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INTERVIEW by Albie Sachs with a former member of the  
**PORTUGUESE CONSTITUTIONAL COURT**

Ever since the adoption of the first Republican Constitution in 1911, the principle of judicial review has been acknowledged in Portugal. As in the case of the USA, the ordinary courts had the power to judge the constitutionality of any legislation or executive decrees. In practice, however, this was more notional than real. Hardly a dozen decisions were given in more than sixty years in terms of which the constitutionality of government action was put in question.

After the Revolution of 25 April 1974, the position changed. In 1976 a new Constitution was adopted by a Constituent Assembly after extensive public debate. This Constitution contained guarantees of individual rights and political pluralism, clauses on workers' rights, gender rights, and important social and economic rights. Until 1982 the question of interpreting and applying the Constitution was left to a body called the Council of the Revolution. In 1982 however the Council of the Revolution was abolished, and its functions in relation to the interpretation of the Constitution were taken over by a newly created Constitutional Court.

All the parties in the Assembly of the Republic supported the idea of an independent and active Constitutional Court, although there was disagreement over how it should be constituted. In the end it was agreed to have a mixed system whereby the ordinary courts would maintain jurisdiction to hear constitutional questions but the final court of appeal in constitutional questions would always be the Constitutional Court.

It should be said that there was considerable opposition at the time from the judges of the ordinary courts to having a constitutional court

sitting above them, and also to the fact that members of the CC could be selected from persons outside the ordinary judiciary.

The CC is made up of 13 members, 10 of whom are elected en bloc by the Assembly by a 2/3 majority. Since no party has a 2/3 majority, there has to be a process of give and take before the list can be agreed upon. In practice half the judges come from members of the ordinary courts and half from outside, mainly the universities. Each judge is nominated in his/her personal capacity but there is a wide spread of backgrounds and political associations. The 10 members of the court themselves select the other three members. The idea is to choose 3 persons of high standing who are not clearly associated with any political positions, to break any deadlock that might emerge. The practice has been to choose judges from the first court of appeal or from the Supreme Court.

Since its inception the CC has been busy and has come to play an important part in portuguese public life. Cases can come to it in two ways. In the first place the ordinary courts can test the constitutionality of any law or actions relevant to a matter before them. The question of constitutionality becomes one of the legal matters that enters into the judgement and that can be appealed against in the ordinary way, with the CC having the last word. Secondly the CC can be asked directly to give an abstract opinion on constitutional questions. This opinion has the full force of law and is not merely advisory. Direct recourse to the CC can be had by the following:

- The President of the Republic;
- The President of the Assembly;
- The Prime-Minister;
- 1/10 of the members of the Assembly;
- The Procurator-General;
- The Guardian of Justice (Ombudsman);
- Regional authorities in relation to questions of their powers.

Ordinary members of the public do not have direct access to the CC but they can create sufficient public opinion to get one of the above to bring a case, more particularly the Ombudsman (an institution which has functionned with notable success in Portugal).

The judges are selected for a period of 6 years, renewable without limit. The renewability is controversial because it seems to encourage some judges not to be as independent as they might for fear of not being renominated. It might be better either to appoint the judges until retiring age or for a fixed, non-renewable, period longer than 6 years.

It seems that the judges in the ordinary courts have overcome their resistance to the CC which now has wide acceptance and considerable prestige in portuguese society.

Apart from testing constitutionality as above, the CC has the following important functions:

- It can be called upon by the President - or in certain cases the Prime-minister or 1/5 of the members of parliament - to check the constitutionality of hotly contested legislation before it is signed (for example, on abortion, on reprivatizing nationalized industries and banks, laws permitting the sacking of employees and many others);
- It can also perform the interesting funtion of calling upon Parliament to adopt legislation where no law exists to give effect to constitutional rights (e.g., protection of personal privacy against being put on computer lists, absense of a law permitting local referenda - in both cases the court published a declaration to the effect that the failure of Parliament to adopt appropriate legislation amounted to an omission in breach of the Constitution - this declaration had a significant impact on public opinion, and steps have been taken to set the legislative process in motion).

In addition, the CC has jurisdiction to decide whether the President is incapacitated or not, decide on the validity of the electoral process, check the legality of the constitution of political parties and their coalitions, and verify in advance the constitutionality and legality of referenda.

The CC decides more than 500 cases per year, the great majority being directly on questions of constitutionality. Looking back on the cases one sees that the court has adopted firm positions in respect of the following:

- declaring unconstitutional features of pre-1974 legislation;

- defending public rights and individual liberties;
- defending workers' rights as set out in the Constitution;
- defending the principle of equal rights, especially in relation to gender;
- defending the powers of parliament as against the executive;
- defending the powers of the regions and the local authorities as against the centre.

On the other hand, the CC has been less firm in defending the social and economic transformations effected by the Constitution such as the nationalizations, the land reform and rights to social welfare.

The CC is divided into 2 sections of six judges each, with the President heading both sections. The President coordinates the work, presides over the discussion, casts a vote but does not prepare or pronounce the judgements. Decisions are by majority vote and each judge has to indicate his/her vote. All judgements are printed in the official Journal and the most interesting are published in 2 or 3 substantial volumes per annum.

The principles of constitutionality have become part and parcel of normal legal practice and references to the Constitution are frequently made in public and political life, sometimes even in trivial and absurd situations. Portugal has undoubtedly benefitted substantially from having a Constitutional Court.

[Notes of an interview in Coimbra on 27th. December 1990 with Vital Moreira, of the Law Faculty of the University of Coimbra, member of the CC from 1983 to 1989, and joint author of the most widely used annotated version of the Constitution of the Republic of Portugal.]