HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

International, Supranational and National Catalogues in the 21st Century

XVIIIth Congress of the Conference of European Constitutional Courts

Portuguese Report*

I. GENERAL PART

CATALOGUES OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

I.I International Catalogues of Human Rights (ECHR, UDHR and ICCPR)

- *In your country, what is the constitutional position/ characteristic/ legal force of international treaties protecting human rights?*

There are three constitutional regimes that *prima facie* play a part in defining the position in the Portuguese legal order of the norms contained in international treaties on the protection of human rights. This is because such norms cumulatively possess a number of characteristics with autonomous constitutional relevance: they are set out in *international conventions*; they form part of the *jus cogens*; and they enshrine *human rights*.

Under Article 8(2) of the Constitution (CRP), the norms included in international conventions that have been properly ratified or approved, enter into and remain in "force in Portuguese internal law once they have been officially published, and remain so for as long as they are internationally binding on the Portuguese State". This is a conventional international-law system whereby norms are automatically received into domestic law, subject to certain conditions. The prevailing understanding is that the legal force of such norms is above that of ordinary-law norms, but below that of constitutional norms. Looking solely at their *conventional source*, this is the position that international treaties which protect human rights occupy in the Portuguese legal order.

Under Article 8(1), CRP, general or common international-law norms form an integral part of Portuguese law. In other words, the constitutional order expressly and unconditionally

* Prepared by Gonçalo de Almeida Ribeiro (Justice of the Constitutional Court), Joana Fernandes Costa (Justice of the Constitutional Court) and António Manuel Abrantes (Legal Adviser at the Constitutional Court).

recognises the binding nature of the *jus cogens*, and the dominant understanding among scholars is that the respective norms possess a legal force which is equivalent to, if not even greater than, that of constitutional norms. To the extent that norms contained in international treaties on the protection of human rights form part of the *jus cogens*, that is their position in the Portuguese legal order.

Article 16(1), CRP, states that: "The fundamental rights enshrined in the Constitution shall not exclude any others set out in *applicable international-law laws and rules*". This precept can be interpreted in two ways: either as a mere norm that excludes inferring *a contrario* that the human rights which are not expressly included in the constitutional catalogue are not recognised in Portuguese law; or as a clause that *incorporates* the human rights which are protected by international law, but are not to be found in the constitutional catalogue of fundamental rights, into the constitutional order. The difference is that the former interpretation would mean that the legal force of human rights norms is determined by their source (e.g. if its source is a treaty, a norm will possess the legal force applicable to treaties in domestic law), whereas the latter, highlighting as it does the *human rights nature* of such norms, would imply that they enjoy constitutional legal force.

Where the norms set out in international human rights conventions are concerned, these three regimes stand in a clear *relationship of speciality*. Their legal force is defined by their *nature*, and – whether because they are included in the *jus cogens*, or because they deal with human rights – the constitutional order attributes them the same importance as constitutional norms themselves, regardless of what type of convention they are contained in.

Having said that, the practical importance of this question is negligible in Portuguese constitutional law, for three types of reason.

Firstly, the Portuguese constitutional catalogue of fundamental rights is so *long* that there are going to be very few cases in which international treaties – namely the UDHR, the ECHR, and the ICCPR – enshrine rights that are not actually expressed in the text of the CRP.

Secondly, Portuguese constitutional case law tends to adopt a *universalist* concept of fundamental rights whereby the constitutional order safeguards not just the rights that are expressly enshrined in the CRP, but all those imposed by the need to recognise the dignity of the human person (see Ruling no. 101/2019, which, along with all the others cited herein, is available at http://www.tribunalconstitucional.pt/tc/acordaos/).

Thirdly, irrespective of their own legal force, international catalogues of human rights fulfil a *heuristic* function within the overall framework of a concept of fundamental rights that tends to be a universalist one. This has led the Constitutional Court to use such catalogues as *topoi* and *exempla*, without displaying excessive concern about preconditions for either their applicability or whether they possess a formally binding nature. It is worth noting at this point that, in the specific case of the UDHR, the CRP contains a special norm in the latter sense – Article 16(2), which states that: "The constitutional precepts concerning fundamental rights must be interpreted and completed in harmony with the Universal Declaration of Human Rights".

- *What mechanism is used to invoke the international treaties in national court decision-making?*

Portuguese law has no specific mechanism for invoking international treaties before the courts. The parties to any dispute can do so without restrictions, on condition that the applicable procedural norms are complied with.

The Constitutional Court does not have extensive powers to hear questions regarding the conformity of internal law – particularly norms contained in legislation – with conventional international law. It can only do so in cases in which an ordinary court has declined to apply a legal norm on the grounds that it is in violation of an international convention [Article 70(1)(i), Law no. 28/82 of 15 November 1982]. This means that in the great majority of cases, guaranteeing the efficacy of conventional norms falls solely to the *ordinary courts*.

- *Is it possible to invoke the direct effect of the international catalogues of human rights? If so, please describe the mechanism.*

International norms concerning human rights *do not* require any *transposing act* in order to have effect in Portuguese domestic law. As we explained above, their efficacy is ensured by the constitutional norms which recognise that legal force pertains to both the *jus cogens* [Article 8(1), CRP] and atypical fundamental rights [Article 16(1), CRP]. We should also note the constitutional requirement to interpret and complete the provisions regarding fundamental rights in accordance with the UDHR. International treaties themselves are automatically received into domestic law, albeit they must first have been officially published here and continue to be received only for as long as they are binding on the Portuguese State.

The immediate entry into force of international human rights norms in the domestic legal order clearly *does not* imply that such norms are *directly applicable* or bind *private individuals* without the need for an *interpositio legislatoris*. This depends on the nature of the fundamental right – or dimension thereof – in question. Article 18(1), CRP, states that the "rights, freedoms and guarantees" – a category which roughly corresponds to the Germanic "basic freedoms" and American "civil rights" – are directly applicable and bind both public and private entities; and the extension included in Article 17 means that this regime also encompasses rights of an "analogous nature". The exact scope of these norms is controversial, but it is generally accepted that not all the fundamental rights (or dimensions of a given fundamental right) possess the structural characteristics which permit or justify their direct applicability and horizontal efficacy.

I.II Supranational Catalogues of Human Rights (the Charter)

- *Is the Charter a point of reference to review the constitutionality of legal rules and/or decisions of public authorities, be it directly (a formal point of reference in some EU member states) or indirectly by 'radiating' through the national catalogues (a substantive point of reference in other states)?*

The CFREU was invoked or referred to in 27 Constitutional Court rulings between 2008 and 2018 (Rulings nos. 164/2008, 101/2009, 359/2009, 121/2010, 207/2010, 274/2013, 404/2013, 823/2013, 838/2013, 862/2013, 544/2014, 578/2014, 854/2014, 856/2014, 103/2015, 141/2015, 193/2016, 481/2016, 591/2016, 137/2017, 86/2017, 241/2017, 266/2017, 420/2017, 841/2017, 225/2018, and 242/2018).

The Charter does not constitute a *formal parameter for constitutionality* in the Portuguese legal order. Symptomatic of this fact is that the Constitutional Court does not have the jurisdiction to consider whether domestic legal norms are in conformity with the Charter. The exceptions to this are the cases (mentioned earlier) in which the Court hears appeals against decisions in which other courts have refused to apply a norm on the grounds that it is in breach of an international convention [Article 70(1)(i), Law no. 28/82 of 15 November 1982]. Having said that, the question before the Court in such cases is not strictly one of *constitutionality*.

The fact that the Charter is not a formal parameter for constitutionality does not mean that *the fundamental rights* enshrined in it do not possess constitutional relevance as a result of the aforementioned paragraphs (1) and (2) of Article 16, CRP. On top of this, there is the *heuristic*

value which, within the framework of a concept of fundamental rights that tends to be universalist, the Constitutional Court's case law recognises to pertain to the various human rights instruments, from the international ones (such as the UDHR and the ICCPR) to the regional ones (like the ECHR and the CFREU). Be that as it may, and as we have already pointed out, the substantial length of the domestic catalogue of rights reduces the relative practical significance of other catalogues from supranational or international sources.

- *Does the human rights case law of the Court of Justice of the European Union serve as guidance for the interpretation and application of the national catalogue in your country by general courts, or as a source for judicial law-making?*

The case law of the Court of Justice of the European Union presents a growing importance in the dialogue which the Portuguese Constitutional Court is fostering with the other European jurisdictions in the fundamental rights field, namely the European Court of Human Rights and other European constitutional courts (primarily those of Germany, Italy, and Spain). This reflects the Court of Justice's increasingly prominent role in protecting fundamental rights, with its case law contributing to a *common European acquis* that offers substantial heuristic advantages in the concrete implementation of constitutional norms in this area.

We do not have an overall view of the situation where the ordinary courts are concerned, but it may be reasonable to say that the Court of Justice's case law on fundamental rights is especially relevant when what is at stake is the interpretation and application of both European Union law and the Portuguese domestic law that is instrumental in its implementation here.

- *Is the national impact of the Charter conditioned, in constitutional terms, by its essentially equivalent degree of protection afforded, or as the case may be in the EU member states, is conditioned by making a request for preliminary ruling with the Court of Justice of the EU?*

The Portuguese Constitutional Court has not yet defined a position with regard to the problem of the equivalence of the level of protection within the scope of the relationships between the CRP and the Charter. Having said that, in Ruling no. 544/2014 the Court attributed a subsidiary function (and a minimum standard of protection) to the European

catalogues of fundamental rights (ECHR and CFREU) and the respective protection system (ECtHR and Court of Justice of the European Union), in relation to the protection granted by the constitutional order. The Court also stated the principle of the prevalence of the highest level of protection (and expressly referred to Article 53 of the Charter).

In areas which are not directly or indirectly covered by European Union Law, and in which the Charter therefore doesn't apply from a formal point of view, functioning instead solely as a complement to the domestic catalogue of rights, the problem of the equivalence of protection has very little practical relevance (see, however, Ruling no.242/2018, in which, basing itself on the principle of equality, the Court found that the higher level of the right of legal persons to legal aid in the Court of Justice's case law extends to purely domestic situations).

The question is more complex – and has not been addressed *ex professo* in our case law – when it comes to areas that are covered by European Union law, namely when what is at stake is the determination of the constitutionality of norms contained in legislation that operates the transposition of directives or is passed or approved under faculties attributed by European law. In any case, we should mention the recent Ruling no. 464/2019, in which the Constitutional Court declared the unconstitutionality of norms set out in domestic legislation, under which the Portuguese intelligence services were authorised to access traffic data, using a faculty provided by European Union law. In reaching this decision, the Court based itself on a constitutional parameter regarding the inviolability of telecommunications and other means of communication – Article 34(4), CRP – which has no parallel, at least expressly, in the CFREU.

I.III National Human Rights Catalogues

- *Is the catalogue of human rights part of the constitution of your country? If so, how is it incorporated (a separate constitutional charter, a part of the Constitution, a part of the constitutional order)? What is its structure?*

The 1976 Portuguese Constitution incorporates an extensive catalogue of fundamental rights, which occupies the whole of Part I (Article 12 to 79), which is itself divided into three Titles:

− Title I is devoted to general principles (Articles 12 to 23), namely the principle of universality, the principle of equality, the regime governing basic freedoms or civil rights, the

regime governing the suspension of the exercise of rights, the institution of the Ombudsman, and the right of access to justice.

− Title II is given over to rights, freedoms and guarantees (Articles 24 to 57) and is divided into three Chapters – on personal rights (e.g. the right to life, the right to personal integrity, criminal procedural guarantees, freedom of expression and information, religious freedom), rights to political participation (e.g. the right to vote, the right to stand as a candidate for election or appointment to public office, freedom of political association), and workers' rights (e.g. job security, the right to unionise, the right to strike) respectively.

− Title III addresses economic, social and cultural rights and duties (Articles 58 to 79) and is also split into three chapters – on economic (e.g. the right to work, consumer rights, the right to private property), social (e.g. the right to social security, the right to health, the right to housing), and cultural (e.g. the right to education, the right to the enjoyment of culture, the right to sport) rights and duties respectively.

- *What is the historical background of the creation of the national catalogue of human rights in your country? Is the respective legislation in your country based on other legislation (previous or foreign), or is it original?*

The catalogue of rights, freedoms and guarantees is markedly influenced by the post-war German and Italian Constitutions, and above all by the 1949 German Basic Law. Although the catalogue of economic, social and cultural rights was more or less distantly inspired by the 1919 Weimar Constitution, it is undeniably related to the constitutions of the Eastern European countries prior to the fall of the Berlin Wall, which incorporated catalogues of workers' and social rights as an alternative to the "bourgeois" catalogues of basic freedoms.

The heterogeneity of these influences is due to the way in which there is a compromise between revolutionary and democratic legitimacies in the original version of the 1976 Constitution, which was reflected in an unusually long and eclectic text. The revolutionary baggage was primarily present in the fields of economic organisation and political power, and was gradually expunged by successive constitutional revisions, above all the first (1982) and second (1989) ones. However, in the fundamental rights field the compromise-based genesis of the initial drafting process permitted an early acknowledgement in the Constitution of the *equiprimordial nature* of basic freedoms and social rights, both of which are rooted in the dignity

of the human person, in terms that were thus far unparalleled in the universe of constitutional democracies that emerged during the post-war period.

- *What has been the development of your national catalogue of human rights over time? Is it undergoing a change? Are new rights included? Is there a constitutional procedure for its modification or amendment?*

The 1976 Constitution has been *revised seven times* over the slightly more than four decades of its existence – in 1982, 1989, 1992, 1997, 2001, 2004, and 2005.

The constitutional revision process, which encompasses the catalogue of fundamental rights, is regulated in Part IV ("Guaranteeing and Revision of the Constitution"), Title II. The regime establishes formal (super-majoritarian requirement), material (constitutional solutions that cannot be touched), temporal (ordinary revisions every five years), and circumstantial (revisions are not possible during a state of siege or emergency) limits. The material limits (Article 288) encompass, among others, "the rights, freedoms and guarantees" and the "rights of workers, workers' committees and trade unions"; these limits apply not to the constitutional precepts, or even to the rights taken individually, but to the applicable categories of rights.

Unlike the organisation of the economy, the political system, and guaranteeing constitutionality (the Constitutional Court was only created in 1982), the fundamental rights domain has not undergone far-reaching changes in any of the constitutional revisions. Its essential characteristics – such as the great length of the catalogue of rights, the dichotomy between basic freedoms and social rights, the enshrinement of workers' rights, and the detailed regulation of the content of many of them – have remained practically intact.

Be that as it may, there have been some noteworthy amendments, such as the strengthening of the guarantees available to addressees of administrative acts (1982 constitutional revision); the possibility of attributing active and passive electoral capacity in some electoral acts to foreigners residing in Portuguese territory (1992 revision); and the enshrinement of the right to fair reparation and compensation in cases involving work-related accidents or occupational illnesses (1997 revision). Other changes have sought to either limit rights or facilitate their restriction in the light of opposing constitutional values, such as the inviolability of a person's domicile (2001 revision), and the limitation of the number of terms of office in the exercise of executive positions (2004 revision). Besides actual amendments

to the text of the Constitution, the whole matter of fundamental rights is naturally affected by new case law generated by the Constitutional Court, above all with regard to the judicial review of the proportionality of restrictions imposed by legislative means.

I.IV The Mutual Relationship Between Different Catalogues of Human Rights

- *Can you give specific examples from the case law of your court related to the use of any of the international catalogues?*

Among the Court's recent decisions (handed down in the last two years), we would particularly point to the following:

– Ruling no. 464/2019 (access to personal data by the intelligence services): the right to respect for private and family life enshrined in Article 7, CFREU, and Article 8, ECHR; and the protection of personal data provided for in Article 8, CFREU.

– Ruling no. 394/2019 (time limit for bringing paternity investigation actions): an individual's duties to the community, as referred to in Article 29(1), UDHR, and the right to respect for private and family life enshrined in Article 8, ECHR.

– Ruling no. 606/2018 (typification of crimes and penalties): the principle of the legality of criminal offences and penalties enshrined in Article 11(2), UDHR, Article 7(1), ECHR, Article 15, ICCPR, and Article 49, CFREU.

– Ruling no. 242/2018 (legal protection afforded to legal persons): the right to legal aid enshrined in Article 47(3), CFREU, and Article 6(1), ECHR.

– Ruling no. 225/2018 (gestational surrogacy and medically assisted procreation): the principle of the prohibition on making the human body and its parts as such a source of financial gain, as enshrined in Article 3(2)(c), CFREU, and the rights of the child enshrined in Article 24, CFREU.

- *Has your court considered the relationship/hierarchy/competition of the catalogues of human rights in light of the protection afforded?*

Portuguese constitutional case law does not include a defined position on the relationship between catalogues of human rights in the light of any supposed differences in the level of protection they provide for some or all rights.

Having said that, two recent decisions may shed some light on this question.

In Ruling no. 242/2018, the Constitutional Court understood the principle of equality to mean that the higher level of protection recognised in the case law of the Court of Justice of the European Union compared to that recognised in Portuguese constitutional case law on the right of legal persons to legal aid should also extend to purely domestic areas – i.e. ones not covered by European law. However, the Court's decision was not that the Charter should be applied instead of the Constitution, but rather than the latter should be interpreted in accordance with the former (or with the pertinent case law of the Court of Justice).

In Ruling no. 464/2019, the Constitutional Court considered the constitutionality of domestic norms authorising access to traffic data by the intelligence services, which had been approved under the terms of a faculty granted by European Union law. It based its findings on a constitutional parameter with regard to the inviolability of telecommunications and other means of the communication – Article 34(4), CRP – which has no parallel (at least in express terms) in either the CFREU or the ECHR. However, the Court did not expressly state that Portuguese law grants a higher level of protection than that afforded by European law.

- *Is there an established procedure for choosing a specific catalogue of human rights in cases where the right is protected under more catalogues?*

There is no record of any case in which the Constitutional Court applied an international or supranational human rights catalogue *to the detriment* of the corresponding constitutional norms. As we mentioned earlier, Portuguese case law primarily recognises a heuristic value on the part of human rights instruments, which serve as a complementary means of interpreting and developing the Portuguese constitutional catalogue.

II. SPECIAL PART

SPECIFIC ISSUES RELATED TO SELECTED FUNDAMENTAL RIGHTS

II.I Right to Life

- *What is the original wording of the provision protecting this right in your national catalogue?*

The right to life is enshrined in Article 24 of the Constitution, which reads as follows:

> Article 24
>
> Right to life
>
> 1. Human life is inviolable.
> 2. In no case shall there be the death penalty.

- *Is it possible to restrict the right? If so, how and under what conditions?*

The Constitutional Court has not yet considered the question of whether the right to life admits restrictions. The big problem in this respect is to determine whether the Constitution allows any kind of restriction on this fundamental right, given the way in which the applicable text is drafted and the inviolability that text expressly confers on it.

If one were to admit that this right is capable of being weighed up against other fundamental rights and other interests to which the Constitution affords its protection, and as such is capable of being restricted, the conditions under which such a restriction could occur would be those required in order to restrict any of the fundamental rights with the nature of "rights, freedoms and guarantees" (see answers to the following questions). In any case, such a restriction could not contradict the provision set out in paragraph (2) of Article 24, which expressly states that "In no case shall there be the death penalty".

The answer is clearer with regard to intrauterine life (i.e. the life of an embryo within the mother's uterus). In this respect, the Court has been taking the view that, although intrauterine life is a value which warrants constitutional protection, the latter is not absolute and that value is capable of being weighed up against other constitutional values that are protected by the CRP.

- *Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.*

As noted above, the Constitutional Court has already had occasion to pronounce itself on the content and scope of the value of intrauterine life several times.

In Ruling no. 25/84, the Court began by stating that intrauterine life is encompassed by the scope of the protection afforded by Article 24, CRP, and represents "an asset that is not legally subjectivized", but then went on to say that that asset can be weighed up against "other legally subjectivized values in a pregnant woman which possess the nature of fundamental rights".

A year later, the Court developed this idea in Ruling no. 85/85: "On the one hand, our view is that intrauterine life shares the position which the Constitution grants to human life as a constitutionally protected good (i.e. with objective constitutional value), but that it cannot enjoy the constitutional protection granted to the right to life in the full sense of the term – which only pertains to persons – and therefore when it is in conflict with fundamental rights or other constitutionally protected values, that good may have to give way (…). Inasmuch as there are no fundamental rights without a subject, only persons can be holders of fundamental rights, so the special protection regime which the CRP affords to the right to life, as one of the 'personal rights, freedoms and guarantees', is not directly and fully valid for intrauterine life and unborn babies (…). The truth is that the foetus is not (yet) a person – a man or woman – and therefore cannot directly be the holder of fundamental rights as such. The protection due to each human person's right to life is not directly applicable, on the same level, to prenatal, intrauterine life."

This position was reiterated in Ruling no. 288/98, when the Court said: "In this vision of things, it is acknowledged that Article 24 of the Constitution of the Republic not only guarantees every person a fundamental right to life, the subject of which is each individual, but also incorporates an objective dimension – a framework within which the protection of human intrauterine life fits – that can be said to be a true constitutional requirement. However, one cannot say that that protection of gestating human life has to acquire the same degree of development, or the same formats, as the protection of the right to life provided to the life whose individual subject is each human being who has already been born – each person". Similar considerations are also to be found in Rulings nos. 617/2007 and 75/2010, which closely follow the earlier case law.

The Court has also made a number of remarks on the importance of other catalogues of fundamental or human rights that enshrine the right to life. In its first decision in this respect, which it handed down in 1984 (Ruling no. 25/84) and in which it considered the

constitutionality of a Criminal Code norm that partially decriminalised abortion, the Court conducted an analysis that looked exhaustively at comparative law, but said almost nothing about international-law sources. The same cannot be said of the Court's most recent decision on the same subject (Ruling no. 75/2010), in which it was called on to consider the petitioners' arguments that the norms under review were in violation of both the Universal Declaration of Human Rights and the European Convention on Human Rights. Although the Court acknowledged that the first of these two instruments could be important to an interpretation of both constitutional and ordinary-law norms on fundamental rights, it took a different view with regard to the second, given that the text of the CRP already encompasses the commands derived from the ECHR.

In the Court's words: "In addition, the Universal Declaration of Human Rights is of specific normative relevance because it is a criterion for the interpretation and completion of constitutional and ordinary-law norms regarding fundamental rights [Article 16(2), CRP] (…). Notwithstanding this fact (and this is also what happens with the text of the European Convention on Human Rights – a document which is indeed part of the international law that is received as a result of Article 8(2), CRP), and as we shall see in more depth in a moment, [the UDHR is not something] that must automatically be called on within the present constitutional review context. The fact is that when compared with either Article 1 [*sic*] of the European Convention on Human Rights ("Everyone's right to life shall be protected by law"), or Article 2 [*sic*] of the Universal Declaration of Human Rights ("Everyone has the right to life"), the normative formula set out in Article 24(1), CRP, expresses a control parameter whose content already includes the directions derived from the ECHR and the UDHR, which in turn makes it unnecessary to consider them autonomously".

This excerpt paradigmatically summarises the position which the Court's case law has been following in this respect, in the sense that the Court has been invoking other catalogues of fundamental or human rights as a referent for the purposes of argumentation and as a criterion for interpreting the Portuguese constitutional catalogue, rather than as an independent standard for the validity of the norms before it for review. In effect, the fact that the fundamental right to life is expressly enshrined in the text of the CRP means that it is not necessary to autonomously resort to the aforementioned catalogues in order to gauge the validity of such norms.

- *Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?*

There are no notable differences.

We should mention that where the protection of intrauterine life is concerned, the Constitutional Court was asked to pronounce itself on whether, in the light of Article 24, CRP, *norms that expanded* the range of situations in which abortion is not a punishable criminal offence were in conformity with the Constitution. In its latest and paradigmatic Judgment, at least (*Case A., B. and C. v. Ireland*, decided on 16 December 2010), the ECtHR addressed the problem of the compatibility between the right of a gestating woman to respect for her private and family life, as enshrined in the Convention, and *norms that exclude* the possibility of an abortion, when one is sought for reasons linked to the need to preserve the pregnant woman's health and wellbeing (applicants A and C), and the danger to the life of the woman and the foetus (applicant C). In this Judgment the ECtHR nonetheless stated that: "The prohibition of abortion to protect unborn life is not (…) automatically justified under the Convention on the basis of an unqualified deference to the protection of pre-natal life or on the basis that the expectant mother's right to respect for her private life is of a lesser stature" (238) – a point on which the ECtHR converged with one of the central elements of the finding of the Portuguese Constitutional Court.

II.II Freedom of Expression

- *What is the original wording of the provision protecting this right in your national catalogue?*

The fundamental right to freedom of expression is enshrined in Article 37, CRP, which reads as follows:

> Article 37
>
> (Freedom of expression and information)
>
> 1. Everyone has the right to freely express and divulge his thoughts in words, images or by any other means, as well as the right to inform others, inform himself and be informed without hindrance or discrimination.
>
> 2. Exercise of these rights may not be hindered or limited by any type or form of censorship.
>
> 3. Infractions committed in the exercise of these rights are subject to the general principles of the criminal law or the law governing administrative offences, and the

> competence to consider them shall pertain to the courts of law or an independent administrative entity respectively, as laid down by law.
> 4. Every natural and legal person shall be equally and effectively ensured the right of reply and to make corrections, as well as the right to compensation for damages suffered.

- *Is it possible to restrict the right? If so, how and under what conditions?*

As is the case with virtually all the fundamental rights, the freedom of expression can also be restricted. However, the fact that this right possesses the nature of a "right, freedom and guarantee" means it benefits from the especially protective regime which the Constitution affords to this type of right (also applicable to "fundamental rights of an analogous nature", under Article 17, CRP).

Any restriction on this fundamental right must thus first of all fulfil the organic and formal requisite of being set out in either a Law passed by Parliament, or an Executive Law issued by the government under an Authorising Law passed by Parliament [Article 165(1)(b), CRP]. In addition, the restriction must also respect the five material requisites which Article 18(2) and (3), CRP, lays down for laws that restrict rights, freedoms and guarantees: *(i)* there must be constitutional grounds for the restriction; *(ii)* the principle of proportionality must be respected; *(iii)* the restriction must possess a general and abstract nature; *(iv)* retroactive efficacy is prohibited; and *(v)* the extent and scope of the right's essential content cannot be reduced.

Any restriction on this fundamental right must also respect the other norms and constitutional provisions in the CRP. One example of this is that no restrictive norm can go counter to the principle of a state based on the rule of law, in its various implementational dimensions (e.g. the dimension of legal certainty and the protection of trust) as included in Article 2, CRP, or the principle of equality enshrined in Article 13, CRP.

Lastly, it is important to point out that Article 37(2) establishes an express limit that cannot be overstepped: exercise of this right "may not be hindered or limited by any type or form of censorship".

- *Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.*

The Court's case law in this field is not particularly abundant – something that can be explained by the fact that its powers to hear questions are limited to reviewing the constitutionality of norms, and there are not many cases in which a possible breach of this right may be autonomously derived from a legal norm.

Be that as it may, the Court has already looked at the content of this fundamental right in a few rulings. One paradigmatic example can be found in Ruling no. 74/84, in which the Court defined the right's scope as follows: "The freedom of expression, as guaranteed by Article 37(1), includes the right to manifest one's own thought (substantive aspect), as well as the right to freely use means whereby that thought can be disseminated (instrumental aspect), particularly for the purpose of engaging in propaganda of a party-political nature". This formulation has been reiterated in various subsequent rulings, namely nos. 258/2006 and 224/2010.

- *Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?*

With regard to the protection afforded to the freedom of expression, the significance of the dissonance that at first sight appears to exist between the Constitutional Court's case law and the jurisprudence of the ECtHR is more apparent than real. This is because, inasmuch as the Portuguese concrete review model is a *strictly normative* one, unlike the ECtHR the Constitutional Court does not possess the competence to investigate any *direct violation* of the freedom of expression (or any other fundamental right) resulting from decisions taken by the jurisdictional power.

In any case, it is worth noting the grounds on which the ECtHR justified finding against the Portuguese State for violation of Article 10 of the Convention in *Lopes Gomes da Silva v. Portugal*, *Conceição Letria v. Portugal*, *Pinto Coelho v. Portugal*, and *Pinto Coelho v. Portugal* (respectively decided on 28 September 2000, 12 April 2011, 28 June 2011, and 22 March 2016). They indicate that the European Court considered a more intense level of protection for journalists' freedom of expression when in conflict with the right to honour and to one's good name in all four cases, and with the interest in the good administration of justice in the last two, than that which underlay some of the arguments which the Constitutional Court

adopted in its decisions on the appeals on constitutional grounds which the applicants in the ECtHR cases had previously brought in the proceedings in which they were convicted by Portuguese courts (Rulings nos. 113/1997, 407/2007, 605/2007, and 90/2011 respectively).

The applicant in both cases referred to as *Pinto Coelho v. Portugal* was the same journalist. In both, the ECtHR distanced itself from the position taken by the Portuguese Constitutional Court. Contrary to the latter, it considered that holding the applicant criminally liable for the unauthorised dissemination of items and documents that were subject to judicial confidentiality in the earlier case, and of the content of recordings of testimony given at trial hearings in the later proceedings, constituted an infringement of the freedom of expression that was not matched by any imperative social need, and that the rights and interests used to substantiate the opposite position – the public interest in the implementation of an impartial and independent justice, and the interest of both the accused person and the supposed injured parties in avoiding the public disclosure of facts that would prejudice their reputations, or that invaded the sphere of their private lives – did not constitute relevant or sufficient grounds to justify that infringement.

II.III Right to Privacy/Right to Respect for Private Life/Right to Private Life

- *What is the original wording of the provision protecting this right in your national catalogue?*

The fundamental right to the preservation of the intimacy of private and family life is enshrined in Article 26(1) of the Constitution, which reads as follows:

> Article 26
> (Other personal rights)
>
> 1. Everyone is accorded the rights to personal identity, to the development of personality, to civil capacity, to citizenship, to a good name and reputation, to their image, to speak out, to the preservation of the privacy of their personal and family life, and to legal protection against any form of discrimination.

- *Is it possible to restrict the right? If so, how and under what conditions?*

Like virtually all the fundamental rights, the right to the preservation of the intimacy of private and family life can be restricted, under the same terms and with the same limits as those applicable to the freedom of expression.

- *Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.*

Yes. The fact is that the Court has a large body of case law on the fundamental right to the preservation of the intimacy of private and family life, which it has gradually been interpreting in more detail.

The first time the Constitutional Court formulated a definition of the content of this right was in Ruling no. 128/92. The Court stated that the content resulted in every person's right to see his/her domestic or family space or home protected against intrusions by others – i.e. a right to a private sphere which no one can enter without the right-holder's authorisation. In the Court's view, that right comprises on the one hand an autonomy (which encompasses the person's right to regulate that intimate space themselves, free from any state or social encroachments), and on the other the right to the non-dissemination of anything that pertains especially to that intimate sphere without the interested party's authorisation (a "right to personal secrecy"). On the subject of the places in which private life can be manifested, the Court stated that that life encompasses "personal life, family life, the relationship with other spheres of privacy (…) the place which directly pertains to personal or family life (…), and private means of expression and communication (correspondence, telephones, oral conversations etc.)". This means that Portuguese constitutional case law recognises private communications – including their content and the circumstances in which they take place – to be a means whereby aspects of a person's private life are manifested, and which therefore fall within the scope of the applicable protection afforded by the CRP.

As to the objective scope of the right to the preservation of the intimacy of private life, the Court has gradually been firming up the following propositions: *(i)* the different manifestations of this overall right include the rights to be left alone (to solitude), to anonymity, and to informational self-determination; *(ii)* here in Portugal, the right to the free development of one's personality, seen as the freedom of conduct and the freedom to shape and express one's personality, is treated differently from the right to the preservation of privacy, in the sense that it includes the freedom to control the information about that which, as a result of that freedom of conduct, each person does in his/her private sphere; *(iii)* the formulation "preservation of the intimacy of private life" cannot be interpreted restrictively, in such a way as to circumscribe the constitutional protection of the most intimate aspects of personal life, because that would mean ceasing to cover all the other spheres of life that

must also be shielded from the public, as a necessary condition for safeguarding people's integrity and dignity; and *(iv)* the fact that the Court refuses to establish an equivalence between "privacy" and "intimacy" does not mean that one cannot define graduations between different spheres of private life, depending on their greater or lesser connection to the attributes that go to make up personality (see Rulings nos. 306/2003, 368/2002, 355/97, 442/07, and 230/08, among others).

The Constitutional Court has also been interpreting this right with reference to other catalogues of fundamental or human rights. One paradigmatic example in this regard is Ruling no. 225/2018, in which the Court pronounced itself on the constitutionality of norms which permitted the use of gestational surrogacy, and others which established a solution in which data in cases of so-called "heterologous" medically assisted procreation (MAP) were anonymous. The Court went to great lengths to consider both the rights of the various parties involved in the gestational surrogacy procedure (beneficiaries, surrogate, child), and those of children born by means of heterologous MAP procedures, with reference to the right to respect for private and family life enshrined in Article 8, ECHR, and particularly with the interpretation given to it by the ECtHR in cases regarding such practices. Other examples are to be found in Ruling no. 420/2017, in which the Court invoked the right to respect for private and family life set out in Article 7, CFREU, and in Ruling no. 488/2018, in which the Court referred to the right to respect for private and family life enshrined in Article 8, ECHR, as part of its review of the constitutionality of norms imposing time limits on bringing paternity investigation actions.

In any case, and as we have been emphasising, the Court has essentially been invoking these catalogues of fundamental or human rights as both referents in its reasoning and criteria for the interpretation of the Portuguese constitutional catalogue, and not really as an independent standard for the validity of the norms submitted to it for review.

- *Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?*

There are no differences worthy of note.

We should point out that, with regard to the protection of the right to the preservation of private life, the starting point for the Constitutional Court's case law is the guideline that is currently prevalent at both the ECtHR and the Court of Justice of the European Union. This

can be seen in Ruling no. 464/2019, in which the Court considered the constitutionality of a set of norms designed to enable the official intelligence services, subject to certain preconditions, to access traffic data that had previously been stored by electronic communication service-providers. The Court considered that Article 34(4), CRP, provides the inviolability of telecommunications and other forms of communication with a specific, strengthened form of protection.

II.IV Freedom of Religion

- *What is the original wording of the provision protecting this right in your national catalogue?*

The fundamental right to freedom of conscience, religion and form of worship is enshrined in Article 41, CRP, which reads as follows:

> Article 41
>
> (Freedom of conscience, of religion and of form of worship)
>
> 1. The freedom of conscience, of religion and of form of worship is inviolable.
> 2. No one may be persecuted, deprived of rights or exempted from civic obligations or duties because of his convictions or religious observance.
> 3. No authority may question anyone in relation to his convictions or religious observance, save in order to gather statistical data that cannot be individually identified, nor may anyone be prejudiced in any way for refusing to answer.
> 4. Churches and other religious communities are separate from the state and are free to organise themselves and to exercise their functions and form of worship.
> 5. The freedom to teach any religion within the ambit of the religious belief in question and to use the religion's own media for the pursuit of its activities is guaranteed.
> 6. The right to be a conscientious objector, as laid down by law, is guaranteed.

- *Is it possible to restrict the right? If so, how and under what conditions?*

As with virtually all the fundamental rights, the freedom of religion can be restricted under the same terms and with the same limits as those applicable to the freedom of expression.

- *Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.*

Yes, the Court has pronounced itself on the scope of the right to freedom of religion in several rulings, of which nos. 544/2014 and 578/2014 are paradigmatic examples.

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

The Constitutional Court has also been interpreting this right with reference to other catalogues of fundamental or human rights. One paradigmatic example in this respect is to be found in Ruling no. 544/2014, in which the Court invoked various international instruments – the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the United Nations Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief , Article 2 of the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, and, within the frameworks of the Council of Europe, Article 9, ECHR, Articles 7 and 8 of the Framework Convention for the Protection of National Minorities of 1 February 1995, and of the European Union, Article 10, CFREU – in order to configure the Portuguese constitutional concept of "religious freedom".

In the same ruling, the Court also stated that a number of catalogues of fundamental rights and the respective protection systems (such as the ECtHR) occupy a subsidiary dimension (and provide a minimum standard of protection) in relation to the protection afforded by the constitutional order, saying especially that the highest level of protection must prevail. To quote the Court: "Notwithstanding the fact that the scope of the protection afforded to the right of freedom of religion in the aforementioned case law of the European Commission of Human Rights and the European Court of Human Rights – which suggests that only the (negative) dimension of non-discrimination must be observed when the labour relations in

question cease – one cannot fail to bear in mind that these days the protection of religious freedom possesses a multilevel, national, regional and universal framework within which the highest [level of] protection must prevail. As such, on the one hand, some of the transnational catalogues and their guarantee systems would appear to be subsidiary in relation to the protection of the fundamental right provided by national legal orders – one example is the protection system applicable to the European Convention on Human Rights; on the other, such transnational protection systems, and especially regional ones, implement the rights they protect as minimum standards, with a view to their maximum effectiveness, with one of their provisions (and this is the case of the Charter of Fundamental Rights of the European Union) being that they do not prejudice a broader protection that may be granted to the right in question on each state's domestic level, on the higher level of protection derived from those states' constitutions (see Article 53, CFREU). Because of this, the understanding attached to the scope of the regional international protection of religious freedom, when invoked in order to enforce respect for periods designed to safeguard workers, under Article 9 of the European Convention on Human Rights, does not prejudice the constitutional protection of the freedom of religion provided for in Article 41 of the Constitution, as requested by the appellant in the present case".

Be this as it may, and as we have been pointing out, the Court has essentially been attributing a heuristic value to international human rights catalogues.

- *Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?*

The Constitutional Court's case law (Rulings nos. 544/2014 and 578/2014) refers to a more intense level of protection of the right to religious freedom – at least in cases in which its exercise proves incompatible with compliance with labour-related or functional duties – than that which the ECtHR has deduced from Article 9 of the Convention.

In both *X v. United Kingdom, Tuomo Konttinen v. Finland* and *Louise Stedman v. United Kingdom*, decided by the Commission on 12 March 1981, 3 December 1996 and 9 April 1997 respectively, and *Francesco Sessa v. Italy*, Judgment of the ECtHR on 24 September 2012, the various appeal instances saw the right to religious freedom from an essentially negative perspective, denying the possibility that freedom of worship might prevail over contractual obligations derived from a labour relationship, or over other functional duties pertaining to a legally defined status.

II.V Prohibition of Discrimination

- *What is the original wording of the provision protecting this right in your national catalogue?*

The prohibition of discrimination is enshrined in Article 13, which reads as follows:

> Article 13
>
> Principle of equality
>
> 1. All citizens possess the same social dignity and are equal before the law.
>
> 2. No one may be privileged, favoured, prejudiced, deprived of any right or exempted from any duty for reasons of ancestry, sex, race, language, territory of origin, religion, political or ideological beliefs, education, economic situation, social circumstances or sexual orientation.

- *Is it possible to restrict the right? If so, how and under what conditions?*

Unlike the fundamental rights addressed above, the prohibition of discrimination is not formally included in the catalogue of rights, freedoms and guarantees. Given that this value takes on the nature of a legal principle which is intimately associated with the principle of equality, it is provided for in the Article of the Constitution on the latter.

According to the Court's case law, "the principle of equality fundamentally encompasses three dimensions or aspects: the *prohibition of arbitrariness*; the *prohibition of discrimination*; and the *obligation to differentiate*. The first of the three is taken to signify the requirement for equal treatment for equal situations and the prohibition of equal treatment for situations that are manifestly unequal (treat that which is equal equally; treat that which is different differently); the second – at stake here – implies the illegitimacy of any differentiation of treatment based on subjective criteria [such as those listed as examples in Article 13(2), CRP]"; and the third is a "way of compensating for unequal opportunities" (Ruling no. 382/2017).

In Ruling no. 308/2018, the Court considered the constitutionality of a divergence between the regime governing challenges against presumed paternity and that governing a parent's recognition of a child. The Court said the following about the prohibition of discrimination: "The constitutional relevance of 'suspect classifications' – the list of which includes, as we have seen, children born out of wedlock – is not restricted to the domain of the prohibition of privileging or prejudicing certain individuals *solely* due to the fact that, or because, they

belong to a certain social group. The name attributed to them – *suspect* classifications – is derived from the circumstance that they denote social groups who have been historically discriminated against or privileged, whose interests are presumed to be unfairly and unequally considered and represented, be it in the ordinary legislative process, be it – and this often occurs – in old legislation that remains in force due to the combined effect of the legislator's inertia and the fading of memories; most often, the relevant social groups are minorities who are victims of historical injustice, ingrained prejudices, social exclusion and political marginality. In truth, the Constitution places a 'cloud of suspicion' of discrimination over legal distinctions whose *effect* is a difference in how those social groups are treated, even though the legal regime could be explained by reasons that are not ostensibly discriminatory, and even when such reasons are officially invoked. (…) The *functional* reflection of that suspicion of discrimination is the authority given to the Constitutional Court – a public power that is essentially created in order to *scrutinise* the reasons underlying democratic laws – to engage in a *heightened* form of review in matters linked to respect for the principle of equality. Instead of limiting itself to a negative or minimum level of scrutiny that normally takes the form of the prohibition of arbitrariness, the Constitutional Court must subject legislation based on 'suspect classifications' to the strict gauge of *just measure*. In other words, one must determine not only whether the difference in treatment is based on non-discriminatory reasons, but also whether those reasons – the only ones that can be accepted as legitimate – justify the *exact measure* of the difference in treatment between the target group and its comparative peer. Far from offending against the principle of the separation of powers – namely the separation between the legislative and the jurisdictional powers – this heightened judicial scrutiny is a guarantee of the law's *democratic authority* in the eyes of those who have strong reasons not to believe in the promise that is solemnly made in Article 13(1) of the Constitution: that it will treat them as equal to other citizens."

In the cases in which it has faced an allegation that a certain norm or regime breached the prohibition of discrimination established in Article 13(2), CRP, the Constitutional Court: *(i)* either considered that that violation had not in fact occurred, particularly because the law did not mete out different treatment "*because of* or *due to* [a discriminatory factor] – i.e. with the *goal* of privileging, benefiting, prejudicing any person or persons or depriving them of any right or exempting them from any duty in accordance with" their belonging to social groups in relation to which there is a suspicion of discrimination (Ruling no. 398/2017); or *(ii)* acknowledged the existence of a violation of the prohibition of discrimination, and, on that basis, came to a positive finding of unconstitutionality that was not dependent on the

mediation of any of the requisites or tests inherent in a review based on the principle of the prohibition of excess (suitability, necessity and proportionality in the narrow sense of the term). In short, in cases in which discriminatory treatment has been found to exist, constitutional case law has not tolerated it.

Examples include: *(i)* Ruling no. 400/1991, in which the Constitutional Court declared the unconstitutionality of a norm that forbade the award of legal aid to injured parties who sought to be civil parties in criminal actions brought for public-order crimes. The Court found that prohibition to be "a constitutionally inadmissible factor for discrimination" which, "by granting some (those with economic capacity) the right to become civil parties and, on the level of its effective implementation, denying others (the economically disadvantaged) that same right", caused "a discriminatory treatment to be based on a reason which the Constitution expressly excludes as grounds for differentiating equal or identical personal situations", thereby violating Article 13, CRP; and *(ii)* Ruling no. 382/2017, in which the Court held a norm under which a measure – in this case, of an economic nature – which was intended to support autonomous living and which remained in place after beneficiaries came of age, in order to enable them to complete their vocational training or academic education, necessarily terminated on a beneficiary's twenty-first birthday, unconstitutional for violation of the prohibition of negative forms of discrimination linked to the protection of the right to full development pertaining to young persons who are deprived of a normal family environment, as established in Articles 13(2) and 69(1) and (2), CRP.

In any case, in its case law the Constitutional Court has accepted that the principle of equality (and thus the prohibition of discrimination) requires that that which is necessarily equal be treated as equal and that which is essentially different be treated as different. This means that not all differentiations in the ways in which people are treated are prohibited, but only those which are arbitrary and lack sufficient material grounds (for all these questions, see Rulings nos. 231/94, 369/97, 184/08, and 157/2018). It is thus not contrary to the principle that discrimination is prohibited for the law to include positive discriminations between people that are designed to correct factual inequalities which exist in society and to promote a true material equality. The Constitution itself sets out various norms that establish positive forms of discrimination in the name of achieving an effective equality. One example is Article 68(3), CRP, which states that: "Women have the right to special protection during pregnancy and following childbirth, and working women also have the right to an adequate period of leave from work without loss of remuneration or any privileges".

- *Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.*

The Constitutional Court has been interpreting this prohibition with reference to other catalogues of fundamental or human rights. One paradigmatic example can be found in Ruling no. 121/2010, in which the Court invoked the UDHR and the CFREU in order to consider the constitutionality of a Civil Code (CC) norm whereby the law was changed in such a way to permit same-sex marriages. Among other things, the Court said that the UDHR must only be taken into account when it leads to greater protection for citizens. Similarly, in the same decision the Court relied on a considerable number of ECtHR judgments in order to reach the conclusion that, although the ECtHR had developed a substantial case law whereby discriminations based on sexual orientation should be eliminated, it had never stated that reserving marriage as a legal institution solely to heterosexual couples constitutes any form of illegitimate discrimination in relation to homosexual couples. In an earlier ruling on the same topic (Ruling no. 359/2009), when it considered this question, the Court had invoked the right to non-discrimination provided for in Article 21(1), CFREU.

Be this as it may, and as we have been noting, the function of international catalogues of rights in Portuguese constitutional case law is primarily a heuristic one.

- *Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?*

There are no differences worth noting.

We would say, for example, that where same-sex marriage is concerned and prior to the entry into force of Law no. 9/2010 of 31 May 2010 (legal permission of same-sex marriage), the Constitutional Court was called on to pronounce itself on the regime which defined marriage as *the contract entered into by two persons of different sexes*. In harmony with the position which the ECtHR has recently reiterated with regard to Article 14 of the Convention (*Chapin and Charpentier v. France* of 9 June 2016), the Court concluded that that regime was not in breach of the prohibition of discrimination based on sexual orientation (Ruling no. 359/2009).

II.VI Right to Liberty

- *What is the original wording of the provision protecting this right in your national catalogue?*

The right to liberty is enshrined in Article 27, CRP, which reads as follows:

> Article 27
>
> Right to liberty and security
>
> 1. Everyone has the right to liberty and security.
>
> 2. No one may be wholly or partially deprived of their liberty, except as a consequence of a judicial conviction and sentence imposed for the practice of an act that is legally punishable by a prison term or the judicial imposition of a security measure.
>
> 3. The following cases of deprivation of freedom for the period and under the conditions laid down by law are exceptions to this principle:
>
> a) Detention in flagrante delicto;
>
> b) Detention or remand in custody due to strong indications of the wilful commission of a crime that is punishable by imprisonment for a maximum term of more than three years;
>
> c) The imprisonment or detention of, or the imposition of any other coercive measure subject to judicial control on, a person who improperly entered or improperly remains in Portuguese territory, or who is currently the object of extradition or deportation proceedings;
>
> d) The disciplinary imprisonment of military personnel, which imprisonment is subject to the guarantee of appeal to the competent court;
>
> e) The subjection of a minor to measures intended to protect, assist or educate him in a suitable establishment, when ordered by the competent court of law;
>
> f) Detention by judicial decision for disobeying a court decision or to ensure appearance before a competent judicial authority;
>
> g) Detention of suspects for identification purposes, in the cases that are and for the time that is strictly necessary;
>
> h) Committal of a person suffering from a psychic anomaly to an appropriate therapeutic establishment, when ordered or confirmed by a competent judicial authority.
>
> 4. Every person who is deprived of his freedom must immediately be informed in an understandable manner of the reasons for his arrest, imprisonment or detention and of his rights.

> 5. Deprivation of freedom contrary to the provisions of the Constitution or the law places the state under a duty to compensate the aggrieved person in accordance with the law.

- *Is it possible to restrict the right? If so, how and under what conditions?*

Like that which happens with virtually all the fundamental rights, the right to liberty can also be restricted under the same terms and with the same limits as those applicable to the freedom of expression.

It is also important to bear in mind that paragraphs (2) and (3) of Article 27 expressly list cases in which restrictions on this fundamental right are permitted. In effect, paragraph (2) authorises restrictions "as a consequence of a judicial conviction and sentence imposed for the practice of an act that is legally punishable by a prison term or the judicial imposition of a security measure", while paragraph (3) sets out various constitutionally permitted measures whereby people can be deprived of their liberty, on condition that those measures are applied "for the period and under the conditions laid down by law".

- *Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.*

Yes. In some of its rulings the Court has already pronounced itself on the scope of the right to liberty, invoking a number of catalogues of human or fundamental rights in the process.

One paradigmatic example here is to be found in Ruling no. 471/2001, in which the Court opined the following with regard to this fundamental right: "What is at stake in the first part of Article 27(1) is the right to liberty as an expression of the right to physical freedom – freedom of movement – inasmuch as (…) that which is enshrined in the Constitution is not the right to liberty in general, but rather the rights that are incorporated into it, such as the right not to be detained or arrested by the public authorities except in the cases and under the terms provided for in Article 27 itself, the right not to be imprisoned or physically prevented from doing something or constrained to do something by someone else, and the right to protection by the state against attacks on one's liberty by someone else. It is the physical freedom of the person concerned to 'come and go' that is at stake, and as such must indeed be understood in harmony with the provisions of Article 5 of the European

Convention on Human Rights – an understanding which the case law of the European Court of Human Rights sees as firm (…)".

- *Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?*

There are no noteworthy differences.