is not enough for there to be a simple failure to act (or in other words, the non-fulfilment of a general duty to legislate); it is necessary not to do something that one was legally-constitutionally obliged to do (or also, not to fulfil a specific duty to legislate); so unconstitutional legislative omissions give rise to a regulatory vacuum that cannot be overcome by resorting to the specific *instrumentarium* that is applicable to integration. Gomes Canotilho and Vital Moreira argue that for a legislative omission to become significant from the point of view of its constitutional control, it must "be linked to a *constitutional requirement for action*"[38]. Even so, the ordinary legislative authorities' legal-constitutional duty "does not automatically correspond to a fundamental right to legislation" – a stance that is shared by virtually all of our legal theorists[39].

Over and above all this, despite a number of differences of opinion in relation to the various aspects of the issue, it is possible to attempt to offer a typology of situations in which

[34] J.J. GOMES CANOTILHO/VITAL MOREIRA, *op. cit.*, p. 1048.
[35] JORGE MIRANDA, *Manual*, VI, as above, p. 285.
[36] J. PEREIRA DA SILVA, *op. cit.*, pp. 27.
[37] J.J. GOMES CANOTILHO/VITAL MOREIRA, *Constituição da República Portuguesa Anotada*, Coimbra, 1993, p. 1047. Also see J.J. GOMES CANOTILHO, *Direito Constitucional*, as above, p. 1033, and J. PEREIRA DA SILVA, *op. cit.*, pp. 11 and 58.
[38] J.J. GOMES CANOTILHO, *Direito Constitucional*, as above, p. 1033. For an identical opinion, see JORGE MIRANDA, *Manual*, VI, as above, p. 286; J. PEREIRA DA SILVA, *op. cit.*, pp. 11-2.
[39] J.J. GOMES CANOTILHO, *Direito Constitucional*, as above, pp. 1036-7, and J. PEREIRA DA SILVA, *op. cit.*, p. 11.

a constitutionally significant omission exists[40]. Those situations are: absence; unsuitability; and deficiency or insufficiency.

a) Situations of absence can consist of an omission pure and simple of the adoption of the legislative measures needed to render impositive constitutional rules executable (in other words, the total lack or absence of rules for regulating a given matter). There can equally be situations of absence when certain constitutional rules are not precise enough to be executable in their own right and implicitly impose the task of giving them practical executability on the ordinary legislative authorities[41]. As an example of this particular type of situation, Gomes Canotilho and Vital Moreira mention the need for a legal definition of the special crimes for which political officeholders may be held liable, and a definition of the general rules governing the right to opposition, as derived from Articles 117(3) and 40 of the CRP, respectively[42].

b) Situations of inadequacy – which some more recent theoretical works talk about – arise following a failure on the part of the ordinary legislative authorities to fulfil their obligation to improve, update, perfect or correct existing rules.

On the subject of situations of this kind, Gomes Canotilho argues that here the omission does not consist of "the total or partial absence of law, but the lack of adaptation or improvement of existing laws". In his opinion, "this lack or shortfall in the extent to which laws are perfected is of particular legal-constitutional importance when the lack of 'improvements' or 'corrections' leads to serious consequences for the practical implementation of fundamental rights"[43].

Pereira da Silva also refers to this format. He says that there are two cases in which it is possible to talk about an obligation to correct or increase the adequacy of existing rules.

First of all, he refers to the so-called 'sliding unconstitutionalities', or "constitutional situations that are imperfect or on the way to becoming unconstitutional". Such situations occur because "the current law has stagnated in time and has not accompanied the

[40] See J.J. GOMES CANOTILHO/VITAL MOREIRA, *op. cit.*, p. 1047.
[41] As Gomes Canotilho and Vital Moreira (*op. cit.*, p. 1047) point out, this hypothesis "only becomes significant in its own right when the constitutional rules in question do not take the legal form of concrete orders to legislate or permanent, concrete requirements".
[42] J.J. GOMES CANOTILHO/VITAL MOREIRA, *op. cit*., p. 1047; and J.J. GOMES CANOTILHO, *Direito Constitucional*, as above, p. 1035.
[43] J.J. GOMES CANOTILHO, *Direito Constitucional*, as above, p. 1035.

evolutionary process of the constitutional reality". In such cases, over a period of time there is "a continuous process in which a given rule becomes unconstitutional, when the circumstance that the legislative authorities' inactivity goes on beyond a more or less precise deadline definitively changes the existing normative situation into an unconstitutional one". This unconstitutionality does not really lie in the current law, "which originally complied with the Constitution (and may perhaps still do so), but rather in the lack of a legislative intervention intended to adapt the legal rule in question to new realities". In this way, the link is established with the legal format of an unconstitutionality by omission[44].

The other cases in which there is a duty to correct occur when "the legislative authorities' prognoses prove erroneous". On the subject of the latter, to a large extent Pereira da Silva seems to go along with the prudent attitude taken by the Constitutional Court (to which he refers), which is that it is more difficult to impose the notion of unconstitutionality by omission in such cases involving an error of prognosis on the part of the ordinary legislative authorities[45].

c) Situations of insufficiency or deficiency. It is also possible to distinguish between two hypotheses in relation to this type of situation. One involves cases of partial unintentional legislative omission, which we have already looked at.

Besides these, we also have cases in which the implementation of a given impositive constitutional rule is itself dependent on the subsequent legislative development of an existing law (for example, a Basic Law is issued, but requires further development in the form of the appropriate Executive Laws)[46].

1.2.5. Thus far our discussion has focused more on the issue of constitutional rules whose breach leads to the existence of a constitutionally significant legislative omission. Similarly, the passage of time also plays an important part in determining the latter's existence. However, it would seem wrong to consider that an unconstitutionality by omission takes the shape of an unconstitutionality *ratione temporis*. In other words, except for cases in which impositive constitutional rules set a deadline with which the legislative authorities are obliged to comply (this has only happened in exceptional circumstances, as regards the rules

[44] J. PEREIRA DA SILVA, *op. cit.*, p. 59.
[45] J. PEREIRA DA SILVA, *op. cit.*, pp. 59 and 66.
[46] See J.J. GOMES CANOTILHO/VITAL MOREIRA, *op. cit.*, pp. 1047-48.

which some legal theorists call 'orders to legislate'), the mere passage of time *per se* cannot be seen as being an acceptable criterion for determining whether or not there is a legislative omission that is significant for the purposes of a control of constitutionality. In a sense, we have here the idea that that which really ought to be taken into consideration are the legal consequences of inertia on the part of the legislative authorities. The truth is that from the moment at which a constitution enters into force, the legislative authorities must comply with any impositive constitutional rules. That is to say that a legislative omission only becomes significant when the inertia or passivity of the ordinary legislative authorities concretely – or in the face of the concrete circumstances that come about at a given moment in time – takes on the sense of a change to the constitutional plan.

Some Portuguese legal theorists particularly highlight the results of inertia on the part of the legislative authorities, while others place more emphasis on the question of the passage of time.

Gomes Canotilho is an example of the former. To his mind the notion of unconstitutionality by omission "is not necessarily linked to the deadlines or times within which the legislative *interpositio* needed to render the constitutional precepts in question executable ought to have taken place". The constitutional significance of the omission should instead be judged essentially by the "legislative measure's importance and the extent to which it is indispensable in lending practical operability to the constitutional rules concerned, rather than by the setting of limits *ad quem*"[47]. Vieira de Andrade's stance is fairly close to that of Gomes Canotilho, when he says that a (total) legislative omission is "easily detectable, in that all it takes is to confirm the real need for legislative intervention in order to render the constitutional rules executable"[48].

Jorge Miranda seems to attribute a more substantial weight to the passage of time. He argues that the "absence or insufficiency of a legal rule cannot be separated from a given moment in time"; except in cases in which the text of the constitution lays down a deadline for the fulfilment of a certain type of rule, the existence of an unconstitutionality by omission "must depend on the nature of things – that is to say, on the nature of the constitutional rule which is not executable in its own right when faced with the life situation that it does not cover (including situations that are being created by the action of the ordinary legislative authorities alongside the constitutional rule in question)". To his way of thinking the

[47] J.J. GOMES CANOTILHO, *Direito Constitucional*, as above, p. 1037.
[48] See J. C. VIEIRA DE ANDRADE, *op. cit.*, p. 382.

scrutinising body "must measure and interpret the time that has passed – the time that the legislative body (with responsibility for the matter) was given in order to issue the law"; and that one should conclude that there is a significant legislative omission "whenever, after everything has been weighed up, one recognises that in the circumstances or situations in which they placed themselves or were placed, the legislative authorities not only could, but should have issued the legal rule" [49].

1.2.6. While we are on the subject of significant legislative omissions, it is also possible to talk about situations in which the latter lead not to an unconstitutionality by omission, but rather to an unconstitutionality by action[50].

This is the case of the so-called partial omissions, which differ from total omissions[51]. Portuguese legal theorists unanimously consider that only the latter always give rise to an unconstitutionality by omission, unlike the former, which can bring about either an unconstitutionality by omission or an unconstitutionality by action caused by a breach of the principle of equality, depending on the situation.

A partial omission exists in cases in which the law that implements an impositive constitutional rule does regulate a matter, but not in every respect; the legislative authorities' intervention is incomplete because it excludes a group of persons or situations from the scope of its application *ex silentio*, without an objective reason and reasonable grounds that would justify this difference in the way in which they are treated[52].

The type of unconstitutionality – by omission or by action – is determined by the knowledge as to whether the ordinary legislative authorities' insufficient or deficient action was intentional or not. If it is confirmed that there was a deliberate intention to cover certain persons or situations and not others, then there is a breach of the principle of equality that is expressly laid down by Article 13 of the CRP and is present in many other constitutional provisions. If, on the other hand, the actions of the ordinary legislative authorities result solely from an incomplete or incorrect assessment of one or more factual situations, but there was no

[49] JORGE MIRANDA, *"Inconstitucionalidade"*, as above, pp. 345-6, and *Manual*, VI, as above, pp. 287-8.
[50] See 3.6 below.
[51] Some authors use or refer to the existence of a different terminology for this dichotomy. More specifically, they talk about "absolute" and "relative omissions". In Portuguese legal theory, see JOSÉ MANUEL CARDOSO DA COSTA, "La justice constitutionnelle dans le cadre des pouvoirs de l'État (Rapport Général)", in *Annuaire International de Justice Constitutionnelle*, III, 1987, p. 22, and J.J. GOMES CANOTILHO, *Direito Constitucional*, as above, p. 1035.
[52] On the subject of partial omissions, among others see, J.J. GOMES CANOTILHO, *Direito Constitucional*, as above, pp. 1035-6; JORGE MIRANDA, *Manual*, VI, as above, pp. 286 *et seq*.

intention to benefit certain persons or situations, then we have an unconstitutionality by omissive action[53]. In the latter case the legislative authorities' silence must be the object of control; in the former, it is grounds for impugnation.

This notion of partial omission is not consensual among legal theorists. Whereas Gomes Canotilho says that "the legal-constitutional concept of omission is compatible with partial legislative omissions or relative omissions"[54], Rui Medeiros criticises the notion, which he calls an "unconstitutionality by omissive action", because he believes that it implies a clear weakening of the principle of equality[55]. Even so, he considers that "even if a constitutional omission of legislation and an unconstitutional discrimination do exist, the most one can say is that in such cases there is a cumulative phenomenon of unconstitutionality by action and unconstitutionality by omission" and that if it is necessary to opt for one of them, one should avoid the "practically innocuous" legal system governing "the control of unconstitutionality by omission"[56].

Nor should we forget the situation in which there is quite simply an abrogation of the legal rules that rendered constitutional rules executable, and which thus leads to a breach of the Constitution. As virtually all the different authors point out – indeed, in doing so they base themselves on the existing jurisprudence of the Constitutional Court – what there really is in such cases is a situation entailing an unconstitutionality by action, in which the object of control is the abrogatory rule and not the situation of legislative omission brought about by that rule[57].

1.2.7. Finally, it is also appropriate to mention one last problem related to legislative omissions, which is knowing whether or not they should be considered constitutionally significant in those cases in which the request for a control is made when the process of making a legislative act is already underway.

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[53] J.J. GOMES CANOTILHO, *Direito Constitucional*, as above, p. 1036. Also see JORGE MIRANDA, *Manual*, VI, as above, p. 288.
[54] J.J. GOMES CANOTILHO, *Direito Constitucional*, as above, p. 1035.
[55] See RUI MEDEIROS, *A decisão de inconstitucionalidade. Os autores, os conteúdos e os efeitos da decisão da inconstitucionalidade da lei*, Lisbon, 1999, p. 513.
[56] RUI MEDEIROS, *op. cit*., p. 520.
[57] See L. NUNES DE ALMEIDA, *"El Tribunal"*, as above, p. 867, and *"Le Tribunal"*, as above, pp. 202-3; J. M. CARDOSO DA COSTA, *"La justice"*, as above, p. 23; J.J. GOMES CANOTILHO/VITAL MOREIRA, *op. cit.*, p. 1050; JORGE MIRANDA, *Manual*, VI, as above, p. 289, and *Manual*, II, as above, pp. 254-5; J.C. VIEIRA DE ANDRADE, *op. cit*., p. 382, note 30; J. PEREIRA DA SILVA, *op. cit.*, pp. 17-18.

This question has already arisen in practice – for example, when a request was made to control the existence of an unconstitutionality by omission due to the absence of legal regulations governing the conduct of local referenda, as provided for by the Constitution[58]. On this question, there appears to be a consensus among theorists that it is not enough for a mere draft bill to have been presented, and less still for there to have been mere statements of intention, for it to be acceptable for a legislative omission not to warrant a negative judgement on the part of the Constitutional Court. With certain variations between them, this is the position that it is possible to deduce from the words of a number of eminent constitutionalists.

Jorge Miranda is of the opinion that if the draft bill has not yet been passed, there is a significant legislative omission, inasmuch as "only actual legislative measures – not future or potential ones – grant executability to constitutional rules". However, no unconstitutionality by omission can be deemed to exist "if the process has already been completed by the legislative body with responsibility for the matter and the publication of the rule is no longer dependent on that body"[59].

Gomes Canotilho and Vital Moreira feel that "in order for the situation in which there is an unconstitutional omission by the legislative authorities to cease, there must be some law on the matter, *and the existence of legislative intentions or processes is not enough*. In the event that a legislative process is pending, it is possible that the Court may wait for a reasonable time before pronouncing; but when it does pronounce, the Constitutional Court cannot deem the omission to have ceased because such a legislative initiative exists. The omission only ceases when a law that renders the constitutional rule executable comes into existence"[60].

However, while he also accepts that, "like [the mere existence of] a legislative initiative, the passage of the principles of a bill does not provide any guarantee that the law itself will actually be issued", Bacelar Gouveia goes further when he reminds us that the problem is not limited to the Assembly of the Republic. The fact is that once a law has received parliamentary approval, "it is still necessary for there to be an intervention on the part of the President of the Republic and the Government, who, by means of his veto and its refusal to grant ministerial countersignature respectively, can prevent the conclusion of the legislative procedure". He concludes that it would not be wholly inappropriate "to formulate

[58] In this respect, see Chapters **3.5** and **4.2** below.
[59] JORGE MIRANDA, *Manual*, VI, as above, p. 290.
[60] See J.J. GOMES CANOTILHO/VITAL MOREIRA, *op. cit.*, pp. 1048-9.

another understanding of the words 'competent legislative body', as they appear in Article 283(2) of the Constitution, (…) in order to also include these two bodies, inasmuch as they intervene in the legislative process"[61].

1.3. The role of the Constitutional Court or other judicial body charged with constitutional control, as a positive or negative legislator

1.3.1. Before addressing this specific question, it is useful to clarify something first.

We cannot fail to mention that the notion of unconstitutionality by omission which is enshrined in our Constitution has already undergone a number of alterations as a result of the constitutional revision that took place in 1982. This first revision of the Constitution changed the body that performs the control function from the Council of the Revolution to the Constitutional Court (whose immediate creation was itself the product of an order to legislate that formed part of the same revision). The 'sanction' the revision provides for in cases in which it is found that there is a constitutionally significant omission became a simple admonition or notification to the legislative authorities, and it is no longer possible for the body charged with the control function to suggest the necessary corrections (or to give instructions) for the ordinary legislative authorities to act on at a later date. The Council of the Revolution had been able to make recommendations under the terms of Articles 146 and 279 of the CRP[62]. The fact that the power to issue these recommendatory rulings was enshrined in the Constitution conveys the idea that remedying an unconstitutional legislative omission implies action on the part of the ordinary legislative authorities[63]. However, as Jorge Miranda

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[61] See JORGE BACELAR GOUVEIA, "Anotação ao Acórdão nº 36/90 do Tribunal Constitucional", in *O Direito*, Year 122, II (April-June), 1990, p. 423.

[62] Article 146 (Responsibility as guarantor of compliance with the Constitution), which has since been repealed, read as follows: "In its role as guarantor of the Constitution, the Council of the Revolution shall be responsible for:
a) (…)
b) Acting in such a way as to ensure the issue of the measures needed to comply with the constitutional rules, to which end it may make recommendations;
c) (…)".

In turn, Article 279 (Unconstitutionality by omission) read as follows: "When the Constitution is not being complied with due to the omission of legislative measures needed to render constitutional rules executable, the Council of the Revolution shall be entitled to recommend to the competent legislative bodies that they issue them within a reasonable period of time".

[63] On the Council of the Revolution's role as the body that controlled constitutionality by omission, see ARMINDO RIBEIRO MENDES, "El Consejo de la Revolución y la Comisión Constitucional. El control de la constitucionalidad de las leyes (1976-1983)", in *Revista de Estudios Politicos*, no. 60-61, April-September, 1988, pp. 844 and 848 (where he tells us that the Council of the Revolution was parsimonious in its use of the power to draw up recommendations, and only did so twice while the original text of the Constitution was in

points out, we should not deduce from this that the Council of the Revolution could "make laws in the form of recommendations – or that it could indicate the legislative rules needed to render the constitutional rules in question executable, which would come to the same thing". Similarly, such recommendations could not embody "any kind of legislative initiative", nor could they constitute "any kind of request for priority when the order of business was decided". As Jorge Miranda concludes, "acting in such a way as to ensure the issue of the measures needed to comply with the constitutional rules (…) is a completely different task from that of suggesting what those measures ought to be" [64].

1.3.2. Having thus offered this prior clarification, we can say that notwithstanding any discussion as to whether the control of unconstitutionality by omission is directed at an omissive conduct on the part of the legislative authorities (a more political view), or at the legal consequences to which the legislative authorities' silence may lead (a normative view) – a question that Portuguese legal theory does not debate at great length[65] – in Portugal the dominant conception of the Constitutional Court's mission is that it performs a control function with an essentially *negative* nature, and can neither replace the ordinary legislative authorities, nor bind their actions in any way[66].

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force: once to recommend that the Assembly of the Republic issue the legislative measures needed to render the constitutional rule which prohibited organisations that display a fascist ideology executable; and once to recommend that the Government adopt the necessary legislative measures on domestic work. He also says that there were three more review initiatives, but that they did not give rise to recommendations. Also see J.J. GOMES CANOTILHO/VITAL MOREIRA, *op. cit.*, p. 1049, and JOSÉ MANUEL CARDOSO DA COSTA, "El Tribunal Constitucional português: origen histórico", in *Revista de Estudios Politicos*, no. 60-61, April-September, 1988, p. 837.

[64] JORGE MIRANDA, *"Inconstitucionalidade"*, as above, pp. 351-2. Also, by the same author, *Manual*, VI, as above, p. 280.

[65] But it does not entirely overlook it either. Pereira da Silva (*op. cit*., p. 13) argues that the target of the determination of the lack of compliance with the Constitution which a legislative omission presupposes "is not the omissive conduct in itself, but rather the situation which is objectively deemed to occur in the legal order as a consequence of that conduct – the implicit normative meaning which is deduced from the silence and which constitutes a breach of the Constitution".

[66] See L. NUNES DE ALMEIDA, *"El Tribunal"*, as above, p. 876; RUI MEDEIROS, *A decisão de inconstitucionalidade. Os autores, os conteúdos e os efeitos da decisão da inconstitucionalidade da lei*, Lisbon, 1999, pp. 494-5 and 514; J.J. GOMES CANOTILHO, "A concretização da constituição pelo legislador e pelo Tribunal Constitucional", in *Nos dez anos da Constituição*, Lisboa, 1986, p. 353; J.J. GOMES CANOTILHO/VITAL MOREIRA, *op. cit.*, pp. 1048-9; JORGE MIRANDA, *"Inconstitucionalidade"*, as above, pp. 346 and 351, and *Manual*, VI, as above, p. 283; VITAL MOREIRA, "Princípio da maioria e princípio da constitucionalidade: legitimidade e limites da justiça constitucional", in *Legitimidade e legitimação da Justiça Constitucional* (Colloquium on the 10th Anniversary of the Creation of the Constitutional Court – Lisbon, 28 and 29 May 1993), Coimbra, 1995, pp. 195 and 197; JOSÉ MANUEL CARDOSO DA COSTA, "Algumas reflexões em torno da justiça constitucional", in *Perspectivas do Direito no início do século XXI* (Studia Iuridica – Colloquia, no. 3), Coimbra, …, p. 121; J. C. VIEIRA DE ANDRADE, *op. cit*., p. 384.

1.3.3. The idea that in the abstract control of norms the body with judicial competence operates as if it were a negative legislator or possesses a negative legislative function – an idea that originated with Kelsen – means that it possesses a cassatory function and restricts itself to expelling or expunging rules that do not comply with the constitution from the legal order[67].

If we transpose this idea to the notion of unconstitutionality by omission, we can say that the Constitutional Court cannot substitute itself for the legislative authorities by creating the missing rule or rules, or even just by urging the legislative authorities to act by indicating the timing for and content of its or their creation[68]. The Court is a 'counterlegislator' and not another legislative authority[69]. The text of our Constitution clearly shows that the legislative authorities occupy a privileged place as the body which implements or executes both the Constitution and the plan that underlies it[70].

Controlling the inertia or inactivity of the ordinary legislative authorities cannot mean that there is an effective power to force them to do something. This is so because, as we have seen, that which is at stake in this type of control is not imposing the controlling body's will on that of the body which is being controlled; the point is rather to reaffirm the supremacy of the constitution.

The idea – which Portuguese legal theorists back – that the Constitutional Court acts as a negative legislator matches a traditional view of this particular constitutional judicial body.

More recently, among foreign legal theorists some sectors of opinion – basing themselves on an ever more creative jurisprudence – have argued that the jurisdiction over constitutional affairs should also possess an integrative or implementative function and should act as a true legislative authority (positive or active legislator). Portuguese legal theory does not seem to identify with this line of thought.

1.3.4. In terms of *effects*, our theorists have described the Constitutional Court's rulings in cases involving the review of unconstitutionality by omission as mere decisions to

[67] See J.J. GOMES CANOTILHO, *Direito Constitucional*, as above, p. 891.
[68] In this precise sense, see NUNES DE ALMEIDA, *"El Tribunal"*, as above, p. 875.
[69] VITAL MOREIRA, *op. cit.*, p. 196.
[70] J.J. GOMES CANOTILHO, *Direito Constitucional*, as above, pp. 1310-11, and JORGE MIRANDA, *"Inconstitucionalidade"*, as above, p. 336. RUI MEDEIROS, *op. cit*., p. 497 also outlines this idea.

verify or recognise a situation[71] [72] – decisions that have a merely declarative effect[73]. This type of judgement is not to be confused with appellatory or delegatory judgements[74], inasmuch as its purpose is to make the competent legislative body aware of its failure to fulfil its specific duty to legislate, as laid down by the Constitution. Without questioning this assertion, Gomes Canotilho considers that the function of the type of control of constitutionality we are talking about here is to provide a sort of formalised critical publicity about breaches of the Constitution.

Again as regards the *effects* of a decision that an unconstitutionality by omission exists, some authors argue that such decisions do not possess any direct legal effectiveness, or that they have no binding effect[75]. How should these statements be interpreted? Essentially, they mean that such a decision by the Constitutional Court in this field not only does not eliminate (or annul) the unconstitutionality (which will only cease to exist upon the *interpositio* of the legislative authorities), but its effects are negative rather than normative in nature[76], and lastly, that it does not oblige the legislative authorities to pass the missing legislative measures.

1.3.5. Despite what we have just said about the efficacy of decisions that merely verify or recognise a situation, it is appropriate to offer a few explanations.

First of all, such decisions are by no means innocuous, in that they always entail a minimum degree of judgement as to the extent to which it would be politically opportune to pass the necessary measure[77].

In addition, it is not possible to sustain the argument that once the Constitutional Court has found that a significant legislative omission does exist, the ordinary legislative authorities are not actually bound to legislate. As Nunes de Almeida concludes, the fact is that this

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[71] Nunes de Almeida,*"El Tribunal"*, as above, pp. 875 and 882, talks about mere decisions to recognise or verify; VITAL MOREIRA, *op. cit.*, p. 197, says that decisions which state that an unconstitutionality by omission exists are a "mere recognition" of the unconstitutionality.

[72] J. M. CARDOSO DA COSTA, *"Algumas reflexões"*, as above, p. 123, and *"A jurisdição constitucional em Portugal"*, as above, p. 62.

[73] Along with other authors, NUNES DE ALMEIDA, *"El Tribunal"*, as above, p. 875, emphasises the merely declaratory effectiveness of decisions that are handed down in cases involving the review of unconstitutionality by omission.

[74] This is the stance taken by NUNES DE ALMEIDA, *"El Tribunal"*, as above, p. 876.

[75] J.J. GOMES CANOTILHO/VITAL MOREIRA, *op. cit.*, p. 1049, VITAL MOREIRA, *op. cit.*, p. 197, and NUNES DE ALMEIDA, *"El Tribunal"*, as above, p. 882, and *"Le Tribunal"*, as above, p. 213.

[76] VITAL MOREIRA, *op. cit.*, p. 198.

[77] J. M. CARDOSO DA COSTA, *"A jurisdição constitucional em Portugal"*, as above, p. 62.

obligation is not derived from the Court's decision, which does not initiate a legislative process in its own right, but from the text of the Constitution itself[78]. Jorge Miranda takes an identical position, when he says that the Court's finding that there is a constitutionally significant omission "does not create any legal obligation on the part of the legislative body, but simply declares that a prior obligation already existed".

Finally, by making the competent body aware of its finding that a constitutionally significant omission exists, the Constitutional Court is not engaging in an act of mere courtesy or simply communicating its decision. The truth is that its action should be seen as an "intentional way of emphasising to the competent body the illicit nature of the unconstitutional omission for which the latter is responsible, and its constitutional duty to put an end to it"[79].

1.3.6. In short, if they had to characterise the Portuguese Constitutional Court's work as activism, moderation or minimalism, our legal theorists would opt for the idea of a minimalist action, associated with a negative view of the Court's functions as regards its competence to control unconstitutionality. To paraphrase Gomes Canotilho and Vital Moreira, "the Constitutional Court's control function is essentially *negative*, inasmuch as its vocation is not to define that which does (or would) comply with the Constitution, but rather *that which does not comply with it*"[80]. Vital Moreira goes a little further when he argues that the concepts of activism or creativity – which he says have to a large extent served as the grounds for the practice of handing down 'manipulative' or 'constructive decisions' – on the part of constitutional justices should be rejected on principle. He takes this position because, as he points out, "there, the constitutional justice unequivocally dresses himself in the legislator's robes and, instead of limiting himself to declaring the unconstitutionality of the rules which the legislative authorities have issued, allows himself to create rules in the legislative authorities' place, or to deliberately attribute to them rules which differ from the ones they actually passed"[81].

[78] See NUNES DE ALMEIDA, *"El Tribunal"*, as above, p. 882, and *"Le Tribunal"*, as above, p. 209.
[79] J.J. GOMES CANOTILHO/VITAL MOREIRA, *op. cit.*, p. 1049.
[80] See J.J. GOMES CANOTILHO/VITAL MOREIRA, *op. cit.*, p. 1049.
[81] VITAL MOREIRA, *op. cit.*, pp. 197-8.

2. Consolidation of control of the constitutionality of the legislative omission in the Constitution, the constitutional jurisprudence and other legal acts

2.1.

Article 3(3) of the CRP states that "The validity of laws and other acts of the state, the autonomous regions, local government and any other public bodies shall be dependent on their conformity with this Constitution". In short, this is the enshrinement of the *principle of constitutionality*, which itself causes the Constitution to be awarded the status of the country's 'Fundamental Law' and the ensuing affirmation of its supremacy over all other state acts. In the Portuguese legal system the Constitution is thus at the summit of the hierarchy of sources[82], and one with which all the rest of the state's acts must comply[83], failing which they are invalid. Where the question that we are particularly looking at here is concerned, Portuguese legal theorists[84] have also been of the opinion that notwithstanding the fact that Article 3 only talks about the state's *acts*, the ensuing principle of constitutionality is also valid in relation to unconstitutional *omissions* – i.e. in relation to cases in which a legislative act that is required by the Constitution has been omitted.

If we look at the concept of a constitution which the Constitutional Court has adopted and developed, in this particular respect we should underline the fact that besides the *formal Constitution*, which is seen as a complex of rules that are formally qualified as constitutional, our constitutional jurisprudence has also referred to the so-called *material Constitution*. This is understood to refer to an unwritten constitutional right which, although its grounds and limits are defined by the formal Constitution, completes and develops the latter[85].

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[82] The only controversial issue among Portuguese legal theorists has been the relationship between the Constitution and European Union law. This subject is now expressly addressed by Article 8(4), which was introduced by Constitutional Law no. 1/2004 (6th revision of the Constitution), which states: "The provisions of the treaties that govern the European Union and the rules issued by its institutions in the exercise of their respective responsibilities shall apply in Portuguese internal law in accordance with Union law and with respect for the fundamental principles of a democratic state based on the rule of law". However, this is a question on which the Constitutional Court has never (before or since the abovementioned precept was included in the Constitution) been expressly called on to pronounce.

[83] Not only in the sense that their content cannot make them contradict constitutional principles or precepts, but also in the sense that they must be practised by whoever is responsible for doing so under the terms of the Constitution, and that they must observe the format and follow the process laid down thereby.

[84] Particularly GOMES CANOTILHO and VITAL MOREIRA, *Constituição da República Portuguesa Anotada*, Vol. I, 4th ed. Revised, Coimbra, Coimbra Editora, 2007, p. 217

[85] To quote GOMES CANOTILHO (*Direito Constitucional e Teoria da Constituição*, pp. 1013-1014), the material Constitution is seen as "the set of purposes and values which constitute the effective principle of the unity and permanence of a legal system (objective dimension), and the set of political and social forces (subjective dimension) which express those purposes or values, thereby ensuring that the latter are pursued and

The Court has also frequently recognised the existence of *implicit* constitutional principles – for example, the 'principle of guilt' or the 'principle of the protection of trust', which are inherent in the principle of the democratic state based on the rule of law that is expressly enshrined in Article 2 of the Constitution.

Following on from that which has also been the understanding among the most representative Portuguese legal theorists, the Constitutional Court has already admitted that the Constitution does not regulate everything it ought to, and that in this respect it is not a law without gaps. Having said this, the concept of constitutional gap has been developed more in legal theory than in constitutional jurisprudence. According to Gomes Canotilho[86], "a **normative-constitutional gap** only exists when there is an *incompleteness* that is contrary to the 'plan' set out by the constitutional order. In other words, an *autonomous constitutional gap* arises when a certain legal rule is not present in the normative-constitutional text, but can be deduced from the plan which underlies the constitution and from the teleology of the constitutional regulations". Jorge Miranda[87] also unreservedly admits the existence of gaps in the Constitution and points to various examples[88], which he defines as "constitutionally significant situations that have not been provided for".

2.2.

Articles 277 to 281 of the CRP state that the object of requests to review constitutionality or legality (in the case of abstract reviews), or of appeals on the grounds of unconstitutionality or illegality (in the case of concrete reviews), must necessarily comprise *legal rules*. Under the terms of Article 277 of the Constitution, unconstitutional rules are those "that contravene any of the provisions of this Constitution or the principles enshrined therein". The abovementioned precepts thus delimit the Constitutional Court's competence in matters concerning the review of constitutionality, in accordance with the definition of the

implemented, sometimes beyond the scope of the written constitution itself. JORGE MIRANDA (*Manual de Direito Constitucional*, Vol. II, 5th ed., Coimbra Editora, 2003, p. 29) defines it as "the mass of fundamental principles which structure and characterise each Constitution in a positive material sense; the direct and immediate manifestation of a legal idea which imposes itself in a given collectivity (either by consent, or by passive adherence); the primary result of the exercise of material constitutive power; and, in democracy, the foremost expression of the freely formed popular will".

[86] GOMES CANOTILHO, *Direito Constitucional e Teoria da Constituição*, pp. 1107-8.

[87] Jorge Miranda, *Manual de Direito Constitucional*, Vol. II, 5th ed., Coimbra Editora, 2003, pp. 299-303.

[88] *Op. cit.*, pp. 302-303.

term *rule*, which constitutional jurisprudence takes to mean "*any act of the public authorities that contains a 'rule of conduct' for private individuals or the public administration, a 'decision-making criterion' for the latter or for judges, or in general terms, a 'standard for assessing behaviour'* "[89].

Indeed, Article 283(1) of the Constitution clarifies this when it says that "At the request of the President of the Republic, the Ombudsman, or, on the grounds of the breach of one or more rights of the autonomous regions, presidents of Legislative Assemblies of the autonomous regions, the Constitutional Court shall review and verify any failure to comply with this Constitution by means of the omission of legislative measures needed to make constitutional rules executable".

The Constitution does not lay down any special process for investigating and judging whether there is an unconstitutionality due to the omission of the legislative measures needed to render constitutional rules executable. This task falls to the Law governing the Organisation, Operation and Process of the Constitutional Court, as we shall see below.

2.3.

The Constitution – particularly Article 221 [90] – in effect means that it is the Constitutional Court that has the last word in legal-constitutional matters, and in this sense it is appropriate to refer to the Constitutional Court as the "official interpreter of the Constitution"[91].

[89] Independently of its general, abstract nature, the concept of 'rule' as it has been implemented by the Constitutional Court's jurisprudence, includes not only legislative acts (laws, executive laws and regional executive laws), but any other normative acts of the public authorities, such as regulations issued by the state, public institutes, public associations or public territorial bodies that are distinct from the state, such as the autonomous regions or local authorities, on condition that, as the text says, they contain a *rule of conduct* for private individuals or the public administration, a *decision-making criterion* for the latter or for judges, or in general terms, a *standard for assessing behaviour*. For this purpose the concept of 'rule' excludes political acts, administrative acts, judicial decisions and private legal acts, such as business dealings conducted under the law.

[90] Which states that the Constitutional Court is specifically responsible for the function of "administering justice in matters of a legal and constitutional nature".

[91] At this point it is appropriate to recall that the Portuguese concrete constitutionality review system has often been called a "*mixed system*", which is based on a format that divides responsibilities between the different instances and the Constitutional Court. On the one hand it is not a system like the Austrian or German ones, in which there is a Constitutional Court and the other judicial instances are not competent to pronounce on issues of constitutionality; but on the other hand it is also not like a judicial review system, inasmuch as decisions handed down by the courts that are hearing given cases can be appealed to a specific constitutional court which stands outside the ordinary jurisdictional system.

The Constitutional Court has effectively sought to implement in some detail the powers that the Constitution grants it in relation to the investigation and review of unconstitutionality by omission of legislative acts. In various Rulings[92], the Court has stated that an unconstitutionality by omission only exists when *"the Constitution imposes a specific requirement on the legislative authorities and the latter do not fulfil it"*.

In this respect the Court has consistently repeated that: "(…) here the intervention of the legislative authorities does not entail the 'duty' of the body or bodies that exercise(s) sovereign power and is(are) competent to respond to the 'general' needs for legislation which are felt in the legal community (i.e. it does not entail a 'general duty' to legislate), but is rather something that is derived from a specific and concrete constitutional responsibility or charge (*Verfassungsauftrag*). At the same time it involves a responsibility or 'imposition' that is not only clearly defined in terms of its meaning and scope and does not leave the legislative authorities any margin for manoeuvre in relation to their own decision to intervene (i.e. in relation to the an of the legislation) – in such a way that it is quite possible to hypothetically talk about a true 'order to legislate' – but is also fulfilled as soon as the applicable rules are issued (so to speak) for the first time (…)"[93].

Ruling no. 424/2001 [94] goes in the same direction: "(…) in the present situation when the request was made the circumstances that typify a 'legislative omission' (even accepting a restrictive view of the concept) were all present, because it entailed a concrete and specific responsibility which the Constitution imposes on the legislative authorities – one whose meaning and scope are perfectly defined, without leaving them any margin for manoeuvre as to their decision on whether or not to intervene, and in which the purpose of the constitutional provision would be fulfilled as soon as the applicable rules were issued".

The Portuguese legal theorists to whom the Court most often refers are practically unanimous in the opinion that when it enshrines the existence of the format of

[92] Most recently, see Ruling no. 474/2002, which is already available at www.tribunalconstitucional.pt. This site also mentions the Constitutional Court's earlier jurisprudence on this subject, as well as that of the earlier Constitutional Commission.
[93] In addition to the aforementioned Ruling no. 474/2002, in particular also see Ruling no. 276/89.
[94] Also available on the abovementioned website.

unconstitutionality by omission, the objective of Article 283 of the Constitution is not to want the Court to undertake a review of the *overall results* of the application of the Constitution, but rather just to assess a *concrete, specific* situation in which the Constitution is breached – a situation that must necessarily be outlined on the basis of a *sufficiently precise rule* which the ordinary legislative authorities have not rendered executable.

Gomes Canotilho[95] notes that "the legal-constitutional concept of omission is not the same as the naturalistic concept", so "it does not just entail a simple negative 'failure to do' on the part of the legislative authorities; it means that the latter have not done that which they are concretely and explicitly obliged to do by the constitution". In other words, a "legally-constitutionally significant legislative omission exists when the legislative authorities do not fulfil, or incompletely fulfil, their constitutional duty to issue rules designed to implement permanent, concrete constitutional requirements".

On this precise point Jorge Miranda[96] also shields himself behind the Constitutional Court's jurisprudence, as set out in the aforementioned Ruling no. 276/89, and adds that "unconstitutionality by omission – like unconstitutionality by action – is not something that exists in relation to the constitutional system as a whole. It exists if there is a rule whose non-executability prevents compliance with the Constitution. The breach specifically exists in the light of a rule that has itself been breached, and not in that of a set of provisions and principles. Otherwise the judgement as to what is unconstitutional would be indefinite, fluid and dominated by extra-legal considerations, and the body that is charged with guaranteeing the Constitution could either be forced to resort to its own judgement, or be paralysed".

Finally, on the subject of unconstitutionality by omission, Vieira De Andrade[97] says: "[…] Of the various requirements for this type of unconstitutionality to exist, here it is of interest to highlight the fact that it must entail a failure to comply with a certain, given rule and not with a set of constitutional provisions and principles. To use a more elaborate way of describing it, which dominates German jurisprudence and legal theory, there is a legislative

[95] GOMES CANOTILHO, *Constituição Dirigente e Vinculação do Legislado*r, Coimbra Editora, 1982, pp. 332 *et seq.* and 481 *et seq*.
[96] JORGE MIRANDA, *Manual de Direito Constitucional*, Vol. VI, Coimbra Editora, 2001, 284 *et seq*.
[97] VIEIRA DE ANDRADE, *Os Direitos Fundamentais na Constituição Portuguesa de 1976*, Coimbra, 1983, pp 380 *et seq*.

omission whenever the legislative authorities do not fulfil, or insufficiently fulfil, their constitutional duty to implement concrete constitutional requirements. It is my opinion that unconstitutionality by omission can only exist – and thus the legislative authorities can only be the object of legal-constitutional censure – to the exact extent that the duty to legislate is materially determined or determinable. The possibility that an unconstitutionality exists is thus dependent on the degree of precision of the rule that imposes the requirement, and consequently on the degree to which the legislative authorities are bound by the Constitution […]".

As Ruling no. 474/2002 concludes, a summary of that which we have been saying means that "the constitutional provision which serves as the grounds for saying that there is an unconstitutionality by omission must be precise and concrete enough to enable the Court to safely decide what legal measures are needed to make it executable, without having to pronounce on what may be divergent political options. So when the possibilities which the Constitution offers the ordinary legislative authorities are practically unlimited, using strictly legal criteria the Court cannot hold that the duty to legislate is not being fulfilled; and consequently, given that the jurisdictional determination of the existence of unconstitutionality by omission cannot be founded on a political judgement, that determination becomes unviable. We will therefore sum up this point by saying that deciding that an unconstitutionality by omission exists in turn supposes the existence of a concrete, specific situation involving a breach of the Constitution – a breach of a sufficiently precise rule which the legislative authorities have not rendered executable within an appropriate period of time".

The Constitutional Court has not set out a theory about the consequences of discovering the existence of a situation in which the Constitution is not being complied with due to the omission of the legislative measures needed to render constitutional rules executable. Instead, in the limited number of cases in which it deemed that a situation involving unconstitutionality by omission existed, it has restricted itself to notifying "the competent legislative body thereof", as per Article 283(2) of the Constitution.

2.4.

The Constitutional Court's powers to investigate and review the constitutionality of legislative omissions are essentially defined by Article 283(1) of the Constitution. We have already referred to this precept, which states that at the request of any one of a list of bodies, the Constitutional Court is responsible for reviewing and verifying "any failure to comply with this Constitution by means of the omission of legislative measures needed to make constitutional rules executable".

In the wake of this constitutional provision, the LTC includes a process that is intended to review and verify this form of unconstitutionality. Article 67 states that except for their effects, the rules governing successive abstract review processes set out in Articles 62 to 65 apply to the process of reviewing a failure to comply with the Constitution due to the omission of the legislative measures needed to render constitutional rules executable. In summary, Articles 62 to 65 say that the request to review unconstitutionality can be submitted at any time (Article 62[1]), must be turned into a case file by the secretariat within 5 days and then presented to the President of the Constitutional Court, who has 10 days to decide whether it is admissible (Article 62[1]). If the request is admitted, and once the response of the body which would be responsible for issuing the rule has been attached to it, or the deadline for such a response has passed without one being received, a copy of the case file is given to each of the Justices. The case file is accompanied by a memorandum in which the President of the Court sets out the prior and background questions to which the Court has to respond, as well as any documents that he deems to be of interest (Article 63[1]). At least 15 days after the memorandum is given to the Justices, it is put to the debate. Once the Court's guidelines on the issues that need to be resolved have been established, the case file is assigned to a rapporteur who is chosen by ballot, or, if the Court so decides, to the President (Article 63[2]). Once the case file has been assigned to the rapporteur, he has 40 days in which to draft a decision that matches the guidelines set by the Court (Article 65[1]). This draft is then distributed to all the Justices and the completed file is sent to the President for inclusion on the agenda of a Court session that falls at least 15 days after the copies were distributed (Article 65[1]).

Where the consequences of the Constitutional Court's decision are concerned, Article 68 limits itself to stating that any ruling in which the Constitutional Court finds that there is an unconstitutionality by omission will have the effect laid down by Article 283(2) of the Constitution. The latter only states that when the Constitutional Court finds that an unconstitutionality by omission exists, it must inform the competent legislative body. As we will see in more detail under item **5** below, neither the LTC nor any other legislation – including the Rules of Procedure of the Assembly of the Republic in particular – expressly says who should be informed or how the legislative omission should be eliminated**.**

3. Legislative omission as an object of investigation by the Constitutional Court

3.1.

In the Portuguese system there is a special process for reviewing unconstitutionality by omission, which includes a rule governing active legitimacy. The only people who can ask the Constitutional Court to "review and verify any failure to comply with this Constitution by means of the omission of legislative measures needed to make constitutional rules executable" are "the President of the Republic, the Ombudsman, or, on the grounds of the breach of one or more rights of the autonomous regions, presidents of Legislative Assemblies of the autonomous regions" (Article 283[1] of the CRP).

The legitimacy to submit requests or appeals to the Portuguese Constitutional Court depends on the type of case in question. First of all, it is important to note that the Court's competence is not limited to reviewing unconstitutionality and illegality. Among others, it is also charged with responsibilities in relation to electoral processes, national, regional and local referenda, and declarations of political officeholders' assets and income and of incompatibilities and cases in which they are prevented from performing their functions.

If we restrict our analysis to the review of the unconstitutionality of rules, in order to demonstrate the special nature of the active legitimacy to ask the Constitutional Court to verify the existence of an unconstitutionality by omission it is important to distinguish between concrete review processes on the one hand and abstract constitutionality review processes on the other (Articles 277 to 283 of the Constitution; Articles 51 to 85 of the LTC).

The former begin with the lodging of appeals to the Constitutional Court against decisions in cases that are underway in the common (civil, criminal, administrative) courts. Such appeals to the Constitutional Court can be made by anyone who is a procedural party to the case in the broad sense of the term (e.g. the plaintiff, the defendant, the accused, the Public Prosecutors' Office).

In terms of the way in which the LTC is systematised, abstract constitutionality review cases are subdivided into the following categories: preventive review cases, successive review cases, and cases involving the review of unconstitutionality by omission.

The President of the Republic, the Prime Minister, one fifth of the Members of the Assembly of the Republic, and the Representatives of the Republic in the Azores and Madeira autonomous regions possess legitimacy to ask the Constitutional Court for a *preventive* assessment of the constitutionality of rules (Article 278 of the Constitution). The legitimacy of each of these bodies depends on the type of rule-making act in question (for example, that of the Representatives of the Republic is limited to rules set out in *regional* legislative decrees).

The President of the Republic, the President of the Assembly of the Republic, the Prime Minister, the Ombudsman, the Attorney General, and one tenth of the Members of the Assembly of the Republic can initiate *successive* unconstitutionality review processes. When a request for a declaration of unconstitutionality is based on a breach of the rights of the autonomous regions, active legitimacy is possessed by the Representatives of the Republic, the Legislative Assemblies of the autonomous regions, the presidents of the Legislative Assemblies of the autonomous regions, the presidents of the Regional Governments, and one tenth of the Members of the respective Legislative Assembly.

The active legitimacy in processes involving the review of unconstitutionality by omission is thus really very restricted.

3.2.

As is clear from the previous point, only the bodies referred to by Article 283(1) of the CRP can pose the Constitutional Court questions concerning unconstitutionality by omission, which is the object of a specific procedure.

However, it does sometimes happen that appellants in appeals involving the concrete review of the unconstitutionality of rules that have been applied in decisions handed down by ordinary courts argue the existence of an unconstitutionality by omission. In such cases the Constitutional Court will not hear the issue of unconstitutionality by omission, due to the lack of legitimacy on the part of the appellants and the fact that they have not used the *procedurally appropriate mechanism* (e.g. Rulings nos. 32/90; 79/94; 190/97; 238/97; 499/97; 125/98; 232/98; 330/98; 326/01).

There have been very few cases indeed involving the concrete review of unconstitutionality by omission – to date the Constitutional Court has only handed down seven decisions in cases of this type (the first on 1 February 1989 and the most recent on 19 November 2002)[98]. To place this in context, we should note that so far the Constitutional Court has proffered around 14,300 decisions in all, excluding decisions taken by a single Justice.

All these cases concerning the review of unconstitutionality by omission were brought by the Ombudsman.

The LTC states that the request asking the Constitutional Court to assess whether there is a failure to comply with the Constitution due to the omission of the legislative measures needed to render constitutional rules executable must be addressed to the President of the Court. It must specify which constitutional rule (or rules) lacks executability as a result of the omission of the necessary legislative measures (Article 51[1] of the LTC, which is the first of the common provisions applicable to abstract review cases, as defined by the LTC).

[98] There was also a case which was brought under the system that preceded the creation of the Constitutional Court, and which was passed on to the latter. In its Ruling no. 9/83 the Court decided not to hear the request, which had been made by the *Council of the Revolution*, and ordered the shelving of a case which had transited to it from the *Constitutional Commission*, in which the Court was asked to issue a *formal opinion* on the possible existence of an unconstitutionality by omission.

In practice, the request has on occasion been accompanied by legal opinions or reports (e.g. Rulings nos. 182/89, 276/89).

In case no. 36/90 the Court allowed the Ombudsman to ask for both a successive review of unconstitutionality and an assessment of the existence of an unconstitutionality by omission in the same petition. The Court considered these two requests – both concerning the issue of the *possibility of the transmission of the right to rent a residential property in cases involving the termination of a* de facto *union of a couple with underage children* – in the same case and issued its decisions on them in a single Ruling (no. 359/91).

3.3.

The Portuguese Constitutional Court does not possess the power to consider an unconstitutionality by omission *ex officio*.

In some of the Court's decisions in other types of case (see **3.1** above), there are references to the possibility that a given situation might constitute an unconstitutionality by omission, but they take the shape of a mere *obiter dictum* – in other words, they do not possess the nature of a decision and no consequences are drawn from them.

This occurred, for example, in Constitutional Court Ruling no. 55/85, which was given in a concrete review case in which the Court analysed one of the rules in the Code of Penal Procedure (CPP). The appellant was an accused who had been convicted by the ordinary courts of the crime of murder.

The Ruling said that in a certain form of criminal case (proceedings for 'complaint'), the fact that no means for preserving elements of proof with a verbal origin was provided for meant that the appeal court could only change the *de facto* decision in exceptional circumstances. The Constitutional Court offered the following comment on this conclusion:

> "On the level on which the TC [Constitutional Court] must analyse it, this objection cannot be heard. The truth is that it does not raise any question about the constitutionality of Article 469 of the CPP [Code of Criminal Procedure]. It may well be that in this respect it does question the constitutionality of the criminal-procedural system, which could be criticised for not including rules that safeguard the position of an accused person who wants an appeal court to

> reassess a *de facto* decision handed down by the court of first instance. But in this light, what this manner of thinking would lead to is the existence of an unconstitutionality by omission – the legislative authorities would not be implementing a certain requirement to legislate that might form part of Article 32(1) of the CR [Constitution of the Republic].
>
> However, in a case of this kind the Court is not required to verify the existence of an unconstitutionality of this type, which is provided for by Article 283 of the CR".

Ruling no. 174/93 was handed down in a successive review case. As in Ruling no. 55/85, the Court refers to the possible existence of an unconstitutionality by omission, but like in the earlier case, was not in a position to decide whether one actually existed or not.

3.4.

The Constitution, and accordingly the LTC as well, expressly refer to the "omission of the *legislative measures needed* to render *constitutional rules* executable" (Articles 283[1] of the CRP and 67 of the LTC).

Bearing in mind the types of legislative act provided for by Article 112(1) of the CRP, the missing legislative measures can be laws, executive laws or regional legislative decrees. This means that if the Constitution is not being complied with due to the absence of some other type of rule-making act, or to the lack of acts of some other nature (e.g. political, administrative acts), a constitutionally significant omission cannot exist.

It is therefore not possible to say that there is an unconstitutionality by omission due to the lack of an act that does not possess a *legislative* nature, nor that an omission exists because a *non-constitutional* rule (e.g. a law that possesses superior force) has not been rendered executable.

In the Portuguese system, what counts is reviewing and verifying whether or not there is any *failure to comply with the Constitution*.

3.5.

As we said in **3.2** above, the Constitutional Court refuses to consider questions of unconstitutionality by omission that are included in appeals concerning a concrete review of

unconstitutionality. It does so on the basis of both the lack of legitimacy of the party that requests the review, and the error in the form of procedure. What we are talking about here are not cases of a real refusal to consider requests based on unconstitutionality by omission, because they did not entail the use of the correct procedural form for such a review.

As to the possibility of the Constitutional Court refusing to hear a case for formal reasons, we should note that it is up to the President of the Court whether or not to admit a request for a review of unconstitutionality by omission, albeit a preliminary act of acceptance on his part does not preclude a definitive rejection of the request by the Court as a whole (Article 51[2] and [4] of the LTC).

If the President of the Constitutional Court considers that any of the elements which the initial request is supposed to contain (see **3.2** above) are missing, inadequate or obviously lacking in clarity, he will notify the petitioner that he must remedy these shortcomings (Article 51[3] of the LTC).

A request cannot be admitted if it is made by a person or body that does not possess legitimacy to do so, or if the shortcomings in it are not remedied (Article 52[1], the final part of Article 62[1], and Article 67 of the LTC). However, the competence to decide whether or not to admit the request does not belong to the President – it is a collegial one (Article 52[2] and [3] of the LTC).

At this point it is also important to look at the particular situation which arises if, while a case involving a review of unconstitutionality by omission is still pending, a legislative act that overcomes the omission in question is published.

In the Portuguese Constitutional Court's jurisprudence there are three cases (those which gave rise to Rulings nos. 276/89, 638/95 and 424/01) in which a legislative act that addressed the matter which formed the object of the requests in pending cases was published in the Official Gazette *(Diário da República)*. In all three cases the Court unanimously decided to hear the request (thereby eliminating the possibility that it *would not be heard* because *it had since become useless to do so, which in turn would cause the suit to be terminated),* and then ruled that in the light of the publication of the normative acts, no unconstitutionality by omission existed. The Court thus held that when it comes to assessing

the existence of an omission, the point in time that counts is the date on which the Court hands down its decision.

In Portuguese constitutional jurisprudence, such situations thus do not constitute cases of a *refusal* to hear a petition concerning unconstitutionality by omission, but rather ones in which the Court decides to hear the request and then deems that no unconstitutionality by omission exists.

The same thing occurred in Ruling no. 36/90, although in that case no normative act had been published in the Official Gazette when the Constitutional Court gave its decision. However, the Assembly of the Republic had already passed the general principles of a bill on the matter that formed the object of the request, and the Court deemed that this was enough for there not to be an unconstitutionality by omission. As we have already seen in **1.2.7**, our legal theorists do not all concur on this point.

In Ruling no. 359/91 the Portuguese Constitutional Court held that no unconstitutionality by omission existed in the case before it. It gave various grounds for this decision, including the absence of any imposition by the Constitution of a *specific* and *concrete* duty to legislate on the matter in question (the transmission of the position of tenant of a residential property in a case involving the termination of a *de facto* union of a couple with underage children). Having said this, the absence of this specific duty was not seen as a reason to refuse to consider the existence of an unconstitutionality by omission, but once again rather as grounds for a 'decision of merit'.

The Ruling was given in a case that we have already talked about (**3.2** above), in which the same petition included a request for a successive review (in relation to a Definitive Decision of the Supreme Court of Justice, which was held to breach the principle of non-discrimination against children born outside wedlock) and a request to assess the existence of an unconstitutionality by omission.

To quote the Ruling itself:

> "According to the assessment that is made in the request, we are told that the legal system contains an *unconstitutionality by omission* of any legislative measure which expressly states that the rules set out in Article 1110(2), (3) and

(4) of the Civil Code (CC) are applicable, with the necessary adaptations, to *de facto* unions of couples with underage children.

According to this understanding, this is because if the definitive ruling were to be declared unconstitutional, and despite the fact that the courts would then be able to apply the said rules to *de facto* unions of couples with underage children by analogy, there is nothing to guarantee that the aforesaid analogical application is a constitutional imperative in relation to the courts.

Under the terms of Article 283(1) of the Constitution the Ombudsman possesses legitimacy to ask [the Constitutional Court] to assess and verify a failure to comply with the Constitution due to the omission of the legislative measures needed to render constitutional rules executable.

(…) an unconstitutionality by omission only exists when the Constitution places a concrete, specific requirement on the legislative authorities, which the latter have refrained from fulfilling (on this subject, see Gomes Canotilho, *Constituição Dirigente e Vinculação do Legislador,* Coimbra, 1982, pp. 325 *et seq*., Gomes Canotilho and Vital Moreira, *op. cit.*, vol. 2, p. 549, and Jorge Miranda, *Manual de Direito Constitucional*, vol. II, 2nd ed., Coimbra, 1983, pp. 393 *et seq*.).

In the light of the above remarks, it is not possible to say that the legislative measure *for which the Ombudsman is calling* is derived from a *specific, concrete* duty to legislate imposed by the Constitution, such that failure to fulfil it would generate an unconstitutionality by omission.

If one were to admit the need for such a measure, it would derive from the general duty on bodies that exercise sovereign power and possess the responsibility to legislate to fulfil the 'general' needs for legislation that are felt by the community.

The fact is that Article 36(4) of the Constitution lays down that children born outside wedlock cannot be the object of any discrimination for that reason, and simultaneously prohibits the publication of rules that would contradict this principle.

However, it is not possible to argue that the aforementioned precept contains a concrete imposition on the legislative authorities which would constitutionally

oblige the latter to *issue a rule of the type which the petitioner argues for*, failing which there would be an unconstitutionality by omission.

In addition to all this, if the Definitive Decision of 23 April 1987 were to be the object of a declaration of unconstitutionality with generally binding force, as described above, it would mean that when raised as a relevant criterion for the attribution of the right, the *constitutional principle of non-discrimination against children would obligatorily have to be applied* in terms of the 'children's interest' when allocating the right to rent to which Article 1110(2), (3) and (4) of the Civil Code refers, and it would have to be respected in both the *case of children born in wedlock* and *that of children born of* de facto *unions.*

There is thus no need here for any intervention on the part of the ordinary legislative authorities with a view to remedying a legislative omission which, when we really come down to it, does not exist."

3.6.

As part of the process of reviewing unconstitutionality by omission referred to in **3.1** above, if the Constitutional Court does not hear a request or deems that there is no failure to comply with the Constitution due to an omission of the legislative measures needed to render constitutional rules executable, but does find that the question which has been placed before it relates to other unconstitutional situations that prove to be of a 'nature analogous' to that of those involving unconstitutionality by omission[99], it cannot, either on its own initiative or at the request of another body, use the case to assess and rule upon the issues in question, even if fundamental rights or freedoms are at stake.

However, in cases involving the review of unconstitutionality by action[100] – in which greater importance is assumed by concrete unconstitutionality review procedures and which entail appeals against the decisions of other judicial bodies, either on the grounds of a refusal

[99] Situations which, while they do not constitute typical cases of unconstitutionality by omission, do lead to the unconstitutionality of rules or to interpretations of rules that would be capable of constituting cases whose nature would be analogous to that of a legislative omission.

[100] Covers the procedures for the preventive review of constitutionality (Articles 278 and 279 of the Constitution and 57 to 61 of Law no. 28/82 of 15 November 1982 (LTC)), the successive abstract review of constitutionality (Articles 281 and 282 of the Constitution and 62 to 66 of the LTC), and the concrete review of constitutionality (Articles 280 of the Constitution and 69 to 85 of the LTC).

to apply rules due to their unconstitutionality (Article 280[1]a of the Constitution), or because they have applied rules which the appellant alleged to be unconstitutional during the proceedings (Article 280[1]b), or because they have applied a rule which the Constitutional Court has already deemed unconstitutional (Article 280[5] of the Constitution)[101] – the Court considers and rules on questions posed by the parties[102] which, while they do not constitute typical cases of legislative omission, could constitute cases of unconstitutionality that were 'analogous' to situations of legislative omission in which the breach of fundamental rights or freedoms were at stake.

Examples of such situations include cases in which a new law repeals an existing one that rendered constitutional rules executable, cases in which the unconstitutionality of a rule is derived from the lack of, or inadequate, implementation of the current legal system, and cases in which the unconstitutionality results from the failure of the regulation of a legal rule to provide for certain situations or certain cases that are deemed 'analogous', as we will specify in the answer to item **4.7** of the questionnaire.[103]

In concrete constitutionality review cases, if the procedural preconditions for the type of appeal in question are fulfilled, the fact that the parties wrongly argue that the rules, segments of rules or interpretations of rules under consideration suffer from unconstitutionality by omission does not prevent the Constitutional Court from looking at, and declaring the existence of, concrete defects in terms of unconstitutionality by action. One example of this is Ruling no. 47/2007, to which we will refer in the answer to item **4.7** of the questionnaire. Nor is the Court bound to consider the question solely in the light of the constitutional parameter which the appellant argues has been breached.

4. Investigation and assessment of the constitutionality of legislative omission

4.1.

[101] Also see Article 70[1]a, b, g and h of the LTC).
[102] The Public Prosecutors' Office and persons who, under the law that regulates the case in which the decision was handed down, possess the legitimacy to appeal against that decision (Article 72[1]a and b of the LTC) – as a rule, losing parties and third parties who are directly prejudiced by the decision.
[103] For the consequences of such cases for Portuguese legal theory, see 1.2.6 above.

All the above means that we can say that whenever there is a constitutional requirement to legislate supported by a rule whose meaning and scope are sufficiently precise, in relation to which the omission of a necessary legislative measure leads to a concrete and specific situation of breach due to the lack of executability of a constitutional rule, at the request of the bodies with legitimacy to do so the Court can assess and verify whether there is a failure to comply with the Constitution as a result of the omission of the legislative measure in question.

The 'investigation and analysis' of the legislative omission is conducted on the basis of this presupposition, and the applicable review procedures can concern any 'matter' in relation to which the Constitution imposes, as described above, the adoption of legislative measures 'needed' to render its rules executable. In this respect the Court's work does not differ in any way due to the nature of the legal matter involved in the request for a review of unconstitutionality by omission.

This leads to the existence of a number of traits that characterise the control of 'unconstitutionality by omission'.

On the one hand, this control is excluded from the material scope of the majority of the appeals in which the Court has a hand following a decision by another judicial body – concrete review procedures. The Court is not responsible for assessing legislative omission problems that arise at the level of the judicial resolution of concrete legal issues – see **3.6** above and **4.7** below.

On the other hand, this is an appeal whose object is limited to assessing and verifying a failure to comply with the *norma normarum* in relation to a concrete duty that the constitution imposes on the competent legislative bodies.

However, despite all this there are still some traits that are characteristic of the Court's intervention under this heading. They are clearly visible in the cases which considered the omission of legislative measures and involved the criterion that was followed in the control of legislative omissions concerning 'rights, freedoms and guarantees' and 'economic, social and cultural rights' and the admissibility and significance of partial legislative omissions.

If we begin by considering the hypotheses in which the request for a review of unconstitutionality by omission involved the executability of fundamental rights, it is important to note that the majority of the cases that have been brought before the Court concerned 'rights, freedoms and guarantees' (see Rulings nos. 182/89, 359/91 and 638/95),

whose immediate applicability (Article 18[1] of the Constitution) was prejudiced by the absence of a legal rule that ordered, implemented or shaped the right in question, inasmuch as the latter's exercise "necessarily presuppose[s] a more or less complex organisational / institutional structure which the legislative authorities have not yet constructed" (Ruling no. 90/84).

This is what happened in the case that underlay Ruling no. 182/89 – where the issue was the omission of the legislative measure that was provided for by Article 35[4] of the Constitution ("The law shall define the concept of personal data for the purposes of computerised records") and was needed to render the guarantee set out in paragraph [2] of the same Article ("Third-party access to files containing personal data and the interlinking thereof shall be prohibited, as shall cross-border flows of data, save in exceptional cases provided for by law") fully executable. As this decision underlined, the legislative omission that was censured by the Court resulted from the absence of a legal rule which would have defined the concept of personal data in such a way as to make the prohibition imposed by paragraph [2] of the Article effective. The Court considered that it was necessary for there to be a "*legislative mediation or* interpositio legislatoris*"* to ensure this effect.

In Ruling no. 351/91 the Court considered and ruled on a request from the Ombudsman for not only a successive abstract review of the Definitive Decision which the Supreme Court of Justice handed down on 23 April 1987 ("the rules laid down by Article 1110(2), (3) and (4) of the Civil Code [transmission of the position of tenant in the event of divorce or judicial separation] are not applicable to *de facto* unions, even if the couple in question has underage children"), but also a review of the "unconstitutionality by omission of a legislative measure which expressly states that the rules set out in Article 1110(2), (3) and (4) of the Civil Code (CC) are applicable, with the necessary adaptations, to *de facto* unions of couples with underage children".

In this decision the Constitutional Court issued a declaration with generally binding force of the unconstitutionality of the Supreme Court of Justice's Definitive Decision, because it breached the principle of non-discrimination against children laid down by Article 36(4) of the Constitution ("Children born outside wedlock shall not be the object of any discrimination for that reason, and neither the law, nor official departments or services may employ discriminatory terms in relation to their filiation"). However, it held that there was no unconstitutionality by omission, on the basis that the aforementioned constitutional precept

did not contain a "concrete imposition on the legislative authorities that would constitutionally oblige the latter to *issue a rule of the type which the petitioner argues for*, failing which there would be an unconstitutionality by omission".

Lastly, Ruling no. 638/95 analysed the Ombudsman's request that the Constitutional Court assess and verify the failure to comply with the Constitution due to the omission of the legislative measures needed to render the rule laid down by Article 52[3], which enshrines the right of *actio popularis* ("Everyone shall be granted the right of actio popularis in such cases and under such terms as the law may determine, either personally or via associations that purport to defend the interests in question, particularly the right to promote the prevention, cessation or judicial prosecution of offences against public health, the degradation of the environment and the quality of life or the degradation of the cultural heritage as well as to apply for the appropriate compensation for the aggrieved party or parties"), executable. The Court held that there was no unconstitutionality by omission, inasmuch as after the request had been submitted, a law (Law no. 83/95 of 31 August 1995) was enacted which, in the Court's opinion, contained "an overall, integrated and as far as possible complete set of rules governing the 'right of *actio popularis'* enshrined in Article 52[3] of the Constitution".

Only once has the Court been faced with a request for a declaration of unconstitutionality by omission involving a right from the catalogue of 'economic, social and cultural rights' (Ruling no. 474/02) (The Court has never made any distinction that would exclude such rights from its analyses of legislative omission cases.)

In this Ruling the Court ruled on a request from the Ombudsman to consider and verify whether any "unconstitutionality results from the absence of the legislative measures needed to render the rule set out in Article 59(1)e of the Constitution fully executable in relation to Public Administration workers". (This Article states that: "[1.] Regardless of age, sex, race, citizenship, place of origin, religion and political and ideological convictions, every worker shall possess the right: [e)] To material assistance when he involuntarily finds himself unemployed".) In this case the Court concluded that there was a partial omission and decided to confirm the non-existence of the legislative measures needed to render the right provided for by Article 59(1)e of the Constitution executable.

The criterion adopted by the Court was that of considering whether, whatever the nature of the fundamental right – and its legal force – the constitutional rule *"possesses the characteristics needed for there to be an unconstitutionality by omission, even though that right is a social right and ought not to be considered analogous to the rights, freedoms and guarantees"* (Ruling no. 474/02).

When it comes to the second aspect we mentioned above, it is important to begin by noting that in the majority of cases it has decided, the Court has been faced with a situation in which there was total legislative silence in relation to the concrete constitutional requirements that were at the root of the review requests.

Besides Rulings nos. 182/89 and 638/95, which we have already referred to, it is also worth looking at: Ruling no. 276/89, in which the Court considered a request from the Ombudsman for a review of the omission of the legislative measures needed to render Article 120[3] of the Constitution ("The law shall specify the special crimes for which political officeholders may be held liable, together with the applicable penalties and the effects thereof") executable; Ruling no. 36/90, in which the Court was asked, again by the Ombudsman, to consider and verify the failure to comply with Article 241[3] of the Constitution ("by secret ballot, local authority bodies may directly consult the citizens who are registered to vote in their area on matters that are included within their exclusive area of responsibility, in such cases, under such terms and with such effectiveness as the law may lay down"); and Ruling no. 424/01, in which the Court decided a request from the Ombudsman to consider and verify the omission of the legislative measures needed to render the rule set out in Article 239[4] of the Constitution ("Nominations for election to local authority bodies may be submitted by political parties, either individually or in coalition, or by groups of registered electors, all as laid down by law") executable.

The omission of legislative measures due to the 'incompleteness' of a given set of legal or normative rules was questioned in two cases.

The first was the object of Ruling no. 351/91, in which the Court decided against the existence of an unconstitutionality by omission.

In the second case, which was resolved by Ruling no. 474/02, despite the fact that the Court considered that there was no consensus among legal theorists or in jurisprudence *"on the question of whether, when the principle of equality is breached as a result of an imperfect*

or incomplete legal implementation of a constitutional requirement to legislate, in such a way as to create a discriminatory situation between members of its target audience, there is an unconstitutionality by action, an unconstitutionality by omission, or possibly both" (Ruling no. 474/02), it concluded that a partial omission did exist and decided to hold that the legislative measures needed to render the right provided for by Article 59(1)e of the Constitution executable had not been made.

It is also appropriate to offer an observation about the cases concerning the 'organisation of political power', which were the object of Rulings nos. 276/89, 36/90 and 424/01. In all three cases, the legislative authorities ended up by fulfilling the need for regulations that were capable of rendering the constitutional rules in question executable, before the Court handed down its decisions.

Lastly, having set out the cases in which the Constitutional Court pronounced on the issue of unconstitutionality by omission, it only remains to point out that as part of appeals involving the concrete review of constitutionality, the Court has considered issues that are close or analogous to the problems raised by legislative omissions – a subject that we will cover in **4.7** below.

4.2.

If we turn now to the criteria that govern whether or not a legislative omission which can be constitutionally censured exists or not, it is important to begin by noting that in a process involving the review of unconstitutionality by omission, omissions are significant when they reflect *"non-compliance with constitutional requirements in the strict sense of the term – in other words from the failure to comply with rules that permanently and concretely oblige the legislative authorities to adopt legislative measures which put the Constitution into practice"* (see Ruling no. 474/02).

Under this interpretation, for a legislative omission to exist, at the constitutional level there must be *"a concrete, specific requirement to legislate, set out in a rule that possesses a sufficient degree of precision"* (Ruling no. 474/02). This is to say that there must *"concretely* [be] *a specific incumbency on the legislative authorities which they refrain from fulfilling"* (Ruling no. 359/91) – a constitutional requirement whose meaning and scope are clearly defined.

The fact is that under the criterion that has been employed by the Constitutional Court, what is at stake here is not a review of the fulfilment of the 'general duty to legislate' with which the bodies that exercise sovereign power and possess legislative attributes are charged and which is designed to *"help respond to the 'general' needs for legislation that are felt by the legal community"*, and of the results of the exercise of that fulfilment, but rather an inquiry intended to gauge compliance with the constitutional injunctions that create *"a specific, concrete constitutional incumbency or charge,* (…) *whose meaning and scope are clearly defined and do not leave the legislative authorities any margin for manoeuvre as regards their decision to intervene"* (Ruling no. 276/89).

In summary, we can agree with Ruling no 509/02 when it says that an unconstitutionality by omission arises when the *"Constitution contains a sufficiently precise and concrete order to legislate, such that it is possible to safely determine what legal measures are needed to render it executable"*.

In any case, the Court has held that there is no failure to comply with the Constitution due to legislative omission when, despite the fact that no legal rules are currently in effect, the legislative body is considering an initiative that will fulfil the constitutional requirement in question. In these circumstances, which were addressed by Ruling no. 36/90, the Court felt that "while it is possible to doubt whether the simple submission of a bill in its own right has the effect of denying the existence of an omission for the purposes of a declaration of unconstitutionality, the passage of [...] a bill – even though only in its general principles – must, as a rule, already be considered adequate for that purpose".

As we said earlier, the object of such appeals is to secure the review of a failure to comply with the Constitution due to an omission of the *legislative* measures needed to render constitutional rules executable. The mention of *legislative* measures should be taken to include the legislative acts of the competent bodies (the Assembly of the Republic, the Government, and the Legislative Assemblies of the autonomous regions), as defined by the Constitution.

However, even though the problem was not addressed by any of the decisions we have mentioned so far, it would not seem right to completely exclude the possibility that when it comes to gauge the existence of a problem with a legislative omission, the Court might either take into account or even emphasise acts with a normative content which cover the matter in question.

The Constitutional Court can assess legislative omissions that arise from the repeal of laws which rendered constitutional rules executable without the accompanying issue of another law with the capacity to provide an answer to the constitutional requirement involved.

However, in such cases the Constitutional Court has deemed that such an occurrence constitutes a real unconstitutionality by omission, and one which can be taken into account in concrete constitutionality review cases. A good example of this stance is provided by the Court's reasoning in Ruling no. 39/84, which clarifies that "[when] the state does not duly implement the concrete, specific constitutional tasks with which it is charged, this can be the object of constitutional censure under the heading of unconstitutionality by omission; but when it undoes that which had previously been done in order to carry out that task, and thereby damages the guarantee of a fundamental right, then the constitutional censure is already to be found at the level of an unconstitutionality by action" that must be attributed to the revocatory law.

Lastly, it is also important to point out that as part of the process of determining the existence of a legislative omission, the Constitutional Court essentially verifies the normative contents required by the Constitution and is not competent in this type of case to pronounce on the practical application that is made of a given set of legal rules.

4.3.

As to the methodology that underlies the weighing up of whether a legislative omission exists, depending on how the appeal on the grounds of constitutionality is configured the heart of the question entails determining the legal-normative meaning of the constitutional parameter in question, especially in terms of whether or not the constitutional rules create a requirement to legislate in the sense which would warrant the finding that the Constitution is not being complied with. Clearly, this methodological effort bears in mind – more precisely, is based on – the legislative measures that are considered to have been omitted.

At this level, it is possible to say that the Court has attached different weights to the 'traditional' elements of the interpretation.

First of all, as regards the grammatical element – it is important to note that the Constitutional Court has not considered that this interpretative element possesses a determinant weight in its assessment of the requirements to legislate whose omission are

subject to censure (see Ruling no. 182/89). According to the remarks that were made in the latter decision, it is possible to say that it is not enough for there to be a mere literal referral to *'the terms of the law'* for there to be an unconstitutional legislative omission.

More important if one is to be able to conclude that the constitutional rule creates a requirement to legislate in the sense we described earlier, is the teleology of the rule, both first of all as regards the practical intentionality it displays, and then later in gauging the need for measures to put it into practice. This teleology is interpreted in the light of the rule's key *ratio iuris* (systematic element).

The Court has also invoked the historical element in reaching its decisions, both at the level of the definition of the criterion underlying the determination of the meaning of the constitutional rule in question (see Ruling no. 276/89), and when it comes to weighing up a given set of legal rules (see Ruling no. 474/02).

In addition to all this it is also important to say that in those cases in which the silence on the part of the legislative bodies is broken after the request for a review has been submitted, but before the appeal is decided, the Court has concerned itself with verifying whether or not the new legislative measures fulfil the constitutional purpose (see Rulings nos. 276/89, 638/95 and 424/01).

Another important methodological aspect concerns the fact that when faced with a partial omission, the Court will examine the existing outlines of the law to see whether it fulfils the applicable constitutional requirement or not.

Finally, unlike that which happens in the other appeals which are subject to decision by the Constitutional Court, the latter's rulings under this particular heading do not often include references to comparative law or to cases that have come before international instances of justice.

4.4.

In cases involving the review of unconstitutionality by omission, when the Constitutional Court concludes that measures needed to render a constitutional rule executable do not exist, it restricts itself to finding that the Constitution is not being complied with due to the omission of those measures; it does not actually take any other measures itself, even if the omission is related to the oversight of fundamental rights.

4.5.

Under the terms of Article 283[2] of the Constitution, "Whenever the Constitutional Court determines that unconstitutionality by omission exists, it shall notify the competent legislative body thereof".

This formula, which is less incisive than the one used in the original text of the Constitution – which enabled the body that reviewed constitutionality to make *recommendations* to its legislative counterparts – reflects the idea that when the Court declares that a legislative omission exists, it is calling attention to the need for that legislative omission to be eliminated. At the end of the day this is "a call with political and legal significance, which the Constitutional Court makes to the competent bodies, so that they take action and issue legislative acts that are needed to render the constitutional laws executable"[104].

As such, the Constitutional Court's decision does not display any sign of a criterion for modelling/implementing the missing legal regulations, nor does it make any recommendations about deadlines by which changes ought to be made.

At the same time, while there is no doubt that in providing the grounds for its decision and explaining the reasons why it has found that the Constitution is not being complied with, at the end of the day the Constitutional Court does determine the sense and extent of the legislative omission, this does not mean that it defines any normative criterion that would have the effect of altering or supplanting the legislative omission with practical effects as regards the legal system's 'development', let alone its application by the various judicial instances.

4.6.

On the subject of the 'assessment of the legislative omission', and specifically as regards the Constitutional Court's decision and its effects, we feel that the decision is limited to finding whether or not the Constitution is being complied with, and then informing the competent legislative body accordingly. The law does not provide for any other effects.

4.7.

[104] GOMES CANOTILHO, *Direito Constitucional*, Almedina, 7th ed., p. 1039.

As we said in answer to point **3.6** of the questionnaire, it is in cases involving the review of unconstitutionality by action, and particularly concrete review cases, which address appeals against decisions handed down by other courts, that the Constitutional Court assesses 'analogous questions'. These constitutionality-related issues concern rules or normative segments or aspects that a decision against which an appeal has been lodged has not applied on the grounds of their unconstitutionality, or, notwithstanding the fact that the appellant has accused them of the defect of unconstitutionality, have been applied by the judicial decision as *ratio decidendi* and form the object of the appeal on the grounds of constitutionality.

In Ruling no. 47/2006[105] [106] the Constitutional Court had to judge whether a situation that typifies unconstitutionality by omission existed or not. At issue was an appeal on the grounds of unconstitutionality against a decision by the Supreme Court of Justice. In this case, the Constitutional Court considered the unconstitutionality of rules which revoked other rules that enshrined the right of workers' representatives to play a part in the corporate boards of companies that belong to the public sector, where those other rules had rendered the constitutional rules which provide for this right executable.

The Court held that this situation did not constitute a case of *unconstitutionality by omission* (as the appellants argued), but rather of *unconstitutionality by action*, inasmuch as *there was no omission of legislative measures* [needed] *to render the participation of workers' representatives in the corporate boards of the company in question executable, but rather the publication of legislation repealing laws which had already enshrined that participation.*

In this respect the Court wrote:

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[105] In this case the Constitutional Court decided:

a) To hold Article 40[1] of Executive Law no. 558/99 of 17 December 1999 unconstitutional for repealing the articles of Executive Law no. 260/76 of 8 April 1976, which provided for workers to take part in the corporate boards of state-owned companies, in that this repeal breached the terms of Articles 54[5]f and 89 of the Constitution of the Portuguese Republic.

b) To hold Article 5[1] of Executive Law no. 276/2000 of 10 November 2000 unconstitutional for approving the new articles of association of SATA, S.A. and repealing the previous ones, to the extent that they had provided for workers to take part in the corporate boards of state-owned companies, because this repeal breached the terms of Articles 54[5]f and 89 of the Constitution of the Portuguese Republic.

106 This Ruling was a majority decision, with two dissenting voices.

> "The fact is that there are no real doubts that the repeal of the whole of a law which is required under the terms of the constitution means that the revocatory law itself is unconstitutional. It is true that this law only entails such a discredit to the extent that by leading to the rebirth of a situation in which a specific duty to take legislative action is not being fulfilled, it is at the root of an unconstitutionality by omission. In other words, although it was the revocatory law that initiated a situation in which there is a constitutionally inadmissible vacuum, from the point of view of negative legal values everything happens the other way round, and the unconstitutionality of the revocatory law (unconstitutionality by action) takes on the nature of a consequence of the aforementioned situation of a normative vacuum (unconstitutionality by omission). However, it is also true that in the situation under consideration, the legislative authorities are not just 'not doing something' that is required by the Constitution, as is the case with legislative omissions; rather they are 'undoing something', and more precisely, they are 'undoing something' that was and is laid down by the Constitution. This is why the revocatory law, which embodies the act of undoing, cannot be the object (as the generator of an unconstitutionality) of a review of an omission, but rather of a review of an action" (*Dever de legislar e protecção jurisdicional contra omissões legislativas*, Lisbon, Universidade Católica, 2003, p. 245 *et seq*., especially pp. 282 *et seq*. and 286)."

In this case it was thus decided to hold such revocatory rules unconstitutional, because they breached workers' rights to take part in the corporate boards of state-owned companies, as enshrined in Articles 54[5]f and 89 of the Constitution of the Portuguese Republic.

The Constitutional Court has also already heard cases that addressed the unconstitutionality of rules which it was argued suffered from a *lack of adequate legal authority* or a *lack of sufficient normative precision on the part of the framework which provided that authority*, as regards restrictions on fundamental rights.

In its recent Ruling no. 155/2007[107], in addition to other issues the Constitutional Court had to assess whether the rule set out in Article 172[1] of the Code of Criminal Procedure (CPP) complied with the Constitution, when the rule was interpreted in such a way as to permit the coactive taking of biological samples from a suspect in order to determine his genetic profile without authorisation by a judge, after the suspect had expressly stated his refusal to cooperate with or to permit such sampling.

The question was posed as to whether *the Constitution authorises the restriction of the fundamental rights in question – to physical integrity, to general freedom of action, to the protection of the privacy of personal life* and *to the control of personal information by its subject* – particularly in order to pursue the specific purposes of criminal procedure. This question was considered in the light of Article 18[2] of the Constitution, the relevant part of which states that "the law *may only* restrict rights, freedoms and guarantees *in cases expressly provided for by this Constitution* …". However, the Court concluded *that with a view to the pursuit of the specific purposes of criminal procedure, and once the other, aforementioned constitutional requirements have been complied with, the Constitution authorises the restriction of the fundamental rights to personal integrity, general freedom of action, the protection of the privacy of personal life, and control of personal information by its subject.* In its decision the Court also quoted Ruling no. 254/99[108].

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[107] In this Ruling the Court decided:

"i) Due to its breach of the provisions of Articles nos. 25, 26 and 32[4] of the Constitution, to deem unconstitutional the rule set out in Article 172[1] of the Code of Criminal Procedure, when interpreted in such a way as to permit the coactive taking of biological samples from a suspect in order to determine his genetic profile without authorisation by a judge, after the suspect had expressly stated his refusal to cooperate with or permit such sampling.

ii) Consequently, due to its breach of the provisions of Article no. 32[4] of the Constitution, to deem unconstitutional the rule set out in Article 126[1], [2]a and c, and [3] of the Code of Criminal Procedure, when interpreted in such a way as to consider valid, and thus capable of subsequent use and consideration in court, the evidence obtained by means of the sample taken in the manner described in the previous paragraph."

[108] "[…] The right to the protection of the privacy of personal and family life is enshrined without any limitation on the basis of Article 25[1] of the Constitution, and yet the Constitutional Court accepted that in the event that they are of great interest to the discovery of the truth or as evidence (and thus the right is in conflict with the public interest in pursuing the criminal proceedings and with the principle of material truth) telephone communications may be intercepted and recorded (Ruling no. 7/87, *Acórdãos* as above, vol. 9, pp. 7 *et seq*., 35; similarly, on the use of a photograph as evidence in divorce proceedings when not consented to by its subject, see Ruling no. 263/97, *Diário da República*, Series II, dated 1-7-1997, pp. 7567, 7569). […] Before the 1989 revision of the Constitution (Article 50[1]), the right to access to elected public office was also enshrined without any limitations in principle, other than those which directly applied to judges and magistrates as the result of other constitutional precepts (Article 221[3], now 216[3]), the legal restrictions applicable to military and militarised personnel (Article 270), and those concerning elections to the Assembly of the Republic (Article 153, now 150). However, in Rulings nos. 225/85 and 244/85 (*Acórdãos* as above, no. 6, pp. 793 *et seq*., 798-801 and pp. 211 *et seq*., 217-228) the Court accepted the existence of legal restrictions on court staff (given the

The Court then had to judge whether the *rules* set out in Articles 61[3]d and 172[1] of the Code of Criminal Procedure and Law no. 45/2004 of 19 August 2004 (which established the legal system governing expert medical-legal and forensic evidence) *constitute sufficient legal authority* for the restrictions that are at stake here; or whether, on the contrary, it would be necessary for there to be another, *specific law* which explicitly authorised the coactive gathering of biological substances and their genetic analysis without the subject's consent, and which simultaneously laid down the applicable rules (i.e. by establishing the appropriate material, formal, organisational and procedural requirements). However, the Court concluded that the problem did not lie so much in the *lack of legal authority* (i.e. in the absence of a rule that authorises the coactive performance of the examination – such a rule does exist and is derived from the combination of the precepts laid down by Article 6 of Law no. 45/2004 of 19 August 2004 and Article 172 of the Code of Criminal Procedure) – as perhaps in the *lack of adequate normative precision* on the part of the legal framework that provided this authority, a lack which the Court deemed did not exist in this particular case.

The grounds for declaring the unconstitutionality of the rule at issue were rooted in the fact that to a significant extent the act in question was in contention with fundamental rights, freedoms and guarantees, and that its admissibility during the investigative phase was dependent on prior authorisation by the investigating magistrate, which in this case had not been given.

Having said this, the majority of the cases that are typical of the assessment of 'analogous questions' arise in discriminatory situations, in which – quite apart from other principles – the issues at stake involve situations of material inequality. Examples of this include Rulings nos. 690/98, 1221/96 and 359/91.

In the criminal field, Ruling no. 690/98 held that because it breached the combined provisions of Articles 20[1] and 67 of the Constitution, the rule set out in Article 68[1]c of the Code of Criminal Procedure (CPP) was unconstitutional when interpreted in such a way as to

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public interest in maintaining the separation and independence of local authority and judicial functions) and for local authority staff and agents working in the direct administration of the local authority in question (given the public interest in maintaining the independence and impartiality of local power). In both cases the limitations that were set out in the Constitution or resulted from legal restrictions on certain subjects provided the grounds for arguments that other limitations should be admissible in hypothetical cases of conflicts of constitutionally recognised rights or interests. […]"

deny privy status in criminal proceedings to the forebears of the deceased victim, when the latter had no descendants and was survived by a spouse from whom he was separated *de facto*, although not legally.

In Ruling no. 1221/96 the Constitutional Court decided, *due to its breach of the provisions of Article 36[4] of the Constitution, to hold unconstitutional the rule set out in Article 1793[1] of the Civil Code, when interpreted to mean that the system it creates is not applicable to situations involving the termination of* de facto *unions, if the latter were constituted* more uxorio *and there are underage children from the union*.

In the event of a divorce this Civil Code rule permitted the courts *to grant the rental of the family home, be it held jointly by the couple or singly by the other spouse, to one of the spouses at his or her request, while particularly considering the needs of each of the spouses and the interests of the couple's children.*

The issue was thus the determination of the universe of intended objects of the rule. In this particular case, it entailed knowing whether it was equally applicable to situations involving the end of *de facto* unions which had been constituted *more uxorio* and from which there are underage children.

The Court considered that it was not called on *to determine whether the text of the Constitution can or cannot be interpreted in such a way as to make it possible to extend the legal system governing family rights to* de facto *unions, or whether the rules that are laid down for marriage can be applied by analogy to* de facto *unions, but rather, in the light of Article 36[4] of the Constitution* [109]*, to take care to ensure that the interest of underage children born outside wedlock is one of the vectors of the criterion which the courts employ when they determine the fate of the family home* [110].

[109] Under the heading "Family, marriage and filiation", Article 36[4] of the Constitution of the Portuguese Republic states that: "Children born outside wedlock shall not be the object of any discrimination for that reason, and neither the law, nor official departments or services may employ discriminatory terms in relation to their filiation".

[110] In this decision the Court also felt that to the extent that it concerns the effects of the divorce, Article 1793 of the Civil Code affects the institutional status acquired by the marriage, because to attach a merely formal value to this argument would lead to a consequent discrimination against children born outside wedlock, inasmuch as their interest in maintaining the family residence could not be addressed whenever paternal authority was granted to the parent who did not own the family home.

In this decision the Court maintained the jurisprudential line that had previously been taken in Ruling no. 359/91 [111], because it felt that there was a correlation between the situations addressed by paragraphs [2] and [3] of Article 1110 of the Civil Code – with the interpretation accorded to them by the Supreme Court of Justice's Definitive Decision of 23 April 1987, which declared that they were not applicable to *de facto* unions, *even if the couple had underage children* – and by paragraph [1] of Article 1793 of the Civil Code. This correlation was due to the fact that in addition to other things, the former addressed the fate of the family home when the couple had lived in a rented property, while the latter covered that of a family home which either belonged jointly to the couple or singly to one of the spouses.

4.8.

On the subject of the legal-technical means employed by the Constitutional Court when it seeks to avoid the legal gaps that could arise from a decision whereby the law or some other legal (normative) act is recognised as being in breach of the Constitution, it is important to point out that the constitutional and procedural format for appeals involving the review of unconstitutionality by omission does not mention any specific rule-making instrument that can be mobilised to this end.

However, in parallel to this – where successive abstract constitutionality review cases are concerned – the Constitution gives the Court a number of powers to define the effects of any unconstitutionality.

The fact is that whereas Article 282[1] of the CRP states that *"A declaration of unconstitutionality (...) shall take effect as of the moment at which the rule declared unconstitutional or illegal came into force, and shall cause the revalidation of such rules as the said rule may have revoked"*, Article 282[4] enables the Court to decide that the scope of the effects of the unconstitutionality should be less than this, *"When required for the purposes of legal certainty, reasons of fairness or an exceptionally important public interest"*.

In other words, the Court can restrict the declaration of unconstitutionality's effects in relation to the ensuing revalidatory effect and can delay the moment at which the declaration takes effect, thereby doing away with the *ex tunc* efficacy derived from the aforementioned

[111] Ruling no. 359/91 of 9 July 1991 (published in the *Diário da República*, Series I, dated 15 October 1991), which was handed down by majority in a plenary session, declared with generally binding force that the Supreme Court of Justice's Definitive Decision of 23 April 1987 (published in the *Diário da República*, Series I, dated 28 May 1987) was unconstitutional because it breached the principle of non-discrimination against children set out in Article 36[4] of the Constitution.

general rule (among others, see Rulings nos. 140/02, 616/03 and 323/05, in which the Court ordered that the effects of the declaration of unconstitutionality should only come about upon the publication of the respective decisions).

Lastly, under the terms of Article 282[3] of the CRP, when the rule that it has declared unconstitutional concerns penal or disciplinary matters or administrative offences and its contents are less favourable to the defendant, the Court can exclude the exception which the Article makes in relation to cases that have already been tried. In such circumstances the Court is given the powers to increase the normal effects of the declaration of unconstitutionality (see Ruling no. 232/04, which is the only decision to date in which the Court took advantage of this opportunity and decided "to determine the effects of the unconstitutionality of the rules [that it had declared unconstitutional] in such a way as not to make an exception for cases that have already been tried, when the latter concern accessory penalties of expulsion which have not yet been executed when this decision is published").

5. Consequences of the statement of the existence of legislative omission in Constitutional Court decisions

5.1.

Under the terms of Article 283[2] of the CRP, when the Constitutional Court finds that an unconstitutionality by omission exists it must inform the competent legislative body accordingly.

Under the Portuguese system for controlling constitutionality, the effects of finding an unconstitutionality by omission do not differ depending on which legislative body is competent to issue the legislative measures needed to render a given constitutional rule executable.

Whether the competence to issue the legislative measure, the lack of which led to the finding of the existence of an unconstitutionality by omission, is constitutionally entrusted to the Assembly of the Republic, the Government or the Legislative Assemblies of the autonomous regions, the effects of the finding are limited to the Constitutional Court's duty to inform the body with the legislative competence to issue the rule needed to fill the gap.

This means that unlike that which happens as part of a review of unconstitutionality by action, decisions which find that there is an unconstitutionality by omission do not possess concrete legal efficacy and are incapable in their own right and as such of bringing about any kind of alteration in the legal order.

What we have here is a consequence of the type of control that is entrusted to the Constitutional Court. Inasmuch as this control is structurally negative, it does not contemplate the ability to positively impose the normative initiative deemed necessary to overcome the unconstitutional omission which has been found within the scope of the typical procedure; nor, downstream, does it have the power to control and sanction or reverse any inertia on the part of the legislative body which has been notified by the Court – particularly the power to publish the rule in the legislative body's stead if the latter does not repair the omission.

This solution, which is justified on the grounds of democratic principles and the separation of power between the different bodies that exercise sovereign power, means that the possible scope of the Constitutional Court's responsibility as part of the review of non-compliance with constitutional requirements to legislate is located on a purely declaratory level, without any possibility of direct or immediate autonomous interference in the existing legal system.

Albeit they are not binding in nature, to the exact extent to which they are the object of both the imperative notification of the legislative authorities that are the object of the constitutional requirement to legislate that has been held unfulfilled, and the obligatory publicity in the shape of their publication in Series I-A of the *Diário da República* (Article 119[1]g of the Constitution and Article 3[1]b of the LTC), the Constitutional Court's pronouncements of the existence of an unconstitutionality by omission nonetheless constitute calls upon the initiative of the body that is responsible for issuing the rule which is deemed necessary to the executability of the Constitution. Portuguese legal theory tends to attach a certain 'political and legal significance' to such calls (see J.J. Gomes Canotilho, *Direito Constitucional e Teoria da Constituição*, 7th ed., p. 1039).

Let us take a closer look.

The Rules of Procedure of the Assembly of the Republic are silent on the consequences of the notification of decisions which find that an unconstitutionality by legislative omission exists. They neither provide for nor require that such notifications be followed by any type of parliamentary initiative, such as scheduling the issue on which the Constitutional Court has pronounced for discussion in the plenary chamber.

As such, the ability of a decision that declares the existence of an unconstitutionality by omission to positively and consequently influence the legislative process is directly dependent on the initiative of the various parliamentary groups themselves. The ease with which the gap is overcome is thus related to the extent to which it is possible to form consensuses in the field in which the mediating legislative intervention that has been recognised to be required by the Constitution is lacking.

This effective conditioning factor is thus probably the beginning of an explanation as to why the ordinary legislative authorities reacted differently in the only two situations in which the Constitutional Court has found that an unconstitutionality by omission exists.

The first of these occasions involves Ruling no. 189/92 of 1 February 1992, in which the Constitutional Court held that the Constitution was not being complied with due to omission of the legislative measure which was provided for by Article 35[4] and was necessary in order to render paragraph [2] of that Article executable.

Inasmuch as Article 35[2] of the 1982 version of the Constitution (Use of computers) prohibited third party access to files containing personal data save only in exceptional cases provided for by law, and given that paragraph [4] of the same Article referred the definition of the concept of personal data to the ordinary law, the Constitutional Court deemed that a legislative intervention to define the concept of personal data was essential to the full executability of the guarantee in question.

This Ruling was published in the *Diário da República* of 3 March 1989 and was followed by various parliamentary initiatives that tended to foster a legislative intervention in

the field of the defence of ordinary citizens against the computerised treatment of personal data.

Exemplary of the legislative authorities' prompt reaction in this case was the rapid submission and admission to the parliamentary session of 5 April 1989 of a draft resolution (draft resolution no. 24/V) with a view to holding a debate on the protection of people's rights vis-à-vis the use of computer technology and the automated treatment of data of a personal nature.

After the legislative process had thus got underway at the Assembly of the Republic, a law governing the protection of personal data in the light of computer technology (Law no. 10/91) was finally passed on 19 February 1991, enacted by the President of the Republic on 9 April 1991, and published in the *Diário da República* of 29 April 1991.

However, these consequences differed from those that ensued from the Constitutional Court's second pronouncement in relation to a finding of the existence of an unconstitutionality by omission.

In Ruling no. 474/2002 of 19 November 2002 the Constitutional Court held that the Constitution was not being complied with due to omission of the legislative measures needed to render the right provided for by Article 59[1]e executable in relation to Public Administration workers.

The Court considered that inasmuch as the right to material assistance provided for by Article 59[1]e of the Constitution necessarily had to take the shape of a specific benefit, it required the legislative authorities to provide for a social benefit for workers who involuntarily found themselves in an unemployment situation, including those who worked for the Public Administration.

This Ruling was published in the *Diário da República* of 18 December 2002.

However, precisely because this is an area of intervention in which the associated effects probably include an increase in public spending, it is proving difficult to reach a parliamentary consensus, particularly in relation to the aspects of the issue that concern the terms and context of the future system, and the legislative gap which the Constitutional Court denounced still exists.

Notwithstanding the continued existence of a legislative omission that has been deemed unconstitutional, the repercussions in Parliament which followed on the pronouncement included in Ruling no. 474/2002 nonetheless express the political and legal influence which, despite their merely declarative effects, the decisions handed down by the Constitutional Court tend to have on the legislative process and especially on the concrete performance of the agents who implement it.

The fact is that at the initiative of the Portuguese Communist Party's parliamentary group, on 20 February 2003 the Assembly admitted a member's bill seeking to grant the right to an unemployment benefit to teaching and research staff employed by public higher education and research institutions (Member's Bill no. 234/IX).

However, following discussion and a vote on 2 October 2003, this bill failed to pass, because the Members from the parliamentary groups that formed the coalition which backed the then government voted against it.

This legislative initiative was repeated in the following legislature (the Tenth Legislature) in the form of the submission of Member's Bill no. 159/X, once again proposed by the Portuguese Communist Party's parliamentary group.

This member's bill pursued the previous goal of granting the right to an unemployment benefit to teaching and research staff employed by public higher education and research institutions. It was discussed and put to the vote in a plenary session on 8 February 2007, but failed to pass, because the Members from the parliamentary group that supports the current government voted it down.

In the same plenary session Member's Bills nos. 346/X/2 and 348/X were also rejected, again by the votes of the Members who compose the parliamentary group which supports the government. Both bills had been admitted to the Assembly on 31 January 2007, the first at the initiative of the Left Bloc (BE) and the second at that of the Popular Party (CDS/PP).

Both bills were designed to permit the grant – albeit not exactly under the same terms – of the right to an unemployment benefit to teaching and research staff employed by public higher education and research institutions.

Despite the fact that the legislative initiatives intended to overcome the legislative gap identified by Ruling no. 474/2002 have not been successful thus far, the truth is nevertheless that the competent legislative body has never disagreed with the Constitutional Court's pronouncement in that decision, nor has it in any way denied the need to follow it up.

This is demonstrated by the fact that during the Tenth Legislature, but this time as part of the discussion and vote on the details of the 2006 State Budget (Government Bill no. 40/X) in a plenary session on 29 November 2005, the Constitutional Court's pronouncement in the aforementioned decision influenced the parliamentary debate. Besides a specific reference to the ruling, it led the Minister for Parliamentary Affairs, who was present at the session, to justify the delay in the legislative intervention deemed necessary to implement the Constitution by announcing that preparatory documents were being discussed with the trade unions with a view to creating a protective framework for illness and unemployment that would also extend to Public Administration workers.

Despite the influence that we can thus consider to be exercised by the pronunciation of the review body, the truth is that the continuing lack of legislative intervention has led to this case being called a "case of unconstitutionality by aggravated omission" (Professor Jorge Miranda, in an interview with the online edition of the *Público* Newspaper of 7 February 2007).

In short: albeit they lack any possible constitutive efficacy and even if they are not quickly followed by passage of the missing legislative measure, decisions that an unconstitutionality by omission exists always have an effect at a distance – that of institutionally flagging the existence of an unfulfilled constitutional requirement to legislate. Within the context of public debate, this confers a certain type of legitimacy to claims that are perhaps being made by the sector or sectors of society which are most prejudiced by the legislative omission, and at the end of the day, creates the conditions for the possibility that during parliamentary discussions, an account will be called for from the agents to whose inertia the continuation of the legislative omission that has been denounced in a Court ruling may be attributed.

5.2.

Given that, as we began by saying, only one normative provision is made for the effects that result from the finding of an unconstitutionality by omission, there is no particular system that would depend on which legislative body is competent to issue the missing legislative measure. Everything we have said applies universally, whether that responsibility is laid on the Assembly of the Republic, the Government, or the Legislative Assemblies of the autonomous regions.

Conclusions

Article 283 of the Constitution of the Portuguese Republic provides for a specific procedure designed to control non-compliance with the Constitution due to the omission of legislative measures needed to render constitutional rules executable. However, given the quite restrictive way in which both the law and constitutional jurisprudence embody the terms of its admissibility, we must conclude that its importance is relatively marginal. In order to demonstrate this it is enough to note that in the approximately twenty-five years since the creation of the Constitutional Court, only seven requests for a review of unconstitutionality due to an omission of legislation have been made, and only in two such situations has the Constitutional Court held that an unconstitutional situation actually existed.

Where the consequences of such a decision are concerned, the Constitution only states that the Constitutional Court must "notify the competent legislative body thereof". Neither the Law governing the Constitutional Court, nor any other statute – namely the Rules of Procedure of the Assembly of the Republic – says how a legislative omission should be overcome once it has been identified, nor do they provide for or require that such a notification be followed by any type of legislative initiative. Having said this, as we have already shown in more detail, both the imperative notification of the competent legislative body and the obligatory publicity in the shape of their publication in the *Diário da República* are significant calls on the initiative of the body with the competence to issue the rule which is deemed necessary to the executability of the Constitution. Indeed, the notification and publication tend to be accorded a certain political and legal significance.

On the other hand, it is possible to conclude that the legal mechanisms which the Constitutional Court has at its disposal for assessing unconstitutionality by omission are adequate. To a large extent this is because in the Portuguese legal-constitutional system the specific procedure for reviewing unconstitutionality by omission, which we have been discussing here, is only one of a range of possible ways in which the Constitutional Court can control situations involving unconstitutionality by omission. As we have shown at greater length in chapter **4.7** of this report, as part of cases involving the review of unconstitutionality by action the Court also frequently assesses and controls situations that are very close to those which are typically seen as unconstitutionality by omission, and its decisions therein have an effective influence on the process of creating the Law.

Attachment

1. RULING No. 474/02

2. CONSTITUTION of the Portuguese Republic
Article 283

3. LAW of CONSTITUTIONAL COURT
Law n.º 28/82

Articles 3, 51, 52, 53, 54, 55, 56, 62, 63, 64, 65, 66, 67 and 68

RULING No. 474/02

Case no. 489/94.

2nd Section (Plenary).

Rapporteur:- **BRAVO SERRA.**

1. Acting on the grounds of Article 283(1) of the Constitution, the **Ombudsman** has asked this Court to consider and verify whether any unconstitutionality results from the absence of the legislative measures needed to render the rule set out in Article 59(1)e of the Constitution fully executable in relation to Public Administration workers.

In summary, his reasoning is as follows:-

– the systematic location of the rule set out in Article 59(1)e of the Constitution in Chapter I of Title III of Part I thereof could lead to the conclusion that such workers' right to material assistance when they are involuntarily unemployed is only covered by the rules governing economic, social and cultural rights, and that consequently the constitutional rules governing rights, freedoms and guarantees set out in Title I, which include the workers' rights, freedoms and guarantees referred to in Chapter III of the same Title, are not applicable thereto.

– however, the fact that the right in question is nominally an economic one, and structurally a right to a benefit, does not preclude the partial consideration that it possesses a nature analogous to that of the aforesaid rights, freedoms and guarantees, and that under the terms of Article 17 of the Constitution it enjoys the benefit of the rules governing the latter, inasmuch as the indissociable link between the two rights means that workers' right to material assistance calls for a treatment analogous to that given to *the* fundamental right – the right which is the precondition for the existence of all the other rights of private individuals and a primary condition for the existence of human dignity – precisely the right to life.

– while it is not possible to consider the nature of the right to work to be analogous to the nature of the rights, freedoms and guarantees, in the absence of any other consideration there is nothing that would allow us to deny the latter nature to workers' right to material assistance when they are involuntarily unemployed, as a residual way of ensuring them the minimum subsistence conditions needed to safeguard the right to life.

– it is therefore not difficult to conclude that the Constitution requires the legislative authorities to establish a minimum material assistance for all workers who are involuntarily unemployed; the extent of that assistance must be determined by taking the point of reference for such minimum subsistence conditions as its basis; those minimum subsistence conditions are thus the response to the concrete requirement to legislate which the legislative authors of the Constitution imposed on the ordinary legislative authorities, and this provides the grounds

for considering that the nature of workers' right to material assistance (a right which the introductory part of Article 59 of the Constitution awards to all workers) when they are involuntarily unemployed is analogous to that of the rights, freedoms and guarantees.

– in turn, the constitutional notion of 'worker' must encompass everyone who works or provides a service for and on behalf of, and under the direction and authority of, someone else, whatever the latter's category (private or public activity) and the legal nature of the bond between them (private labour contract, civil servant, etc.), and so civil servants are encompassed by that notion.

– consequently, under the terms of the Constitution we must recognise civil servants' right to material assistance when they are involuntarily unemployed.

– the embodiment of this right in ordinary legislation is to be found in Executive Law no. 79-A/89 of 13 March 1989, when it creates the so-called 'unemployment benefit'. Only those workers who are bound by the private legal rules arising from the individual labour contract format receive this benefit. This is why the scope of this Law, which is the only one that covers the rules governing the provision of material assistance to workers when they involuntarily find themselves unemployed, does not cover the staff and agents of the Public Administration, because their legal employment relationship is not regulated by the private legal rules governing individual labour contracts, but rather by specific sets of legal rules.

– while, as regards the aforesaid staff and agents, there are cases in which the causes of the extinction of their legal employment relationship do not permit the conclusion that an unemployment situation is involuntary – the case of dismissal – there are nonetheless a substantial number of situations in relation to which the legislative authorities have not seen fit to adequately develop the full executability of the right set out in Article 59(1)e of the Constitution.

– these situations are as follows: the possibility of dismissal, by order of the body that appointed the member of staff, during the trial period, without prejudice to the rules governing the initial period of traineeship provided for by Article 6(10) of Executive Law no. 427/89 of 7 December 1989; staff and agents who are the object of the disciplinary penalty of dismissal [which can be seen as an involuntary unemployment situation, as is the case with workers who are bound by an individual labour contract and whose unemployment as the result of dismissal with just cause is deemed involuntary under the terms of Article 3(1)a of Executive Law no. 79-A/89 of 13 March 1989]; staff and agents who are deemed to be 'available personnel' under the terms of Executive Law n° 247/92 of 7 November 1992, where the need to opt for any of the exceptional measures designed to slim down the civil service provided for by Article 6 of the same Executive Law can lead to the unavoidable extinction of the public legal employment relationship, to the extent that it is impossible in practical terms to activate all the alternatives listed by the Law in any given case; administrative agents – that is to say, staff whose legal employment relationship arises out of the entry into an administrative employment contract with the Public Administration, which provides that the contract may either lapse [due to its transitory nature, as expressly recognised by Article 15(1) of Executive Law no. 427/89 of 7 December 1989], or that the legal employment relationship may be extinguished simply by the employer terminating it, without there being any voluntary element on the part of the administrative agent [Article

30(1)b]; the special rules set out in the Statute governing the Career of Kindergarten and Basic and Secondary Education Teachers, as approved by Executive Law no. 139-A/90 of 28 April 1990 in relation to situations involving provisional appointments, trial periods, and administrative contracts (Articles 30, 32 and 33, respectively).

– we must thus conclude that in these cases – inasmuch as neither Executive Law no. 79-A/89, nor any other set of rules that leads to the provision of material assistance when the respective workers and agents of the Public Administration involuntarily find themselves in an unemployment situation, applies to them – the right granted by Article 59(1)e of the Constitution is not put into practice by any legislation, despite the fact that there is nothing that would permit unequal treatment compared to that given to workers who are bound by the private legal rules applicable to the individual labour contract.

– inasmuch as what is at stake is a fundamental right whose nature is analogous to that of the rights, freedoms and guarantees, it is not possible for the ordinary legislative authorities to enjoy total freedom of manoeuvre in their decisions as to whether or not it is opportune to make this right a reality. We are therefore not in the presence of a right that is subject to that which is possible – a fact that would entitle the ordinary legislative authorities to defer putting it into practice or developing it as the result of an option they might take in relation to the allocation of available resources.

– we are thus faced with an unconstitutional omission of the legislative measures needed to render the rule set out in Article 59(1)e of the Constitution executable.

– even if we were hypothetically to consider that we are not in the presence of a fundamental right whose nature is analogous to that of the rights, freedoms and guarantees – in which case the legislative authorities would possess significant freedom of manoeuvre to decide whether or not it is opportune to make this right a reality – even then, in any case we would be facing a relative unconstitutional omission [in that the implementation of the right to material assistance enshrined in Article 59(1)e does not cover part of the workers who are the target of that form of protection].

– this failure to cover breaches the principle of equality that is set out in Article 13 of the Constitution and implemented in the introductory part of Article 59(1), which expressly states that every worker shall possess all the rights enshrined in the latter Article. This breach would be no less evident if we were to consider that we are in the presence of a fundamental right whose nature is not analogous to that of the rights, freedoms and guarantees, given that as the legal theorists say, if the legislative authorities voluntarily create a certain set of legal rules, they are obliged not to fail to provide for all the cases that are essentially the same as those which are provided for by that set of rules.

– in this respect it might even appear appropriate to resort to the mechanisms for verifying positive actions, in that in addition to a partial unconstitutionality by omission, we may also be faced with a positive unconstitutionality arising out of the breach of the principle of equality.

– however, in this case, that which is consequently necessary and in accordance with the Constitution is not to do away with the material assistance to workers who are bound by

an individual labour contract, but rather, by drawing up suitable legislative measures, to extend that assistance to the other workers who are in the service of third parties and are not covered by it. Indeed, the Constitutional Court already recognised this when it considered this question in a successive abstract review case (Ruling no. 423/87), in which it accepted that the extension of the system should be preferred to the implementation of fundamental rights in breach of the principle of equality, thereby putting an end to a partial omission.

The **President of the Assembly of the Republic** and the **Prime Minister** were called on to pronounce themselves on this issue should they wish to do so, under the combined terms of Articles 67, 53 and 54(3) of Law no. 28/82 of 15 November 1982. Only the former has done so, saying that he leaves the matter to the Court's discretion.

Inasmuch as the Vice-President of the Constitutional Court has already drawn up a 'memorandum', which sets out the position of this judicial body (and which this Ruling follows practically *pari passu*), it is now necessary to hand down a decision.

2. This Court has stated that an unconstitutionality by omission only exists when the Constitution imposes a specific requirement on the legislative authorities and the latter do not fulfil it (see Rulings nos. 276/89 and 359/91, as published in *Acórdãos do Tribunal Constitucional*, Volume 13, Book I, pp. 135 *et seq*., and Volume 19, pp. 189 *et seq*., respectively).

The first of the two Rulings says:-

> *"*.....
> .....
> .....
> *here the intervention of the legislative authorities does not entail the 'duty' of the body or bodies that exercise(s) sovereign power and is(are) competent to respond to the 'general' needs for legislation which are felt in the legal community (i.e. it does not entail a 'general duty' to legislate), but is rather something that is derived from a* specific and concrete *constitutional responsibility or charge (*Verfassungsauftrag*). At the same time it involves a responsibility or 'imposition' that is not only clearly defined in terms of its meaning and scope and does not leave the legislative authorities any margin for manoeuvre in relation to their own decision to intervene (i.e. in relation to the* an *of the legislation) – in such a way that it is quite possible to hypothetically talk about a true 'order to legislate' – but is also fulfilled as soon as the applicable rules are issued (so to speak) for the first time.*
>
> .....
> .....
> ....."

When it begins to analyse the situation that had been brought before the Court on that occasion, Ruling no. 424/2001 (in *Diário da República*, Series 2, 14 November 2001) states that:

> *"..... ....*
>
> *In its Ruling no. 276/89, as published in* Acórdãos do Tribunal Constitucional*, Vol. 13 – I pp. 135* et seq.*, this Court emphasised the complexity of the problems posed by the exact delimitation of the scope of the concept of 'legislative omission' with regard to the control mechanism provided for by Article 283 of the Constitution of the Portuguese Republic (CRP), in which respect it referred to the jurisprudence of the Constitutional Commission (Formal Opinions nos. 4/77, 8/77, 11/77, 9/78 and 11/81, in* Pareceres da Comissão Constitucional*, Vol. 1. pp. 77* et seq. *and pp. 145* et seq.*, Vol. 2 pp. 3* et seq.*, Vol. 5 pp. 21* et seq.*, and Vol. 15 pp. 71* et seq.*, respectively) and the legal theory advanced by Gomes Canotilho (*Constituição Dirigente e Vinculação do Legislador*, pp. 325* et seq.*), Jorge Miranda (Manual de Direito Constitucional, Bk. II, 2nd ed., 1983, pp. 393* et seq.*), and Vieira de Andrade (*Os Direitos Fundamentais na Constituição Portuguesa de 1976*, Coimbra, 1983, pp 300* et seq.*).*
>
> *In the light of the general theory expounded therein – to which we suggest further reference be made – and similarly in that of the situation which was assessed in Ruling no. 276/89, in the present situation when the request was made the circumstances that typify a 'legislative omission' (even accepting a restrictive view of the concept) were all present, because it entailed a concrete and specific responsibility which the Constitution imposes on the legislative authorities – one whose meaning and scope are perfectly defined, without leaving them any margin for manoeuvre as to their decision on whether or not to intervene, and in which the purpose of the constitutional provision would be fulfilled as soon as the applicable rules were issued.*
>
> *The only question to be considered was whether the time that had passed since the entry into force of Constitutional Law no. 1/97 – for those who feel that this is an essential aspect if one of the situations provided for by Article 283 of the CRP is to exist – was or was not sufficient for the legislative task in question to be carried out.*

> .....
> .....
> ....."

In attempting to summarise the Constitutional Commission and the Constitutional Court's jurisprudence on the matter, José Carlos Vieira de Andrade (*Os Direitos Fundamentais na Constituição Portuguesa de 1976*, 2nd ed., Almedina, 2001, 380, note 24) says that it lists the following requirements: *" ... 1) non-compliance with a given constitutional rule; 2) the rule cannot be executable on its own; 3) the absence or inadequacy of the legislative measures that are necessary in the concrete situation in question; 4) the absence in question is a cause of the failure to comply with the Constitution...*".

The dominant – if not unanimous – understanding among legal theorists is that the objective of Article 283 of the Constitution when it created the figure of unconstitutionality by omission was not to seek an assessment of the overall results of the way in which the Constitution is being applied, but rather just an assessment of a specific, concrete situation involving a breach of the Constitution, which must necessarily arise from a sufficiently precise rule that the ordinary legislative authorities have not rendered executable.

Pursuing the same line of thought, Gomes Canotilho (*Constituição Dirigente e Vinculação do Legislador*, Coimbra Editora, 1982, 332 *et seq.* and 481 *et seq*.) points out that "*the legal/constitutional concept of omission is not identified with the naturalistic concept*", so "*the issue is not just a simple negative 'failure to do' by the legislative authorities; it is that the latter are not doing that which they are concretely and explicitly obliged to do under the Constitution* ". In other words "*a legally/constitutionally significant omission exists when the legislative authorities do not fulfil, or incompletely fulfil, the constitutional duty to issue rules designed to implement permanent and concrete constitutional requirements*".

In another text (*Direito Constitucional e Teoria da Constituição*, Almedina, 1998, 917 *et seq*.) the same author adds that:

> "....
> .....
> .....
> *Unconstitutional legislative omissions are derived from non-compliance with constitutional requirements in the strict sense of the term – in other words from the failure to comply with rules that permanently and concretely oblige the legislative authorities to adopt legislative measures which put the Constitution into practice. We must therefore distinguish between legislative omissions that result from the breach of constitutional precepts which concretely impose something, and a non-compliance with the Constitution that is derived from the non-implementation of abstractly impositive purpose-rules or task-rules. There is a difference between saying on the one hand that there is an unconstitutional legislative omission when the legislative authorities do not take the legislative measures*

needed to execute the constitutional precepts which permanently and concretely require e.g. the creation and updating of the national minimum wage [Art. 59(2) a], the organisation, coordination and financing of a "unified and decentralised social security system" (Art. 63(2)], the creation of a "national health service that shall be universal, general and … shall tend to be free of charge" [Art. 64(2)a], the creation and development of "natural and recreational reserves and parks" [Art. 66(2)c], the promotion and creation of a "national mother/childcare network and a national network of crèches" [Art. 67(2)b], the guarantee of a "universal, compulsory and free basic education" [Art. 74(2)a], and on the other hand, not complying with purpose-rules or task-rules that permanently but abstractly require the pursuit of certain objectives. This is the case, for example, with precepts such as those set out in Articles 9 and 81. The failure to fulfil the Constitution's purposes and objectives is also unconstitutional, but achieving them is essentially dependent on politics and the various democratic instruments, whereas unconstitutional omissions in the limited sense of the term can give rise to a legal action on the grounds of unconstitutionality under the terms of Article 283 of the CRP.

There is also a legislative omission when the Constitution enshrines rules that are not sufficiently precise to become executable in their own right and thus implicitly put the onus back on the legislative authorities to make them executable in practice. This hypothesis becomes an issue in its own right when constitutional rules do not take the legal shape of concrete orders to legislate, or of permanent, concrete requirements [e.g. a law to define the special crimes for which political officeholders may be held liable and thus ensure the executability of Article 117(3), or a law to define how administrative activities are to be processed and thereby render Article 267(2) executable].

An unconstitutional legislative omission also exists when the legislative authorities do not comply with the orders to legislate which the Constitution lays down in some of its precepts. Unlike constitutional requirements (which are permanent and concrete requirements), orders to legislate generally result in unique requirements (i.e. requirements that are concrete, but not permanent) to issue one or more laws that are needed in order to create a new institution or adapt old laws to a new constitutional order. Article 244 of Constitutional Law no. 1/82 contained an order to legislate, inasmuch as this constitutional requirement was fulfilled as soon as the law governing the organisation and operation of the Constitutional

Court was published. Similarly, Constitutional Law no. 1/89 (Art. 207) "orders" the passage of legislation to enable the law governing the organisation and operation of the Constitutional Court to be adapted to the amendments made by the second revision of the Constitution. The same is true of Article 196 of Constitutional Law no. 1/97, which presupposes changes to the same law on the organisation of the Constitutional Court.

The most recent legal theory emphasises that it is possible for there to be a legislative omission if the legislative authorities do not fulfil their obligation to improve or correct prognostic rules that are incorrect or out of step with intervening circumstances. In this case the omission does not consist of the total or partial absence of law, but the failure to adapt or perfect existing laws. This shortcoming or "deficit" in the way in which laws are perfected is of particular constitutional importance when the lack of "improvements" or "corrections" leads to serious consequences for the implementation of fundamental rights

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On this precise point Jorge Miranda (*Manual de Direito Constitucional*, Book VI, Coimbra Editora, 2001, pp. 284 *et seq*.) fully supports the jurisprudence which the Constitutional handed down in Ruling no. 276/89. He quotes the Court's ideas and goes on to note that "*unconstitutionality by omission – like unconstitutionality by action – is not something that exists in relation to the constitutional system as a whole. It exists if there is a rule whose non-executability prevents compliance with the Constitution. The breach specifically exists in the light of a rule that has itself been breached, and not in that of a set of provisions and principles. Otherwise the judgement as to what is unconstitutional would be indefinite, fluid and dominated by extra-legal considerations, and the body that is charged with guaranteeing the Constitution could either be forced to resort to its own judgement, or be paralysed*".

On the subject of unconstitutionality by omission Vieira de Andrade (*op. cit*. pp. 380 *et seq*.) says:

"..... *Of the various requirements for this type of unconstitutionality to exist, here it is of interest to highlight the fact that it must entail a failure to comply with a certain, given rule and not with a set of constitutional provisions and principles. To use a more elaborate way of describing it, which dominates German jurisprudence and legal theory, there is a legislative omission*

whenever the legislative authorities do not fulfil, or insufficiently fulfil, their constitutional duty to implement concrete constitutional requirements.

It is my opinion that unconstitutionality by omission can only exist – and thus the legislative authorities can only be the object of legal/constitutional censure – to the exact extent that the duty to legislate is materially determined or determinable. The possibility that an unconstitutionality exists is thus dependent on the degree of precision of the rule that imposes the requirement, and consequently on the degree to which the legislative authorities are bound by the Constitution ...."

If we think of things in this way, it becomes clear that the constitutional provision which serves as the grounds for saying that there is an unconstitutionality by omission must be precise and concrete enough to enable the Court to safely decide what legal measures are needed to make it executable, without having to pronounce on what may be divergent political options.

So when the possibilities which the Constitution offers the ordinary legislative authorities are practically unlimited, using strictly legal criteria the Court cannot hold that the duty to legislate is not being fulfilled; and consequently, given that the jurisdictional determination of the existence of unconstitutionality by omission cannot be founded on a political judgement, that determination becomes unviable.

We will therefore sum up this point by saying that deciding that an unconstitutionality by omission exists in turn supposes the existence of a concrete, specific situation involving a breach of the Constitution – a breach of a sufficiently precise rule which the legislative authorities have not rendered executable within an appropriate period of time.

3. A significant part of the petitioner's argument is designed to show that the nature of the right to material assistance in an involuntary unemployment situation is analogous to that of the so-called rights, freedoms and guarantees – probably in the belief that only the omission of legislation which ensures that the latter become a reality can lead to the determination that an unconstitutionality by omission exists.

However, we must consider that it would be irrelevant to seek to determine whether the structure of the right enshrined in Article 59(1)c of the Constitution is analogous to that of the rights, freedoms and guarantees, inasmuch as the possible existence or otherwise of such an analogy is of no interest to the decision in this case.

The fact is that virtually all the legal theorists believe without any margin of doubt that the constitutional rules which enshrine social rights can serve as grounds for determining the

existence of an unconstitutionality by omission. The question is whether the preconditions we have set out above are fulfilled or not.

Gomes Canotilho (*Direito Constitucional, op. cit.*, p. 434) says that "*the constitutional rules that enshrine economic, social and cultural rules model their objective dimension in one of two formats: (1) requirements to legislate, in which they indicate that the legislative authorities must act positively by creating the material and institutional conditions needed for these rights to be exercised [see e.g. Articles 58(3), 60(2), 63(2), 64(3), 65(2), 66(2), 73(2 and 3), 78(2)] ; (2) the provision to citizens of benefits that concretise the essential subjective dimension of these rights and execute the fulfilment of the requirements imposed by the Constitution*". He goes on to add (*ibid*, p. 440) that "*combinations of the rules on legislation and the enshrinement of social rights are true requirements to legislate, and failure to fulfil them may give rise to ... unconstitutionality by omission*".

José Carlos Vieira de Andrade (*op. cit.* p. 378 *et seq*.) is particularly elucidative when, in addressing the legal force of the precepts concerning social rights, he points precisely to the "*concrete requirement to enact the measures needed to make the precepts of the Constitution executable – sometimes including the public guarantee of the existence of a system which provides benefits in the form of money, goods or services – and the fact that any failure to fulfil them will lead to unconstitutionality by omission (Article 283)*" as one of the aspects in which it appears. What is more, he says this after noting that "*the precepts concerning social rights to benefits are not merely proclamatory; they constitute preceptive legal rules, which as such grant individual people subjective legal positions (which we call claims) and establish institutional guarantees, thereby imposing the obligation on the legislative authorities to effectively put them into practice – they thus constitute 'requirements to legislate'. As a result the constitutional precepts concerning social rights enjoy the legal force that is common to all imperative constitutional rules* ".

Strikingly, the same author underlines the fact that the *"typical effect of the constitutional rules concerning social rights arises out of their nature as requirements to produce legislation. Inasmuch as their main content involves rights to public benefits, the corresponding duty on the part of the State is precisely first and foremost the duty to legislate, given that making laws is a task that must be performed (in the case of the provision of legal benefits), or an organisational condition that is needed (in the case of rights to material benefits), for those benefits to be effectively provided*".

The petitioner's argument, which attempts to show the analogy between the constitutional right in question and the rights, freedoms and guarantees is thus likely to be based on the mistake that Gomes Canotilho (as above, *Constituição Dirigente*, pp. 336 and 337) describes when he says that *"it is not rare for people to argue that an unconstitutional omission is only of practical consequence when it implies a breach of fundamental rights. Once again the link between an omission on the part of the legislative authorities and an injury to fundamental rights is underlain by a procedural manner of thinking: given that in certain countries a constitutional action can only be brought against acts by public authorities that breach constitutional rights, freedoms and guarantees, it is thought that it is only in such a case that the concept of legislative omission can be used in practice. I do not agree with this theory: (1) an unconstitutional legislative omission exists whenever the legislative authorities do not 'execute', or only partly fulfil, a concrete constitutional*

requirement; (2) not all rights serve as grounds for bringing actions for legislative omission, inasmuch as where such rights are concerned it is also necessary to show that the Constitution specifically imposes a duty to act on the legislative authorities; (3) a breach of fundamental rights by legislative omission can indirectly result from other constitutional provisions, without it being possible to talk – other than in broad terms – about an omission that injures subjective, concrete fundamental rights (e.g. the failure to put the requirement to conduct the Agrarian Reform into practice)."

Given all this, the important thing is to determine whether the constitutional rule concerning the right to material assistance in an unemployment situation possesses the characteristics needed for there to be an unconstitutionality by omission, even though that right is a social right and ought not to be considered analogous to the rights, freedoms and guarantees.

4. The right to material assistance enjoyed by those who involuntarily find themselves in an unemployment situation was already present in the original version of the Constitution, where it was included in Article 52, and was one of the incumbencies on the State, which was required to "*guarantee the right to work, by implementing economic and social policy plans*" – a requirement that shared paragraph a) of Article 52 with "*the execution of full employment policies*".

The 1st revision of the Constitution re-ordered workers' rights [for example, job security, including the prohibition of dismissal without just cause or for political or ideological reasons, was moved from paragraph b) of Article 52 to the new chapter on workers' rights, freedoms and guarantees]. One consequence was that unemployed people's right to material assistance was incorporated into an article which thenceforth addressed workers' rights in general.

While the Constitution was still in its original version António da Silva Leal (in *O Direito à Segurança Social, Estudos sobre a Constituição*, coord. Jorge Miranda, volume 2, 1978, pp. 335 *et seq*.) wrote the following about this constitutional provision:

> "..... .... *A casual reader might well think that in several places the Constitution is influenced by a labourite conception of social security.*
>
> *It is not possible to say that paragraph a) of Article 52, which charges the State with ensuring the provision of material assistance to those who involuntarily find themselves unemployed, as a guarantee of the right to work, is an example of such influences – although it is clear that the right to work is incorrectly identified with the right to social security. In any*

case, the protection of the unemployed is a protection that is specific to workers and one that can be extended to people looking for their first job.

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The right to social security should be considered to include the right of those who involuntarily find themselves unemployed to material assistance which, under the terms of Article 52 of the Constitution forms part of the content of the right to work. The fact that the Constitution has made this unemployed person's right to assistance autonomous cannot be used to argue against its integration into the social security system, which results from the express reference to unemployment made by Article 63(4). The creation or maintenance of an unemployment protection system outside the overall social security system would go against the unified nature that characterises that system under the Constitution

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....."

And the truth is that ever since its original version, the Constitution has also seen the protection of the unemployed as part of the right to social security (see the current Article 63(3), which, once Article 63(1) has stated that *Everyone shall have the right to social security*, lays down that the *social security system shall protect citizens in illness and old age and when they are disabled, widowed or orphaned, as well as when they are unemployed or in any other situation that entails a lack of or reduction in means of subsistence or ability to work*).

Ilídio das Neves (*Direito da Segurança Social*, 1996, p. 121) questions this repeated concern when he says that "*the dual reference to the protection of the unemployed is even more surprising. The fact is that Article 63(4) says that it is one of the possible situations that are to be protected, while Article 59(1)e states that "every worker shall possess the right to material assistance when he involuntarily finds himself unemployed". In addition, in rigorous technical terms this expression "material assistance" does not seem very appropriate to the definition of a specific right to social protection*".

It is significant that Gomes Canotilho and Vital Moreira (*Constituição da República Portuguesa Anotada*, 3rd edition, 1993, note VII on Article 59, p. 320) address this issue in relation to Article 59(1)e and then immediately refer to the unemployment benefit in the following manner:

"..... ....

*The **unemployment benefit** [(1)e] is a kind of compensation or indemnity for non-enjoyment of the right to work [see Art. 58(1)]. Seen from this perspective it should fulfil the following requirements: (a) it should be universal, in that it should cover all unemployed persons whether or not they have already had a job; (b) it should be maintained for as long as the unemployment situation persists, and thus cannot be subject to a set time limit; (c) it should provide the unemployed person with a "proper living" [see Art. 58(1)a], and therefore cannot be much less than the minimum guaranteed wage. It is easy to see that the existing legal system (Executive Law no. 79-A/89) does not provide an answer to all these requirements.*

...."

However, where that which is important to us here is concerned, all we need to acknowledge is that the material assistance referred to by Article 59(1)e must necessarily take the form of a specific benefit that is directly linked to the involuntary unemployment situation – a benefit that the combined interpretation of the aforementioned provision and that set out in Article 63(3) enables us to conclude must obligatorily be incorporated into the overall social security framework and cannot be created without resorting to legislation.

We are thus in the presence of a concrete, specific requirement to legislate, set out in a rule that possesses a sufficient degree of precision. Evidently this is the case without prejudice to the broad margin for manoeuvre which the ordinary legislative authorities enjoy when they come to write the law – while they cannot fail to provide for the existence of a social benefit for people who involuntarily find themselves unemployed, amongst other things they can choose between different ways of organising that benefit and different criteria for determining its amount.

Finally, we should note that Article 59 of the Constitution is aimed at all workers, and obviously also covers those of the Public Administration – a term that is expressly used in Article 269. Indeed, Gomes Canotilho and Vital Moreira (*Constituição..., op. cit.*, note III on Article 53, p. 286) go in the same direction, as we can see when they say that the "*rights provided for by this chapter (and by Article 59) are specific workers' rights, and the Constitution only recognises and guarantees them in relation to workers. It is thus of primordial importance to know what the **constitutional notion of a worker** is. Given that the Constitution does not contain any express definition, the concept must be defined on the basis of the common legal concept, without prejudice to such qualifications as the Constitution may require. We must therefore consider that for constitutional purposes a worker must be a subordinate worker – in other words, one who works or provides a service for and on behalf of, and under the direction and authority of, someone else, whatever the latter's category*

(private or public activity) and the legal nature of the bond between them (private labour contract, civil servant, etc.). So civil servants are certainly encompassed by the concept ("Public Administration workers" is the expression used by Article 269)."

We may thus conclude that there is a specific, concrete constitutional requirement for the legislative authorities to provide for a benefit that corresponds to a material assistance to workers – including those of the Public Administration – who find themselves involuntarily unemployed, failing which there is an unconstitutionality by omission.

5. After the present case was first brought, the general legal rules governing material assistance in unemployment situations were laid down by Executive Law no. 119/99 of 14 April 1999, which replaced Executive Law no. 79-A/89 of 13 March 1989, which had itself been the object of various amendments in the meantime.

Among the provisions of the new legislation, the following are of particular importance to the analysis of the present case:

> *Article 1*
>
> ***(Object)***
>
> *1 – This Law establishes the legal framework governing reparation for the occurrence of unemployment, within the scope of the general rules governing social security for workers who work for third parties, without prejudice to the provisions of any applicable international instruments.*
>
> *2 – Reparation for unemployment situations shall be made by means of both passive and active general measures, as well as via exceptional measures with specific immediate causes.*
>
> *Article 2*
>
> ***(Passive general measures)***
>
> *There shall be the following passive general measures:*
>
> *a) The grant of an unemployment benefit.*
>
> *b) The grant of a social benefit for initial unemployment, or*
>
> *of a social benefit to follow the unemployment benefit*.

Article 3

(Active general measures)

There shall be the following active general measures:

a) The one-time payment of the total amount of (the beneficiary's) *unemployment benefits, with a view to the creation of a self-employment situation.*

b) It shall be possible to accumulate a partial unemployment benefit with part-time work

c) Unemployment benefits shall be wholly or partially suspended while the beneficiary attends a vocational training course that entails the payment of remuneration.

d) Unemployment benefits shall be maintained during periods in which (the beneficiary) *is engaged in an occupational activity.*

Article 5

(General provisions)

1 – Reparation for the occurrence of the unemployment of beneficiaries covered by the general system shall be made by means of the grant of benefit payments.

2 – Reparation for unemployment may also encompass workers whose social protection system does not include unemployment cover, under the terms laid down by specific legislation.

Article 11

(Forms of benefit)

1 – The following shall constitute unemployment benefits: the unemployment benefit; the social unemployment benefit; and the partial unemployment benefit.

2 – The protection awarded by the social unemployment benefit shall be applicable:

a) In situations in which the unemployment benefit cannot be attributed.

b) In cases in which beneficiaries have exhausted the periods in which they are entitled to the unemployment benefit, subject to fulfilment of the other conditions set out in this Law.

3 – The protection awarded by the partial social unemployment benefit shall be provided in situations in which a beneficiary whose is receiving the unemployment benefit enters into a part-time labour contract, under the terms set out in this Law.

An analysis of the legislation of which the above transcripts form part (see in particular Art. 1) immediately reveals the close connection between unemployment benefits and the general rules governing social security for workers who work for third parties.

This leads us to conclude that in order to receive an unemployment benefit it is not enough to be a worker who has worked for someone else and is involuntarily unemployed – it is **also necessary to be a beneficiary of the general social security system**.

Now, while Article 36(1) of Executive Law no. 184/89 of 2 June 1989 states that in *every situation in which* (a person) *furnishes work that is subordinated to the Administration it is obligatory* (for that person) *to be registered with the appropriate social security system*, the truth is that within the overall framework of the Public Administration, the general social security system is only the appropriate system in a small minority of cases. This is because under the provisions of Article 1 of Executive Law no. 343/79 of 28 August 1979, the only people who are *obligatorily registered with the union welfare funds* (CSPs) – the equivalent to today's registration with the aforementioned general system – are all those *workers whose professional activities contribute to the fulfilment of the normal needs of the State, public institutes, and local authorities, or federations or unions thereof, tourist zones and other public-law bodies corporate, and who do not meet the conditions for registration with the Caixa Geral de Aposentações* (General Retirement Fund for civil servants).

In other words, as Ilídio das Neves (*op. cit.*, pp. 690 and 691) points out, the Public Administration's workers are only included in the general social security system "*in the negative sense, inasmuch as given the strict terms under which people are included in the social protection system for civil servants, at the end of the day such inclusions are residual in number* ". The fact is that Article 1(1) of the Statute governing the Retirement of Civil Servants approved by Executive Law no. 498/72 of 9 December 1972 requires the obligatory registration as subscribers to the Caixa Geral de Aposentações of those *staff and agents who, whatever the nature of their contractual bond may be, perform functions in which they are subordinated to the direction and discipline of the applicable management bodies in the Central, Local or Regional Administration, including federations or associations of municipal authorities and municipalised services, public institutes and other public-law bodies*

corporate, and receive a wage, salary or other remuneration whose nature is susceptible to payment of a contribution.

We can thus say that the group of Administration workers who are beneficiaries of the general social security system is a small one (see Ilídio das Neves, *ibid*, who says that this group includes "*those workers who are not hired by the State or other public-law bodies under the administrative employment contract that characterises the specific legal status of Public Administration staff and agents, and who are not subject to the public employment system and are consequently not covered either by the Caixa Geral de Aposentações in terms of pensions, or by the specific legal systems governing other situations.*

This is what happens with people who are hired for a fixed term under Article 18 of the aforementioned Executive Law no. 427/89, as well as with those who are simply paid a salary in order to perform specific functions in certain public departments – particularly those who work in economic fields or in the provision of services of a social or other nature to the general population."

Consequently the group of Public Administration workers who find themselves in a situation in which they may be the recipients of unemployment benefits is also a small one, given that this possibility is not included in the general public service social protection system, despite the fact that on the subject of the public service systems, Article 110 of the Basic Law on Social Security (Law no. 17/2000 of 8 August 2000) states that *public service social protection systems shall be regulated in such a way as to converge with the social security systems in terms of their material scope, the rules governing the formation of rights, and the grant of benefits*.

However, while the vast majority of Public Administration workers – specifically those who were either directly appointed or were hired under an administrative employment contract – cannot receive unemployment benefits because they are not registered with the general social security system, as it so happens special legislation has now enabled a few of them to do so (thereby joining those workers who are recruited for a fixed term or who are exceptionally employed by the Administration under individual labour contracts).

Executive Law no. 67/2000 of 26 April 2000, which was passed while the present case was already underway, means that this is now true of kindergarten teachers and basic and secondary education teachers who are hired to teach at public education establishments.

The preamble to this Executive Law justifies this legislative measure in the following way:

> "*The new legal system governing the protection of the unemployed was approved by Executive Law no. 119/99 of 14 April 1999. Article 5(2) makes it possible to apply these rules to workers whose social protection system does not cover the eventuality of unemployment (under terms to be laid down by a specific new Law).*
>
> *This situation is applicable to persons who (assuming that they fulfil the requirements needed to apply for the*

competitive recruitment procedure) are hired by the Ministry of Education under administrative contracts.

As such this Executive Law provides the framework for incorporating teachers who are engaged to work at public education establishments either in order to fulfil those of the education system's needs that are not provided for by permanent pedagogical area staff, or as the result of the temporary absence of other teachers, into the general social security system governing workers who work for third parties, insofar as it concerns the event of subsequent unemployment."

Articles 1 to 3 of the abovementioned Executive Law read as follows:

Article 1

Object

This Executive Law defines the framework for incorporating staff who are hired to perform teaching functions at public education establishments into the general social security system governing workers who work for third parties, insofar as it concerns the event of subsequent unemployment.

Article 2

Personal scope

This Executive Law shall apply to persons who fulfil the requirements needed to apply for the competitive recruitment procedure and who perform teaching functions at public education establishments under Article 33(2) of the Statute governing the Career of Kindergarten Teachers and Basic and Secondary Education Teachers (the Statute governing the Teaching Career).

Article 3º

Material scope

The staff covered by this Executive Law shall be entitled to protection in the event of unemployment under the terms laid down by Executive Law no. 119/99 of 14 April 1999, with the adaptations set out in this Executive Law.

Another situation that is the object of special legislation concerns military personnel who enlist voluntarily or under employment contracts *(tr: as opposed to conscripts)*. Not only does Article 7(6) of Executive Law no. 119/99 apply the involuntary unemployment provision

to *military personnel who are serving as volunteers or under contract and whose labour relationship ends, with the adaptations derived from the applicable special system*, but Article 25 of the Regulations governing Incentives for Undertaking Military Service under the Contract (RC) and Volunteer (RV) Systems, as approved by Executive Law no. 320-A/2000 of 15 December 2000, states that *once they have ended their service, military personnel who have effectively served under the RC or RV systems shall be entitled to unemployment benefits under the terms of Executive Law no. 119/99 of 14 April 1999, with the adaptations provided for by this Law*.

However, virtually all the Public Administration workers who fall outside the scope of these situations and were either directly appointed or were recruited under an administrative employment contract, are still unable to receive unemployment benefits or any other specific benefit when they are involuntarily unemployed, because they cannot register with the general social security system.

6. The tradition of stability in the public service, where the prototypical situation is that of the civil servant who is appointed for life, may explain why the civil service social protection system does not provide for cover for the possibility of unemployment.

However, the petitioner points to a number of concrete cases in which this stability can be endangered.

One such situation concerns the provisions of Executive Law n° 247/92 of 7 November 1992 on spare staff.

Having said this, this Law was revoked by Executive Law no. 14/97 of 17 January 1997, and the fact is that even in the case of staff and agents who belong to departments and bodies which are abolished, merged or restructured, the recent Executive Law no. 193/2002 of 25 September 2002 does not provide for any measures that would lead to the dismissal of such staff and agents from the public service – as was already the case with Executive Law no. 535/99 of 13 December 1999, which Executive Law no. 193/2002 replaced.

The situation indicated by the petitioner therefore no longer arises.

Another situation envisaged by the petitioner is that of staff and agents who are fired as a disciplinary measure, as provided for by Article 11(1)f of the Disciplinary Statute governing Central, Regional and Local Administration Staff and Agents approved by Executive Law n° 24/84 of 16 January 1984.

Quite apart from the fact that it could be argued that it is doubtful whether this situation ought to be classed as involuntary unemployment for the purposes of Article 58(1)e of the Constitution [although there are those who hold that where the legal rules governing the individual labour contract system are concerned, the parallel situation of dismissal with just cause should be seen as being covered by Article 7(1)a of Executive Law no. 119/99 when it talks about *involuntary unemployment*], we must say that the abovementioned Statute governing the Retirement of Civil Servants states that those who are the object of the

disciplinary measure of dismissal are entitled to benefit from the rules governing ordinary retirements, under the terms and in accordance with the circumstances provided for by Article 37(2)c.

We should also mention the situations of the staff addressed by Article 6(10) of Executive Law no. 427/89 (without prejudice to the rules governing traineeships, those who do not display an aptitude for the performance of their functions can be dismissed by the body that appointed them at any time), and of the assistant university lecturers covered by the provisions of Article 6 of Executive Law no. 245/86 of 21 August 1986 who come to the end of their contracts – situations that do not entitle them to any unemployment or other specific benefit, notwithstanding the fact that their bond to the Administration has ended.

Be that as it may, there is one case that stands out in that certain Public Administration workers can undeniably be placed in a situation of involuntary unemployment. This case is precisely that concerning staff whose legal employment relationship with the Public Administration is constituted by means of an administrative employment contract.

The fact is that the combination of the provisions of Articles 16(2) and 30(1)b and (2) of the aforementioned Executive Law no. 427/89 means that while it is true that the administrative employment contract, which is entered into for a term of one year, is deemed to be tacitly renewed for further successive one-year periods, it is nonetheless true that either party – **and therefore the Administration** – can terminate it without any conditions other than giving *at least 60 days' notice*.

Now, the existence of the situations listed above is sufficient to conclude that under the Public Administration umbrella it is possible for there to be workers who are placed in a situation of involuntary unemployment, without being able to enjoy the assistance benefits which the law provides for in relation to virtually every other worker (in an essentially equivalent situation in Germany, staff who are dismissed have been included in the general social security system since the case of a trainee member of staff whom the German Constitutional Court ruled could not be placed at a disadvantage compared to workers as a whole – B. VerfGE 43, 154, 172).

7. As we have seen, the petitioner argues that "*when the legislative authorities created a system for providing material assistance to workers who involuntarily find themselves in an unemployment situation which only covers workers who are bound by an individual labour contract, ... thereby excluding workers who are civil servants, they breached the principle of equality*". The petitioner goes on to add that that "*which is thus necessary and in accordance with the Constitution in this case is not to do away with the material assistance given to workers with individual labour contracts, but, by means of the passage of appropriate legislative measures, to extend that assistance to the remaining workers who work for third parties and are not presently covered*."

We are all familiar with the doctrinal and jurisprudential differences of opinion on the question of whether, when the principle of equality is breached as a result of an imperfect or incomplete legal implementation of a constitutional requirement to legislate, in such a way as

to create a discriminatory situation between members of its target audience, there is an unconstitutionality by action, an unconstitutionality by omission, or possibly both (in this particular respect see this Court's aforementioned Ruling no. 423/87, as published in *Acórdãos do Tribunal Constitucional*, volume 10, pp. 77 *et seq.*, and quoted in the Ombudsman's petition, and the notes on this decision by Jorge Miranda, *Ensino da Religião e Moral nas escolas públicas*, in *O Direito*, Year 12, 1988, III-IV, p. 542, Gomes Canotilho, *Direito Constitucional*, *op. cit.*, p. 919, and Rui Medeiros, *A Decisão de Inconstitucionalidade*, 1999, pp. 511 *et seq.*).

Be that as it may, everyone must recognise that, in the words of Gomes Canotilho (*Constituição Dirigente...*, *op. cit.*, p. 349), "*the legal protection against unconstitutional omissions can include cases such as that of inequality in the award of benefits (partial omission*)". In this respect it is also appropriate to note Vieira de Andrade's (*op. cit.*, p. 387 and note 44) words:-

> "..... .... *One of the easiest hypotheses to verify is that of the unconstitutionality which results from the breach of the principle of equality as a prohibition of arbitration. This can happen when a law organises or regulates benefits in compliance with the constitutional requirements linked to or derived from the enshrinement of social rights, and in doing so unjustifiably restricts the applicable beneficiaries, in manifest contradiction to the constitutional rule's objectives, either by means of a mistake in the way those beneficiaries are qualified, or by force of habit, or as the result of a discriminatory intention.*
>
> *The force of this rule is derived from the principle of constitutionality and cannot be denied in relation to the precepts concerning social rights, nor can it be removed from the scope of the courts' authority to control*
>
> ....
>
> *In the first case there may also be a situation involving unconstitutionality by omission: by partial omission, if the legislative authorities partly failed to comply with a concrete requirement; by relative omission, if from that moment onwards the legislative authorities are obliged by the principle of equality to extend the benefits in question to identical cases they have thus far failed to address.*

.....
.....
....."

In the case at hand there is unquestionably a **partial omission**, inasmuch as the legislative authorities rendered the constitutional rule that requires them to ensure the provision of material assistance to workers who are involuntarily unemployed executable, but only for some such workers, inasmuch as they excluded virtually all Public Administration workers (see the situations described above).

Now, in the light of the remarks that we have been making, this partial omission suffices in its own right to say that we are in the presence of an unconstitutionality by omission.

At the same time, if we look at the time that has passed since the Constitution came into force – or at least since the entry into effect of Constitutional Law no. 1/82, which reconfigured the framework for the rule that is supposed to be rendered executable (we say this in response to those who feel that this is an essential aspect of the question if any of the situations provided for by Article 283 of the Constitution are to exist) – we can only conclude that that period of time is already "*long enough for the legislative task in question to have been completed"* (the words are from the aforementioned Ruling no. 424/01).

8. In the light of everything that has been said above, the Constitutional Court hereby holds that the Constitution is not being complied with, due to the omission of the legislative measures needed to make the right provided for by Article 59(1)e executable in relation to Public Administration workers.

Lisbon, 19 November 2002

Bravo Serra

Luís Nunes de Almeida

Artur Maurício

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Maria dos Prazeres Pizarro Beleza

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[translation of the document available from the Constitutional Court's website at: http://www.tribunalconstitucional.pt/tc/acordaos/20020474.html]

Constitution of the Portuguese Republic

«**Article 283**

Unconstitutionality by omission

1. At the request of the President of the Republic, the Ombudsman, or, on the grounds of the breach of one or more rights of the autonomous regions, presidents of Legislative Assemblies of the autonomous regions, the Constitutional Court shall review and verify any failure to comply with this Constitution by means of the omission of legislative measures needed to make constitutional rules executable.

2. Whenever the Constitutional Court determines that unconstitutionality by omission exists, it shall notify competent legislative body thereof».

Law of the Constitutional Court

Law n.º 28/82, of 15 November
(modified by Law n.º. 143/85, of 26 November, Law n.º. 85/89, of 7 September, Law n.º. 88/95, of 1 September and by Law n.º. 13-A/98, of 26 February)

«TITLE I
General Provisions

(…)

Article 3
(Publication of decisions)

1. The decisions taken by the Constitutional Court, with the objective of:

(…)
b) Ascertaining the existence of unconstitutionality by omission;
(…)
are published in Series I-A of the Diário da República.

(…)

CHAPTER II

Procedures for the control of constitutionality and legality

SUB-CHAPTER I

Cases for abstract control

SECTION I

Common provisions

Article 51
(Receipt and admission)

1. A request for the appraisal of the constitutionality or legality of the rule of law mentioned in articles 278 and 281 of the Constitution is addressed to the president of the Constitutional Court and should specify, apart from the rules to be assessed, the constitutional rules or principles violated.

2. Received by the secretarial department and duly registered, the request is delivered to the president of the Court who decides on its admission bearing in mind the following numbers and articles.

3. In the case of absence, inadequacy or obvious lack of clarity in the indications mentioned in n.º 1, the president notifies the author of the request to correct it, after which the file will once again be submitted for the purposes of the previous number.

4. The decision of the president, who admits the request, does not preclude the possibility of the court rejecting it definitively.

5. The Court can only declare the unconstitutionality or the illegality of rules that are the object of the request for examination, but they may do this on the grounds of violation of constitutional rules or principles different from those in which violation was claimed.

Article 52
(Non-admission of the request)

1. The request may not be admitted when it is formulated by a person or entity that is not legitimate, when its inadequacies have not been corrected or when it has been submitted outside the deadline.

2. Should the president rule that the request not be admitted, it is submitted for discussion while at the same time copies of the request are sent to the remaining judges.

3. The Court decides within a period of 10 days or, when it is a case of preventive security, 2 days.

4. When the request is refused admission the entity submitting the request is notified.

Article 53
(Withdrawal of request)

The request may only be withdrawn in procedures of preventive control of constitutionality.

Article 54
(Hearing the body responsible for writing the rule)

When the request has been admitted, the president notifies the body that issued the contested rule to respond, if deemed fitting, and give an opinion within 30 days or, when it is a question of preventive control, 3 days.

Article 55
(Notification)

1. The notifications mentioned in the previous articles are made by hand-delivery, or they are sent by post, telegram, telex or fax, according to the circumstances.

2. Notifications are accompanied, depending on the case, by a copy of the ruling or the decision, with the respective grounds, or by the petition submitted.

3. In the case of a collegiate body or its members, notifications are made in the person of the respective president or whoever substitutes him.

Article 56
(Deadlines)

1. The periods referred to in the preceding articles and in the following sections are continuous.

2. When the period to carry out a procedural act ends on a day when the Court is closed, including days when public holiday bridges have officially been allowed, the deadline is transferred to the next working day.

3. The periods in the cases regulated in Sections III and IV are, however, suspended during the judicial holiday period.

4. Deadlines are extended by 10 days, or 2 days in the case of preventive control, when the acts involve a body or entity with their head office outside the mainland of the Republic.

(…)

SECTION III

Cases of successive control

Article 62
(Deadline within which the request is admitted)

1. Requests for appraisal of unconstitutionality or illegality mentioned in sub-paragraphs a) to c) of n.º 1 of article 281 of the Constitution may be submitted at any time.

2. There is a 5-day deadline for the secretarial department to submit the request to the president of the Court and a 10-day deadline for the president to decide on its admission or to apply the facilities envisaged in n.º 3 of article 51 and in n.º 2 of article 52.

3. The author of the request has 10 days in which to make any corrections.

Article 63
(Preliminary discussion and distribution)

1. A copy of the file is distributed to each judge with the reply from the body that issued the rule, or after the deadline established for this purpose has elapsed without a reply being received. The file is accompanied by a memorandum in which the president of the Court has formulated the objection and background questions which the Court must reply to, as well as any documents of reputed interest.

2. At least 15 days after the memorandum has been sent, it is submitted for debate and, when the Court has decided its approach to the questions to be resolved, the case is assigned to a reporter judge appointed through a draw or, if the Court sees fit, by the president.

Article 64
(Requests with the same object)

1. When a request has been admitted, any others with the same object that are also admitted are included in the file concerning the first.

2. The body that issued the rule is notified of the submission of the subsequent request, but the president of the Court or the reporter judge may dispense with a written opinion on the same whenever they consider that this is not necessary.

3. If it is decided that a further hearing should not be dispensed with, a period of 15 days is granted for the purpose, or the initial period extended for a further 10 days should the period not have elapsed.

4. Should distribution already have been made, the period mentioned in n.º 1 of article 65 is extended for 15 days.

Article 64-A
(Requisition for information)

The president of the Court, the reporter judge or the Court itself may request from the bodies or entities involved, any information deemed necessary or useful for examining the request and arriving at a decision on the case.

Article 65
(Decision-making)

1. When the file has been distributed to the reporter judge, the latter, within a period of 40 days, draws up a draft decision in harmony with the approach decided by the Court.

2. The secretarial department distributes copies of the draft referred to in the previous number to all the judges and, when the president has received his copy, the case is ready to be included on the agenda of the Court session held after at least 15 days have elapsed following distribution of the copies.

3. The president may reduce the periods mentioned in the previous numbers by half when serious reasons justify this and after hearing the opinion of the Court.

4. If the petitioner so requests it on acceptable grounds and if the body who issued the rule agrees, the president, after hearing the opinion of the Court, will decide whether priority should be given to consideration and decision of the case.

(…)

SECTION IV

Cases for the control of unconstitutionality by omission

Article 67
(Remission)

The system established in the previous section, apart from the effects, is applied to the procedure for assessing the non-fulfilment of the Constitution through the omission of legislative measures required to make constitutional rules feasible.

Article 68
(Effects of verification)

The decision in which the Constitutional Court verifies the existence of unconstitutionality by omission has the effect envisaged in n.º 2 of article 283 of the Constitution.

(…)»