CATÓLICA Global School of Law

CATÓLICA RESEARCH CENTRE FOR THE FUTURE OF LAW
LISBOA · PORTO

CGSL WORKING PAPERS

No. 3/2022

The Conundrum of Constitutionally Conforming Interpretation

Gonçalo de Almeida Ribeiro

The Conundrum of Constitutionally Conforming Interpretation

Gonçalo de Almeida Ribeiro[*]

Abstract

This paper examines the doctrine or canon of constitutionally conforming interpretation in constitutional adjudication in Portugal. It begins by posing the following conundrum unveiled by the doctrine: on the one hand, it is very hard if at all possible to draw a line between constitutionally conforming interpretation and judicial review of constitutionality; on the other hand, statutory construction is always already constitutionally conformed, namely by basic principles and fundamental rights. It follows that there are no obvious conceptual limits to the jurisdiction of a specialized constitutional court. Following a brief description of the main features of the Portuguese system of judicial review of legislation, which departs from the standard post-war model in a number of noteworthy respects, the paper discusses the ways in which the case law of the Constitutional Court manages the challenge to its own jurisdictional boundaries posed by the doctrine of constitutionally conforming interpretation in two main realms of activity: incidental control and abstract review. It then concludes that the Portuguese case illustrates the unsettled ambivalence between two grand conceptions of constitutional adjudication in a liberal democracy: a restrictive one as a counterpart to the democratic legislature and an expansive one as the paramount forum of constitutional interpretation.

[*] Judge of the Constitutional Court of Portugal. Professor of Law at Universidade Católica Portuguesa (Lisbon).

I. Setting the Stage

Here is what we may call a textbook presentation of the doctrine or canon of 'constitutionally conforming interpretation'.[1] A court of law is faced with some issue of statutory interpretation. As it bears on the case at hand, the relevant provision may be respectably construed in two different ways or may be interpreted as having one or another of two possible senses. Imagine the provision reads 'no vehicles in the public parks',[2] and the issue is whether it applies to tourists riding electric scooters or disabled individuals in motorized wheelchairs. The judges consider the language of the provision carefully, take stock of the other provisions in the statute, go through the legislative record, and ask themselves what should have driven a reasonable lawmaker to interdict vehicles in the public parks. That might very well suffice for some to make up their minds about the meaning of the provision. Yet others are genuinely torn. Then one of the judges has a brilliant idea: let us consider which of the two possible senses is in accordance or at any rate is in greater harmony with the Constitution. It is tricky to determine whether that would be of any use to decide the case involving electric scooters, but it is easy to see how – assuming some fairly common constitutional standards – the argument would favor a reading of the provision according to which it does not apply to disabled individuals in motorized wheelchairs. Indeed, it is very likely that the provision, interpreted so as to interdict these, would be deemed unconstitutional. Therefore, by applying the doctrine or canon of constitutionally conforming interpretation, the law-applying official manages with one stroke to preserve the provision, to uphold constitutional values, to renew the presumption that duly enacted laws are valid, and to avoid having to rule on the constitutionally of the provision or referring the matter to another court competent to do so.[3] The judges saw that it was all very good.

---

[1] See, e.g., Karl Larenz and Claus-Wilhelm Canaris, *Methodenlehre der Rechtswissenschaft* (Berlin, Heidelberg, and New York, Springer, 3.rd ed. 1995) 159-63.

[2] With a nod to H. L. A. Hart, 'Positivism and the Separation of Law and Morals', 71 *Harvard Law Review* 593 (1958) 607.

[3] These are standard justifications for constitutionally conforming interpretation. See, generally, Eduardo García de Enterría, *La Constitución Como Norma Y El Tribunal Constitucional* (Madrid, Civitas, 3.th ed. 1994) 95-103. It should be noted that none of them applies across the board. The goal of preserving the provision is mute in systems where neither the judiciary in general nor a specialized court hold the power to strike down unconstitutional norms. The aim of upholding constitutional values may be equally attained by a decision striking down the unconstitutional norm, if such a power is vested in the judiciary or a specialized court. The presumption that duly enacted laws are valid

Alas, it is not quite as simple and tidy as that. Let us suppose instead that the judges come to the view that the most plausible reading of the statute is that it applies in the motorized wheelchair case.[4] Perhaps the rest of the statute makes it clear that the legislative purpose was to ban non-pedestrians from accessing public parks, as evinced by the fact that other provisions target bicycles, horses, roller skates, and even baby strollers. Now it looks like the question of constitutionality cannot be avoided. If we assume – for ease of exposition – a concentrated system of constitutional adjudication, the judges should refer the case to the Constitutional Court for preliminary review of the constitutionality of the provision. But notice that it is not the whole provision concerning vehicles that is at stake here. It is only that tiny bit which concerns motorized wheelchairs. When the Constitutional Court rules that it is unconstitutional, the law on the books is unscathed: what is struck down is not the provision 'no vehicles in the public parks', nor even some printed segment of it, but a certain interpretation bearing on a narrowly defined range of cases.[5] It is an ideal norm or abstract meaning concerning wheelchairs supposedly contained in the much broader provision concerning vehicles at large.

---

hardly applies to laws enacted before the Constitution came into force. Finally, avoiding to rule on an issue of constitutionality is not a concern when more than one of the competing interpretations is constitutionally acceptable and is in any case not necessarily beneficial, notably if it deprives the Constitutional Court of the final say on an issue of constitutional interpretation or encourages an encroachment of the judiciary on the domain of legislative power. See Rui Medeiros, *A Decisão de Inconstitucionalidade – Os Autores, o Conteúdo e os Efeitos da Decisão de Inconstitucionalidade da Lei* (Lisboa, Universidade Católica Editora, 1999) 291-98.

[4] It is tempting to see the issue of the applicability of a statute as a matter of considering the rational force of rules and their defeasible character. See, generally, Frederick Schauer, *Playing by the Rules – A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford and New York, Clarendon Press, 1991) 112-66. But that is not quite right. The issue of whether a rule ought to be applied in a case presupposes its applicability, and my example is located at this earlier stage of whether the provision 'no vehicles in the public parks' is even applicable to motorized wheelchairs. The interpretation of the statute purports to answer the question of its normative meaning. A further issue is whether a law-applying official may set the norm as yielded by interpretation aside on account of countervailing reasons, notably the constitution-sensitive equities of the situation. That would be the case if the question under consideration was whether the driver of an automobile picking up an injured child in a public park and driving her to the nearest hospital could be exempted from the prohibition.

[5] In other words, what is sometimes called a case-norm (*Fallnorm*), a universalizable criterion of decision-making tailored by the judge from statutes and other binding sources to the relevant properties of the case at hand. See Wolfgang Fikentscher, 'Die Theorie der Fallnorm als Grundlage von Kodex- und Fallrecht (code law and case law)', 21 *Zeitschrift für Rechtsvergleichung* 161 (1980).

That being the case, referring the matter to the Constitutional Court will have the same effect – ruling that the provision does not apply to wheelchairs for constitutional reasons or that it is unconstitutional in so far as it applies to wheelchairs comes to the same. The provision as such is preserved, its presumed validity corroborated, and constitutional values are upheld. The referring track has nonetheless important and perhaps decisive advantages over the strictly interpretive one: the polluted interpretation is eliminated for good (assuming that a judgment of unconstitutionality carries an *erga omnes* effect) and the constitutional reasons that play the decisive role are assessed by a court specialized in performing that very task. It is hence doubtful whether it does not make more sense – not to say that it is imperative − to refer the matter to the Constitutional Court even when the statute can be interpreted so as to exclude the meaning deemed constitutionally problematic.

If one takes this line of reasoning to its logical end though, not only should ordinary courts in legal systems in which constitutional adjudication is concentrated refrain from engaging in constitutionally conforming interpretation, they should stick to ordinary legal reasoning and defer any issues that involve the interpretation of the Constitution or in whose respect constitutional reasons are decisive to the Constitutional Court. But that cannot be right. For what counts as successful or competent legal reasoning of the so-called ordinary kind – notably statutory interpretation − is necessarily informed by constitutional considerations.[6] All legal reasoning is in a broad sense *constitutionally conformed*. In fact, plausible or respectable interpretations are the ones that can be squared with familiar 'elements' or 'criteria' such as the wording of the provision, the statute as a whole, and the legislative record.[7] I do not wish to go into the actual content of these criteria or the canons that may be formulated with respect to each of them.[8] Much less do I mean to establish their relative importance in case of conflict or survey the various theories of statutory interpretation that have been proposed to that effect.[9] I merely want to point out the

[6] See Aharon Barack, *Purposive Interpretation in Law*, translated by Sari Bashi (Princeton and Oxford, Princeton University Press, 2005) 233-59.

[7] See Larenz and Canaris, *supra* note 1, 141-68.

[8] For a famous collection and mockery of canons of statutory construction, see Karl N. Llewellyn, 'Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed', 3 *Vanderbilt Law Review* 394 (1949-50).

[9] For a discussion of the canons, see Robert Alexy, *A Theory of Legal Argumentation – The Theory of Rational Discourse as a Theory of Legal Justification*, translated by Ruth Adler and Neil MacCormick (Oxford and New York, Oxford University Press, 1989) 234-50. For a critical survey of the main theories of legal interpretation, particularly in the English-speaking world, see Barack, *supra* note 6, 260-304.

truism that none of it, notably the criteria and canons themselves, is made out of thin air: law-applying officials, chiefly among them judges, engage in statutory interpretation because they regard statutes as binding for deep-seated *constitutional reasons* such as legal certainty, equality of treatment, democratic legitimacy, and the separation of powers. Statutory interpretation is hence responsive to the reasons that constitute its practical justification, reasons that are unmistakably and unavoidably of a constitutional nature.[10]

Moreover, to the extent that statutory construction takes into account the so-called *purposive or teleological criterion*,[11] which concerns the aims of a reasonable lawmaker,[12] the full range of constitutional values, including fundamental rights and basic principles, is very much part of that activity from the outset.[13] It bears notice that, as legislatures are constitutionally instituted in order to instantiate certain values and perform certain functions, a reasonable lawmaker is necessarily created in the image of the Constitution. This is true even of laws enacted before − sometimes decades or centuries before − the Constitution came into force, because their continuity is premised on the functions and values they serve according to contemporary constitutional standards – in other words, on it being possible to interpret them as authored by a reasonable lawmaker here and now.[14] If I am allowed the tautology, old

[10] See Joseph Raz, *Between Authority and Interpretation* (Oxford and New York, Oxford University Press, 2009) 223-40. As Alexy, *supra* note 9, 250, puts it: the canons of interpretation 'are forms in which legal reasoning has to be cast if its is to fulfil its claim to correctness, which, unlike that of general practical discourse, contains acknowledgement of the mandatory character of legislation'. The mandatory character of legislation is in turn grounded in what are sometimes called 'formal principles', such as the ones referred to in the main text. Regarding these, see Robert Alexy, 'Formal Principles: Some Replies to Critics', 12 *International Journal of Constitutional Law* 511 (2014).

[11] On this criterion (or rather the multiple criteria that come under the label), see, generally, Franz Bydlisnki, *Grundzüge der Juristischen Methodenlehre* (Wien, Facultas, 2012) 41-60.

[12] Frederick Schauer, *Thinking Like a Lawyer – A New Introduction to Legal Reasoning* (Cambridge and London, Harvard University Press, 2009) 160-61, distinguishes accurately and accessibly legislative intent (the intentions of lawmakers) from the purpose of a statute. There is a parallel distinction in the civilian tradition − well documented in Larenz and Canaris, *supra* note 1, 137-41 − between the subjective will of the legislator (*mens legislatoris*) and the objective will of the law (*mens legis*). For an attempt to bring both elements into a unified theory of legal interpretation applicable to wills, contracts, statutes, and constitutions, see Barack, *supra* note 6, 120-206.

[13] See Harald Bogs, *Die verfassungskonforme Auslegung von Gesetzen unter besonderer Berücksichtigung der Rechtsprechung des Bundesverfassungsgerichts* (Stuttgard and Berlin, Kohlhammer, 1966) 24-32.

[14] On democratic self-authorship in statutory construction and the related 'intergenerational problem of the law, the constant reality of being bound by laws in whose production one had no chance to

laws ought to be preserved only if they are worth preserving, and what makes them worthy of preservation can only be found, if only implicitly, in the Constitution.[15] If anything, then, the teleological or purposive criterion – with all its constitutional baggage – is especially useful and weighty with respect to them.[16]

With these preliminary thoughts we have worked ourselves into a conundrum. On the one hand, we see that the line separating constitutionally conforming interpretation from constitutional adjudication is very fine, if it exists at all, when more than one interpretation is available. Indeed, for any statute or provision which admits of more than one interpretation, and where constitutional reasons play a decisive role in the adoption of one or another of the competing senses, conforming interpretation and constitutional adjudication are typically interchangeable. Whether we carve 'no wheelchairs in the public parks' out of the provision by means of interpretation or bring it out in the open and subject it to judicial review, the outcome is identical and the reasoning indistinguishable. Constitutional reasons play a decisive role either way, and that raises the question of whether constitutionally conforming interpretation is not a disguised form of constitutional adjudication and a euphemism for depriving the Constitutional Court – if there is any such institution in the legal system – of the final say on matters of its jurisdiction. On the other hand, constitutional reasons are in one way or another always decisive in any issue of statutory interpretation, whether because substantive constitutional values make their way into the construction of a provision by means of the so-called purposive or teleological criterion of interpretation,[17] or simply because the various criteria of interpretation and the limits they set on the range of acceptable meanings of a provision are shaped by the constitutional principles of legal certainty, formal equality, democratic legitimacy, and the separation of powers.[18] Statutory construction is hence always already constitutionally conformed, such that any issue concerning the meaning of a

participate', see Paul W. Kahn and Kiel Brennan-Marquez, 'Statutes and Democratic Self-Authorship', 56 *William & Mary Law Review* 115, 118-23, 136-45, 161-179, and *passim*.

[15] See Konrad Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* (Heidelberg, C. F. Müller, 20.th ed 1999), 31-32.

[16] See Medeiros, *supra* note 3, 315-16.

[17] See A. Castanheira Neves, *O Instituto dos 'Assentos' e a Função Jurídica dos Supremos Tribunais* (Coimbra, Coimbra Editora, 1983) 294-95.

[18] See Gonçalo de Almeida Ribeiro, 'Judicial Activism and Fidelity to Law', in Luís Pereira Coutinho, Massimo La Torre, and Steven D. Smith (eds.), *Judicial Activism: An Interdisciplinary Approach to the American and European Experiences* (Berlin and New York, Springer, 2015) 31-46.

provision may be cast as an issue of constitutionality that falls within the jurisdiction of the Constitutional Court.[19]

Now if constitutionally conforming interpretation is a form of constitutional adjudication and if ordinary legal reasoning – notably statutory construction – is always already constitutionally conformed, there are no *conceptual limits* to constitutional adjudication. It follows that a Constitutional Court created for the 'specific task of administering justice in constitutional matters'[20] ends up being – self-defeatingly − a court of general jurisdiction, at least with respect to issues of law. This conundrum is at the heart of any system of constitutional adjudication, for any such system is bound to set limits to what counts as judicial review of constitutionality and, most importantly, to what falls within the jurisdiction of the Constitutional Court. The choice of such limits is contained within two poles. At one end of the spectrum, judicial review may be reserved to those cases in which no available interpretation of the provision would secure its constitutionality and the provision is affected as a whole or in some literally severable part; that would apply to a provision or some printed segment of it that read 'no wheelchairs in the public parks'. At the other end, one could open the door to judicial review in any case in which constitutional reasons other than those that inform the ordinary canons of statutory construction play an important role; that would enable judicial review each and every time an interpretation is chosen on account of its accordance with the Constitution. Underlying these polar options there are, it seems to me, two competing conceptions of the primordial role of a Constitutional Court in a liberal democracy: a narrower one as a counterpart to the democratic legislature and a broader one as the forum of constitutional interpretation.

The choice between these conceptions and their institutional and procedural implications is a proper subject for an ambitious theoretical inquiry. My task on this occasion is far more modest. I shall try to discuss the ways in which the Portuguese system of judicial review manages and deflects the conundrum unveiled by constitutionally conforming interpretation. In order to do so, a summary account of the main features of the system is evidently indispensable.

[19] See Medeiros, *supra* note 3, 298-301.

[20] Article 221 of the Portuguese Constitution.

II. The Portuguese System of Judicial Review

The Constitutional Court of Portugal was established in 1983, following the first amendment (in 1982) of the Constitution of the Portuguese Republic of 1976, the constitutional text that marked the transition to democracy and remains in force to this day, notwithstanding numerous and extensive amendments.[21] The institution of Constitutional Courts has been a standard feature of the post-war transition to democracy in successive waves of democratization.[22] However, the Portuguese system of judicial review of constitutionality deviates from the post-war standard in a number of important respects − differences that emerge particularly in the domain of 'incidental control'.

The standard post-war model of judicial review comprises three main features.[23] First, the authority to strike down laws is exclusively assigned to a court of *specialized* jurisdiction whose judges are typically appointed for a non-renewable term in office following a special procedure. This is the most prominent distinguishing feature between the so-called concentrated model of the *Verfassungsgerichtsbarkeit*, originally conceived by the Hans Kelsen,[24] and the 'diffuse' model of judicial review of legislation that developed in the United States in the early nineteenth century following the landmark Supreme Court decision in *Marbury v. Madison*.[25] Second, issues of constitutionality may be brought before the Constitutional Court in one or another of two paradigmatic ways: either at the request of public authorities empowered to do so by the Constitution — a type of procedure labeled 'abstract

[21] This section largely reproduces what I wrote in Gonçalo de Almeida Ribeiro, 'Judicial Review of Legislation in Portugal: Genealogy and Critique', in Francesco Biagi, Justin O. Frosini, and Jason Mazzone (eds), *Comparative Constitutional History – Volume One: Principles, Developments, Challenges* (Leiden and Boston, Brill, 2020) 201-206.

[22] See Francesco Biagi, *Corte Costituzionale e Transizioni Democratiche* (Bologna, Il Mulino, 2016) 269-308.

[23] See Victor Ferreres Comella, *Una Defensa del Modelo Europeo de Control de Constitucionalidad* (Madrid, Marcial Pons, 2011) 25-167.

[24] Hans Kelsen, 'Wesen und Entwicklung der Staatsgerichtsbarkeit', in Hans R. Kletatsky, René Marcic, and Herbert Schambeck (eds), *Die Wiener rechtstheoretische Schule. Schriften von Hans Kelsen, Adolf Merkl, Anfred Verdross* (Vienna 2010), II, 1485-1531.

[25] 5 U.S. 137 (1803). For a comparison of the two models, see Mauro Cappelletti, 'Judicial Review in Comparative Perspective', 58 *California Law Review* 1017 (1970), 1033-40. See also Alec Stone Sweet, 'Why Europe Rejected Judicial Review – And Why It May Not Matter', 101 *Michigan Law Review* 2745 (2002-2003), 2765-71.

review' — or in the context of a dispute in which a constitutional issue has been brought to light — what is known as 'incidental control'. In the latter case, the ordinary judge suspends the proceedings and refers the matter to the Constitutional Court for *preliminary review* of the constitutionality of the contentious law.[26] Third, the effect of a judgment deeming a law unconstitutional in the context of incidental control is not merely that it cannot be applied to the dispute that triggered the Constitutional Court's review but that the law, judged *invalid*, is eliminated from the statute books. It cannot therefore be applied by any public authority or relied upon by any private actor in the future; indeed, it is regarded as if it had never been enacted (allowance usually made for *res judicata*). In other words, the decisions of the Constitutional Court have an *erga omnes* (as opposed to an *inter-partes*) effect. Another feature of some post-war systems may be called quasi-standard. It is the procedure enabling individuals to address to the Constitutional Court complaints against decisions by public authorities, particularly ordinary courts, that infringe upon their fundamental rights. It is a *quasi*-standard feature because it exists in some but not by any means in all systems of constitutional justice that in every other respect conform to the standard model. The most prominent examples of such a procedure are the German *Verfassungsbeschwerde* and the Spanish *recurso de amparo*.[27]

The Portuguese system departs from the outlined standard in a number of significant respects. There is a specialized constitutional jurisdiction − a Constitutional Court staffed by judges selected through a special procedure for a non-renewable term of

[26] This is a generalization. There are significant variations across jurisdictions that embrace the concentrated model regarding the role of the ordinary judge in the incident of constitutionality. In Germany, the judge can only submit a question to the *Bundesverfassungsgericht* if she believes that the applicable law is unconstitutional. See Konrad Hesse, *supra* note 15, 283-84. At the opposite pole of the spectrum, the requirement in Italy is that the issue posed to the *Corte Constituzionale* is not manifestly ill-founded (*non manifesta infondatezza*). See Gustavo Zabrebelsky and Valeria Marcenò, *Giustizia Costituzionale* (Bologna, Il Mulino, 20212) 291-93. Spain presents an intermediate case: if the ordinary judge is doubtful about the constitutionality of the law, the issue should be referred to the *Tribunal Constitucional*. See Javier Perez Royo and Manuel Carrasco Durán, *Curso de Derecho Constitucional* (Madrid, Marcial Pons, 16.th ed 2018) 748-52. Common ground among all systems of concentrated control, however, is that ordinary courts play an important preliminary role in incidental control, based on their power and duty to examine the validity of the applicable law (*Prüfungsrecht*), and only the Constitutional Court can decide as to the constitutionality of the law in question.

[27] Surely it is no accident that in the Italian system, which does not recognize 'individual complaints', the path to the Constitutional Court through incidental control is relatively open compared to Germany and Spain, since ordinary judges ought to refer to the Constitutional Court any issue of constitutionality raised in the proceedings so long as it is not *manifestly ill founded*.

nine years in office. Of the thirteen members of the Court, ten are elected by a parliamentary supermajority – two thirds of the Members of Parliament − and the remaining three are chosen (a procedure labelled 'co-option') by those who have been elected. Unlike the systems that conform to the standard model, however, the jurisdiction of the Court to rule on issues of constitutionality is *not exclusive*. Indeed, although the Constitutional Court has the monopoly of abstract review – which takes a variety of forms −,[28] the Constitution assigns to *all* courts the power to set a law applicable to the proceedings aside on account of its unconstitutionality. The power is explicitly granted by Article 204 of the Constitution, which reads: '[i]n matters that are submitted for judgment, the courts may not apply norms that contravene the provisions of the Constitution or the principles enshrined therein'.

A second area of divergence concerns the mechanism of incidental control, which in the Portuguese system does not take the form of preliminary review. It consists in a system of *appeals* from the decisions of ordinary courts on the constitutional issue. The regime is elaborate – not to say arcane. When an ordinary court sets a law aside on account of its unconstitutionality, the Public Prosecutor (*Ministério Público*) – the rough equivalent of the German *Staatsanwalt* − is legally bound to appeal that decision immediately to the Constitutional Court. When the constitutionality of a law applicable to the dispute is questioned by one of the parties to the lawsuit and the ordinary court decides against it, the litigant can appeal to the Constitutional Court on that issue, but only following the exhaustion of all ordinary appeals. If the Court finds a violation of the Constitution, it will rule that the law cannot be applied in the proceedings and remand the case to the ordinary court which last applied it for a fresh judgment. In sum, in the context of incidental control, the Constitutional Court operates as a supreme appellate body — albeit its competence is confined to the issue of whether the applicable law violates the Constitution — as opposed to a court of preliminary review.

[28] Abstract review may take place after a bill has been passed but before its promulgation (preventive or *ex ante* control) or after the statute comes into force (successive or *ex post* control). The former is the case in France, where a bill passed by a parliamentary majority may be referred by the minority to the *Conseil Constitutionnel*, which has less than a month to repeal or accept it. The latter is the most typical procedure in European systems. See John Ferejoh and Pasquale Pasquino, 'Constitutional Adjudication: Lessons from Europe', 82 *Texas Law Review* 1671 (2004). The Portuguese Constitution recognizes both forms of abstract review (Articles 278 and 281). Additionally, there is an abstract procedure to verify unconstitutionality by omission, that is, when the issue is whether the legislature failed to comply with a constitutional duty to act (Article 283). The procedure has been dormant for decades. See, generally, Jorge Miranda, *Manual de Direito Constitucional* VI (Coimbra, Coimbra Editora, 4.th ed. 2013) 295-399.

Moreover, a judgment deeming a law unconstitutional in the context of incidental control is binding only *inter-partes*, meaning that the law at stake remains in force after the judgment. In other words, the Court – typically operating in panels of five judges − does not rule that the law is *invalid*; it rules that it is *inapplicable*. In abstract review, on the contrary, the decision is necessarily by the plenary and has an *erga omnes* effect, although what this means depends on the type of review and the content of the judgment: in e*x-ante* or preventive review, the judgment that the law is unconstitutional inhibits its promulgation; in *ex-post* or successive review, as it is common in standard systems, the law is declared invalid and eliminated from the legal system; in the rarely used procedure for constitutional omissions, the Court simply acknowledges or verifies that the legislative body has failed to comply with a duty to act. These are all 'positive' judgments of unconstitutionality, so-called because the Court rules that the law (or, exceptionally, the absence of some law) is positively unconstitutional. When the Court rules that the law (or its absence) is not unconstitutional – a so-called 'negative' judgment of unconstitutionality – the decision has no effect, in the sense that it does not prevent the ordinary courts and the Constitutional Court itself from taking up the issue of the law's constitutionality again in the future and ruling that it is unconstitutional. In sum, there is no such thing as an *erga omnes* decision that the law under scrutiny is 'in conformity with the Constitution'.[29] The wide gap thus opened by the system between abstract review (where the decision to strike down a law has an *erga omnes* effect) and incidental control is narrowed by an option allowing the Court on its own initiative or at the request of the Public Prosecutor to subject to abstract review any law that has been ruled unconstitutional at least three times in the context of incidental control.[30]

Finally, in the Portuguese system there is no procedure of 'individual complaint' comparable to the *Verfassungsbeschwerde*. But that does not mean that constitutional justice remains purely 'abstract': a matter of comparing a subordinate legal standard – an ordinary law – with a higher standard – constitutional provisions. The Portuguese Constitution provides that the object of review are *norms* (Articles 277/1, 278, 280, 281). Although it is likely that the drafters of the constitutional text meant the term

[29] See J. J. Gomes Canotilho, *Direito Constitucional e Teoria da Constituição* (Coimbra, Almedina, 6.ª ed. 2002) 1012-14.

[30] It is far more common for the procedure to be triggered by the Public Prosecutor. In fact, I am not aware of any instance of the Court moving *ex officio* to declare unconstitutional a law so ruled at least three times in the context of incidental control.

'norm' solely in opposition to the term 'statute',[31] indicating that the unconstitutionality of a provision does not affect the validity and effectiveness of the rest of the statute, except where the former logically entails or practically determines the latter, the Court has interpreted the term 'norm' in the context of incidental control to mean the *ratio decidendi* of the judgment, by which it is meant the provision as construed and applied by the ordinary court in the proceedings. While this has generated a great deal of controversy about what exactly qualifies as a norm for the purposes of an appeal to the Constitutional Court – namely how general in its scope and how closely related to a statute a stated norm has to be in order for it to be a proper object of judicial review –, it has also lent to the system some of the 'case and controversy' savor typical of the diffuse model, has expanded the jurisdiction of the Court well beyond that of a mere counterpart to the democratic legislature, and has enabled it to perform at least some of the rights-protective function served by a procedure of 'individual complaint'.[32]

The rest of this paper is concerned with the way in which the Portuguese system as summarized deals with the issue of constitutionally conforming interpretation. It is convenient to separate the analysis into two parts, one concerning incidental control and the other abstract review, given an obvious difference between them: in the former, the object of review is an interpretation of the law by the ordinary court that issued the decision subject to appeal – a norm generated in the process of construing and applying one or several provisions in a case; in the latter, the Constitutional Court itself is typically bound to interpret the law – to give meaning to a provision or a conjunction of provisions whose constitutionality is challenged by a competent official –, and it does so necessarily outside of the context furnished by a particular controversy.[33]

[31] Rui Medeiros, 'A Força Expansiva do Conceito de Norma no Sistema Português de Fiscalização Concentrada da Constitucionalidade', in Jorge Miranda (ed.), *Estudos em Homenagem ao Prof. Doutor Armando M. Marques Guedes* (Coimbra, Coimbra Editora, 2004) 185.

[32] See Paulo Mota Pinto, 'Reflexões Sobre a Jurisdição Constitucional e Direitos Fundamentais', in *Themis – Edição Especial 30 Anos da Constituição Portuguesa*, 2006, 207-10.

[33] See Jorge Miranda, *supra* note 28, 82.

III. The Issue in Incidental Control

When ordinary courts engage in 'constitutionally conforming interpretation', are they using their (diffuse) power to set unconstitutional norms aside, such that their decisions may be appealed to the Constitutional Court? It is worth noting at the outset that the case law rejects two polar options: the minimalist view that constitutional jurisdiction is only triggered if constitutional reasons are invoked to set aside or challenge the law as written and the maximalist view that any issue of legislative interpretation is an issue of constitutionality that can be appealed to the Constitutional Court.[34] Since this is all dauntingly technical and somewhat baroque, I better explain the point a little more carefully.

On the one hand, an appeal to the Constitutional Court may have as its object what I called earlier an ideal norm or abstract meaning contained in a provision. Indeed, this is most common in incidental control: the issue of constitutionality is not whether the law as written is entirely or partially unconstitutional, but whether its application in a range of cases is so.[35] For the purposes of a challenge before the Constitutional Court, it does not matter if 'no motorized wheelchairs in the public parks' is spelled out in the books or is construed as part of the meaning of 'no vehicles in the public parks'. In the latter case, if the ordinary court sets the law aside for constitutional reasons, the Public Prosecutor has a legal duty to appeal the decision immediately to the Constitutional Court; and if, on the contrary, the court applies the norm, the parties to the lawsuit – for example, a disabled individual in a motorized wheelchair who was fined for violating the prohibition and sues the enforcement authority – have a right to appeal to the Constitutional Court. Of course, even when the provision is challenged as written – as a whole or in part –, what is being challenged in incidental control is always the interpretation given to it by the ordinary court, not the words themselves or the text as an artifact.[36] But there is a conceptual difference to be

[34] See, generally, Carlos Lopes do Rego, *Os Recursos de Fiscalização Concreta na Lei e na Jurisprudência do Tribunal Constitucional* (Coimbra, Almedina, 2010) 26-52.

[35] See José Manuel M. Cardoso da Costa, 'Justiça Constitucional e Jurisdição Comum (Cooperação ou Antagonismo?)', in Fernando Alves Correia, Jónatas E. M. Machado, and João Carlos Loureiro (eds.), *Estudos em Homenagem ao Prof. Doutor José Joaquim Gomes Canotilho* (Coimbra, Coimbra Editora, 2012) 203-204.

[36] The procedural consequence, repeatedly made in the case law, is that the appellant must state the norm to be scrutinized as opposed to simply indicating the statute or provision containing it. See, e.g.,

acknowledged between an interpretation of the provision or of one of its formal segments concerning all the cases to which it applies and one which concerns solely its broader or narrower scope of application.[37] I mean that it is different to interpret 'no dogs in the banks' to mean 'no dogs in the premises of financial institutions that take deposits and make loans' as opposed to 'no dogs in the sides of rivers acting as a barrier between the water and the ground', and to interpret it as 'no guide dogs for the visually impaired in the banks'. There we have alternative readings of an object – a provision, a segment thereof, or a conjunction of provisions –, whereas here we have competing accounts of its scope of application. Such a distinction is essential for the minimalist conception of constitutional jurisdiction, since it considers the former but not the latter as falling under its purview, but it is largely immaterial for the Portuguese system of incidental control, which accepts both as 'norms' fit for review by the Constitutional Court.[38]

On the other hand, although statutory construction is always already constitutionally conformed in a broad sense, the Constitutional Court does not – save in exceptional circumstances to be highlighted in the next paragraph – review the interpretations endorsed by the ordinary courts.[39] That is true both ways: ordinary legislative interpretation is conceived neither as the application of an interpretive norm whose constitutionality may be challenged – for instance, the norm according to which 'the meaning of a provision is limited by the semantic possibilities of the terms used in it' – nor a decision to set aside other norms that could be offered as interpretations. Therefore, a party to a lawsuit does not have the right to appeal to the Constitutional Court from the decision of an ordinary court concerning the correct interpretation of the law; and the Public Prosecutor has neither the duty nor the power to appeal from an interpretive judgment on the grounds that by attributing a given meaning to a

Acórdãos n.ºs 499/2009, 247/2020, 748/2020, 24/2021. All the cited decisions of the Constitutional Court, unless otherwise noted, are available at https://www.tribunalconstitucional.pt/tc/acordaos/.

[37] See Lopes do Rego, *supra* note 34, 50-52, for a taxonomy of 'norms' for the purposes of incidental control: the norm as a whole, a normative segment, a normative interpretation, and a normative dimension.

[38] See Rui Medeiros, *supra* note 3, 334-36.

[39] *Id.* at 359-63. In the words of Acórdão n.º 677/2016, standing for a very long and old line of case law, '[i]t is in principle not part of constitutional jurisdiction to scrutinize the interpretation given by the ordinary courts to ordinary legislation. That is so because the Constitutional Court exists to perform a specific task, which concerns the interpretation of a distinctive type of law – the Constitution – and the administration of a distinctive kind of justice – over norms. The interpretation and application of ordinary laws to common disputes is the exclusive province of the ordinary courts'.

provision it implicitly set aside other meanings on account of the constitutional principles informing the ordinary canons of statutory construction. If the issue is whether 'no vehicles in the public parks' comprises 'no motorized wheelchairs in the public parks', and the ordinary court, engaging solely with the ordinary canons of construction and making no explicit appeal to constitutional standards, rules that it does not, the settled understanding is that the correctness of the interpretation is not a proper object of constitutional review. If it were, the Constitutional Court would inevitably become a *Superrevisionsgerichts*.[40]

The case law allows two important exceptions to the non-reviewable character of interpretive judgments. The first concerns violations of the principle of criminal legality in cases where the ordinary court clearly exceeds – *in malam partem* – the limits of interpretation, namely by resorting to the creation of a new norm by analogy. For a long time, the Constitutional Court rejected appeals on such grounds, notwithstanding several dissenting opinions, arguing in a nutshell that the issue necessarily involved scrutinizing the interpretive judgment of the ordinary court, leaving the door wide open to what I have been calling the maximalist view of judicial review of constitutionality. In a landmark decision by the Plenary in 2008, the Court reversed course, arguing that in some circumstances – essentially when there is an apparent infringement of the principle of legality of such a nature as to be replicated in a large number of cases – the Court may review the constitutionality of the process of judicial norm-creation, since criminal law is an area where the Constitution strictly disables it.[41] The second exception concerns judicial review of interpretive norms enshrined in legislation, notably Article 9 of the Portuguese Civil Code. If a party to the lawsuit questions the constitutionality of the ordinary court's interpretation of such provisions, arguing for instance that it violates the separation of powers or the democratic principle, the Court takes the matter under review.[42] The reason for this is that under scrutiny are not the canons of construction endorsed by the ordinary courts

[40] See Werner Heun, *Die Verfassungsordnung der Bundesrepublik Deutschland* (Tübingen, Mohr Siebeck, 2012) 211-12.

[41] Acórdão n.º 183/2008. For a detailed account of the case law and the transformation operated by this decision, see Lígia Ferro da Costa and Selma Pedroso Bettencourt, 'GPS do Princípio da Legalidade Penal: Uma Análise da Jurisprudência Constitucional', in Maria Lúcia Amaral (ed.), *Estudos em Homenagem ao Conselheiro Presidente Rui Moura Ramos*, vol. II (Coimbra, Almedina, 2016) 384-412. See also António Cortês, 'O Controlo do Princípio da Tipicidade Penal – Uma Análise Jurisprudencial', in *Tribunal Constitucional – 35.º Aniversário da Constituição de 1976*, vol. II (Coimbra, Coimbra Editora, 2012) 97-109.

[42] See, e.g., Acórdão n.º 182/2020.

but statutory norms that shape and limit the interpretive freedom of the judiciary. It is doubtful whether these exceptions can be reconciled with the main body of doctrine and, perhaps more ominously, whether the reasons offered for them cannot be exploited strictly with the tools of analysis and deduction to assemble an unstoppable Trojan Horse for the maximalist view. But their very existence corroborates my introductory remarks about the conundrum of constitutional adjudication and illustrates rather nicely the compromises that in the wake of it a Constitutional Court is tempted to make.

In any case, leaving these exceptions aside, the Court's case law takes a middle road between the maximalist and the minimalist view: it (usually) refuses to scrutinize the ordinary course of statutory construction, regardless of the unavoidably constitutional character of its governing principles, and it reviews the decisions of ordinary courts with respect to the scope of application of statutory provisions, despite the fact that ruling on such issues leaves the statute unscathed.[43] The problem of constitutionally conforming interpretation in a *narrow sense* emerges in this system when the ordinary court more or less explicitly entertains several possible meanings of a provision – or a set of provisions – and invokes constitutional reasons to endorse one of the contenders.[44] This is different both from ordinary interpretation, which relies on constitutional reasons implicitly, and striking down a norm drawn from the statute, which presupposes that the court has settled on a particular interpretation. When the ordinary court, in the course of interpreting a statute, makes an argument to choose a particular interpretation out of its conformity with the Constitution,[45] is it not setting aside the norm – or norms – contained in the competing interpretations? Returning to our example, is there a distinction to be made, as far as constitutional jurisdiction is concerned, between setting aside for constitutional reasons 'no motorized wheelchairs in the public parks' following the interpretation of the statute or in the course of interpreting it? The case law has long been divided on this point.

[43] See Carlos Blanco de Morais, *Justiça Constitucional, II: O Direito do Contencioso Constitucional* (Coimbra, Coimbra Editora, 2.ª ed. 2011) 914-15.

[44] See Acórdão n.º 364/94, for the statement of a general judicial duty to choose, between two possible interpretations, the one that is in conformity with the Constitution. As Miguel Nogueira de Brito, *Introdução ao Estudo do Direito* (Lisboa, AAFDL, 2017) 228, rightly points out, the canon entails a symmetric duty with a negative content: the prohibition of giving a statute a meaning the ordinary canons cannot vindicate. On this issue, see also Friedrich Müller and Ralph Christensen, *Juristische Methodik*, vol. I (Berlin, Duncker & Humblot, 10.th ed. 2009) 132-33.

[45] Medeiros, *supra* note 3, 290-91, 324-25.

One can find three types of case of constitutionally conforming interpretation. In the first, competing interpretations are considered, the ordinary court finds that one clearly accords with the ordinary canons more than the others, and further argues that this is the only sense that is compatible with the Constitution. In the second, competing interpretations are considered, the ordinary court considers at least two roughly equally plausible as far as statutory construction goes, and selects the one that is in conformity with the Constitution. In the third, the ordinary court finds that the interpretation suggested by the ordinary canons is unconstitutional, and argues that the provision can only be rescued if given an alternative interpretation in conformity with the Constitution. It is settled case law that in the first type of case constitutional reasons – by which I mean reasons other than those that are always already involved in statutory construction – play a subsidiary role, corroborating as opposed to determining the interpretive outcome; constitutional reasons are *obiter dicta* in the ordinary court's ruling, and judicial review is accordingly uncalled for.[46] It is also settled that in the third type of case there is an implicit decision to set aside, on grounds of unconstitutionality, the norm contained in the interpretation suggested by the ordinary canons; denying constitutional jurisdiction in these circumstances would be tantamount to undermining the authority of the Constitutional Court.[47]

It is the second type of case that has been controversial from the outset and so remains to this very day. One view is that when two interpretations are considered and deemed roughly equally plausible, and the choice between them is essentially guided by constitutional reasons, the ordinary court is for all intents and purposes exercising its power of judicial review of constitutionality, thereby rendering its ruling appealable to the Constitutional Court. The 'difference [between conforming interpretation and a judgment of unconstitutionality] in such cases, if it exists at all, is utterly irrelevant. In both situations the issue boils down to a norm not being applied in a category of cases following it being measured against a constitutional standard'.[48] The other view is that if the choice is between two plausible meanings, and constitutional reasons are decisive to favor one over the other, the ordinary court is very much operating within the confines of statutory construction.[49] It is only when

[46] See, e.g., Acórdãos n.^{os} 389,/98, 285/2002, 8/2008, 152/2009.

[47] See e.g., Acórdãos n.^{os} 137/85, 500/96, 1020/96, 219/2020.

[48] Acórdão do Tribunal Constitucional n.^{o} 137/85, *in* Acórdãos do Tribunal Constitucional, vol. VI, 321. See also, e.g., Acórdãos n.^{os} 266/92, 636/94, 41/95, 211/2017.

[49] See Medeiros, *supra* note 3, 317-18.

the most plausible or the only possible interpretation is rejected on constitutional grounds that the ordinary court crosses the line separating statutory construction from judicial review, thereby rendering its judgment an appropriate object of appeal to the Constitutional Court.[50] These tendencies – one expansive, the other restrictive – coexist somewhat uneasily in the case law, hence constituting a disputed domain in the struggle to determine the boundaries of constitutional jurisdiction. It goes without saying that underlying it is the unresolved tension between those two grand conceptions of the primordial role of a Constitutional Court in a liberal democracy that I stated earlier: a restrictive one as a counterpart to the democratic legislature and an expansive one as the paramount forum of constitutional interpretation.

Before we turn to abstract review, it is worth pointing out an intriguing element of the Portuguese system of incidental control of constitutionality. Article 80-3 of the Act on the Constitutional Court reads: '[i]f the judgment of constitutionality or legality of the norm applied or set aside in the appealed ruling is based on a particular interpretation of it, then it should be applied with that very same interpretation in the proceedings' (my translation). Albeit obscure, this provision seemingly gives to the Constitutional Court the power to bind the ordinary court whose ruling is under appeal to a particular interpretation that it deems in conformity with the Constitution. That is quite an encroachment on the jurisdiction of ordinary courts, which is why some scholars have argued that the provision is unconstitutional, unless – supreme irony! – it is given a constitutionally conforming interpretation.[51] Two countervailing factors are worthy of notice here. First, when the decision, as is often the case, concerns an ideal or abstract norm concerning a subset of cases within the scope of a statutory provision – such as 'no motorized wheelchairs in the public parks' as a norm contained in 'no vehicles in the public parks' – judgments of unconstitutionality and of constitutionally conforming interpretation are interchangeable in practice: whether the ruling is that the ordinary court cannot apply the provision to disabled individuals in motorized wheelchairs or that the provision should be interpreted as not applying to disabled individuals in motorized wheelchairs the outcome is identical.[52] Second, the Court rarely uses this power – regarding it as an exceptional device –,[53] no doubt

[50] Acórdão do Tribunal Constitucional n.º 425/89, in *Boletim do Ministério da Justiça*, n.º 388, 151. See also, e.g., Acórdão n.º 792/2017.

[51] Medeiros, *supra* note 3, 363-87. For the opposite view, see Blanco de Morais, *supra* note 43, 930-40.

[52] Lopes do Rego, *supra* note 34, 292-93.

[53] See Acórdãos n.os 27/2006, 136/2009, 267/2017, 401/2017, for a statement of the exceptional nature of the device.

in some measure because the judges are aware of its atypical character,[54] but also because opting for 'constitutionally conforming interpretation' to the detriment of a judgment of unconstitutionality burns the bridge between the *inter-partes* procedure of incidental control and the *erga omnes* procedure of abstract review: the special procedure enabling the Public Prosecutor or the Court *ex officio* to subject to abstract review a norm judged unconstitutional at least thrice in the context of incidental control. Indeed, if instead of ruling that the norm 'no motorized wheelchairs in the public parks' is unconstitutional the Court were to rule that the provision 'no vehicles in the public parks' should be read so as to exclude motorized wheelchairs, its decision would only matter for the case at hand, not contributing for the minimum of three decisions of unconstitutionality that could trigger an abstract ruling that would eliminate the polluted meaning from the legal system. Thereby, the Constitutional Court resorts to 'constitutionally conforming interpretation' in incidental control only in exceptional cases. The most common type documented in the latest case law involves awkward situations in which the ordinary court strays off the conventional path of statutory construction in order to rescue a provision from a judgment of unconstitutionality only to end up with a norm that the Constitutional Court deems unconstitutional, unlike the one that the wording of the provision and other standard canons readily convey.[55] In that context, 'constitutionally conforming interpretation' by the Constitutional Court operates as a remedy against a misguided application of that very canon by the ordinary courts.

IV. The Issue in Abstract Review

In abstract review, the Constitutional Court is typically bound to interpret the law and does so outside of the context of a controversy. Moreover, it lacks the power to bind ordinary courts to a particular interpretation, since it is only so-called *positive judgments of unconstitutionality* that carry an *erga omnes* effect. In preventive review, ruling that the norm under scrutiny is unconstitutional inhibits the promulgation of the bill as whole. In successive review, the norm deemed unconstitutional is eliminated, usually with retroactive effect. In the (largely dormant) procedure for

[54] See Joaquim de Sousa Ribeiro and Esperança Mealha, 'Portugal: Constitutional Courts as Positive Legislators', in Allan R. Brewer-Carías (ed.), *Constitutional Courts as Positive Legislators – A Comparative Law Study* (Cambridge and New York, Cambridge University Press, 2011) 728-29.

[55] See, e.g., Acórdãos n.os 276/2004, 331/2016, 132/2018, 11/2019, 233/2020.

omissions, the Court merely verifies a failure to comply with a duty to legislate.[56] If the Court concludes that a norm subject to successive abstract review – by far the most common form of abstract review – is not unconstitutional, ordinary courts may still set it aside in a particular case and their judgments may be confirmed on appeal by the Constitutional Court. Indeed, it is theoretically possible for a norm once declared to be in conformity with the Constitution to again be subject to abstract review and struck down.[57] It follows that the Court cannot issue an interpretive decision carrying an *erga omnes* effect, that is to say, it cannot bind ordinary courts to interpret the law under scrutiny in a particular way. Even if such an interpretation turned out to be decisive for the judgment that the law is not unconstitutional, it is possible – and not unprecedented – for that interpretation to be rejected by the ordinary courts and for the law to be thus given a meaning that the Court would have found unconstitutional. This poses the question of whether constitutionally conforming interpretation has any role to play in the realm of abstract review.[58]

The question may be addressed at two different levels, considering the broader or narrower function ascribed to constitutionally conforming interpretation. In a broad sense, as we have seen, statutory construction is always already constitutionally conformed, not only in the often overlooked sense that the ordinary canons of interpretation are infused with and shaped by constitutional principles such as legal certainty, formal equality, democratic legitimacy, and the separation of powers, but in the more specific sense that constitutional values make their way into the construction of any legislative provision by means of the so-called purposive or teleological criterion. There is simply no way the Constitutional Court can avoid constitutionally conforming interpretation in this broad sense, for otherwise it would fail to properly discharge its inevitably interpretive role in procedures of abstract review. If a provision reads 'no parking in front of a garage' and another reads 'no sleeping in railway stations',[59] it is obvious that the purpose is not to prevent a driver from parking in front of the entrance of his own garage or a parent from rocking the baby

[56] Strictly speaking, only declarations of unconstitutionality in successive abstract review carry an *erga omnes* effect, since in preventive review the addressee of the judgement is the promulgating authority (usually, the Chief of State) and in the procedure for omissions the Court merely states the absence of a constitutionally required measure.

[57] Canotilho, *supra* note 29.

[58] Medeiros, *supra* note 3, 391-94.

[59] With a nod to Lon L. Fuller, 'Positivism and Fidelity to Law – A Reply to Professor Hart', 71 *Harvard Law Review* 630 (1957), 664.

to sleep while waiting to board a departing train. Part of what makes it obvious is the fact that such purposes would render the provisions not only unconstitutional but utterly implausible as choices of a lawmaker created in the image of the constitutional order. Any interpreter comes to the task of constructing a provision loaded with assumptions, experiences, and expectations, all of which are more or less embedded with values explicitly or implicitly enshrined in the Constitution as the supreme law of the land.[60] Constitutional judges are not and could not be any different.

In a narrower sense, we face the now familiar problem of settling the score between two roughly equally plausible interpretations of a provision, a segment thereof, or a conjunction of provisions – in other words, two candidate norms, one deemed unconstitutional and the other in conformity with the Constitution. It seems that in these cases the Constitutional Court finds itself between a rock and a hard place. If it strikes the law down, it may be charged with throwing the baby out with the bathwater: the entire object is flushed down the toilet, in spite of the fact that there was at least one plausible interpretation that would not render it unconstitutional. But if the Court endorses the approved interpretation, ruling that 'the law is not unconstitutional if interpreted in this fashion', nothing prevents the other courts from rejecting it and give the law the very meaning that renders it unconstitutional. There is, however, a way out of this dilemma, if instead of relying on constitutionally conforming interpretation in the narrower sense to reach a judgment of unconstitutionality, the Court does the opposite: state the interpretation that it deems unconstitutional and rule accordingly that 'the law is unconstitutional insofar as it is interpreted in the following way…'.[61] There are two forms that these interpretive rulings can take in the case law of the Portuguese Constitutional Court in procedures of abstract review – in fact, of successive abstract review only, since in the procedure for omissions there is by definition no law to be interpreted and in preventive review any unconstitutionality of a norm implies that the bill to which it belongs has to be vetoed *in totum* and returned to the legislative body.

The first form concerns the choice among alternative readings of a provision, a segment thereof or a conjunction of provisions. Let me go back to my earlier example

[60] Barack, *supra* note 6, 41-42, writes: '[t]e language of the statute remains as before, but its meaning has changed to adapt the law to contemporary conditions. An example is a law passed by a nondemocratic regime. When the regime changes and democracy reigns, a judge interprets the law according to democratic values, narrowing the gap between law and society'.

[61] Medeiros, *supra* note 3, 397-400.

– unrealistic yet instructive – of a provision that reads 'no dogs in the banks'. If we assume, somewhat fantastically, that there really is no way of telling if 'banks' here means the financial institution or the sides of a river, each of the candidate interpretations – 'no dogs in the premises of financial institutions that take deposits and make loans' and 'no dogs in the sides of rivers acting as a barrier between the water and the ground' – encapsulates a complete account of the provision's meaning. Now let us further suppose that the Constitutional Court is of the view that while the first interpretation is not unconstitutional, since there is a reasonable justification for keeping dogs from entering the premises of financial banks, the second is irredeemably so, as it constitutes an arbitrary infringement of the general right to freedom of dog owners. If the Court rules that the provision is not unconstitutional insofar as it is interpreted to mean 'no dogs in the premises of financial institutions that take deposits and make loans', it will not prevent ordinary courts from interpreting the provision as a prohibition against dogs in riverbanks. If, on the contrary, the Court rules that the law is unconstitutional insofar as it means 'no dogs in the sides of rivers acting as a barrier between the water and the ground', it is both eliminating this norm from the range of potentially applicable norms in the legal system and preserving the possibility of the alternative norm concerning financial institutions to be applied if the ordinary courts, discharging their interpretive role, agree that it can be squared with the provision. A declaration of unconstitutionality of a particular interpretation in abstract successive review is hence a subtle alternative to constitutionally conforming interpretation.[62]

The second form that an interpretive ruling in abstract review may take concerns competing accounts of the scope of application of a provision, a segment thereof, or a conjunction of provisions. Imagine the issue is whether 'no dogs in the banks' contains 'no guide dogs for the visually impaired in the banks', there being no question that 'banks' here means 'the premises of financial institutions that take deposits and make loans'. The two interpretations under contention – the prohibition extends or does not extent to guide dogs for the visually impaired – revolve strictly around the issue of the provision's scope of application. Imagine further that the Constitutional Court takes the broad reading of the provision, according to which it applies to guide dogs for the visually impaired, to violate the constitutional duty of the state to protect individuals with disabilities. If the Court rules that the provision is not unconstitutional insofar as it does not apply to guide dogs for the visually impaired,

[62] *Id.* at 403-406.

it will not prevent ordinary courts from so applying it. If, on the contrary, the Court rules that the law is unconstitutional insofar as it applies to guide dogs for the visually impaired, it eliminates this norm from the range of potentially applicable norms in the legal system while preserving the rest of the provision in relation to which no issue of constitutionality is raised. Therefore, a declaration of unconstitutionality of this type – a so-called *qualitatively reductive* decision – is yet another example of a subtle alternative to constitutionally conforming interpretation. It is an alternative to CCI because the Court, instead of suggesting how the provision ought to be read in order to secure its constitutionality, *strikes down* a candidate interpretation it deems unconstitutional. It is undoubtedly the case, however, that the *type of reasoning* supporting each of the alternatives is identical, such that the alternative outcomes – interpreting the provision in conformity with the constitution so as to exclude its application in a range of cases or ruling out as unconstitutional the provision's application to the very same range of cases − are perfectly symmetrical.[63]

It may happen that the law under scrutiny in a procedure of successive abstract review, which may be initiated well after the law came into force or may concern a partial modification of a longstanding legislative framework, has already been subject to interpretation by the ordinary courts, and sometimes there is a settled view on the matter. That is notoriously the case when the Supreme Court of Justice or the Supreme Administrative Court, having been called to settle interpretive disagreements among lower-instance courts or between different panels within themselves, issue a so-called *standardizing judgment*. The state of a law that is subject to a uniform practice of interpretation by the ordinary courts is felicitously labelled in Italy *diritto vivente* – literally, living law.[64] In such circumstances, the Constitutional Court is not only relieved of the burden of interpreting at its own peril the law subject to abstract review of constitutionality but would be ill-advised to ignore the interpretation that the ordinary courts have settled on.[65] Taking the *diritto vivente* under consideration may push the Constitutional Court in one or another of two general directions. It may be that the ordinary courts have been interpreting the provision under review in conformity with the Constitution, in which case it is surely wrong to declare it unconstitutional as a whole and may be pointless to declare some other interpretation, even if it is the most obvious or natural one, unconstitutional. Another possibility is

[63] *Id.* at 433-39.

[64] See, generally, Gustavo Zagrebelsky, 'La Dottrina del Diritto Viventi', 31 *Giurisprudenza Costitutizonale* 1148 (1986).

[65] Medeiros, *supra* note 3, 412.

that the *diritto viventi* is unconstitutional, in which case the Court should declare the law unconstitutional, even if it could be interpreted – perhaps more naturally – in a way that would render it constitutionally conforming. By taking the interpretation endorsed by the ordinary courts seriously, the Constitutional Court merely acknowledges that it has no special authority in that field, as evinced by the fact that it cannot issue interpretive judgments *erga omnes*.[66]

I suspect that the reader is by now tired of my academic examples, so I shall venture the description of an actual case of a declaration of unconstitutionality that took into account the *diritto viventi*. Alas, realism comes at the cost of simplicity: the case is quite a bit more technical and convoluted than my silly illustrations with vehicles in the public parks and dogs in the banks. The challenged provision increased the probation period on a permanent employment agreement for workers seeking their first job from 90 days (the period applicable to any new hires) to 180 days; within this period, the employer holds the power to terminate the employment at will. The additional 90 days were justified by the legislature as an incentive for employers to offer inexperienced workers permanent contracts and as part of an effort to curtail the practice of abusing fixed-term agreements in order to circumvent legal restrains on employee dismissal. In general, the Court was of the view that the policy − an example of what is called in contemporary behavioral studies 'choice architecture'[67] − was constitutionally unobjectionable. There was a rider though. The law determined that if the employee had previously completed a fixed-term agreement with the same employer, the probation period would be reduced accordingly – as far as the 180 days of probation if the fixed-term experience lasted that long or even longer. But what if the recruited worker had completed a fixed-term agreement with *a different employer*? Although there was no express provision for these cases, it was plausible to interpret the law as determining that the additional 90 days of probation for inexperienced workers should be reduced in these cases, since the new recruit did have some work experience, albeit with another employer. The ordinary courts' settled understanding was nonetheless that the concept of a 'worker seeking a first job' comprised any individual who had never enjoyed a permanent employment agreement, even if it turned out to be someone with many years of work experience under fixed-term contracts. The Constitutional Court was of the view that, interpreted in such a way,

[66] See Jorge Miranda, *Manual de Direito Constitucional*, II (Coimbra, Coimbra Editora, 7.th ed. 2013) 333.
[67] See Richard H. Thaler and Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (New Haven and London, Yale University Press, 2008), 81-100.

the law discriminated against employees whose work experience had been accumulated under fixed-terms contracts.[68] Consequently, it struck down the provision insofar as it applied to these workers – a pristine example of a qualitatively reductive decision premised on the *diritto viventi* in the relevant province of the legal system.

V. Conclusion

I have argued in the introductory remarks to this paper that constitutional adjudication is hostage to a conundrum. If we take an expansive view of its role, as the paramount forum of constitutional interpretation,[69] it has no conceptual limits, since in one way or another legal reasoning in a liberal democracy is always already constitutionally conformed, namely by fundamental rights and basic principles. If we take a restrictive view of constitutional adjudication, as a negative legislature strictly endowed with the power to annul statutes,[70] the actual part played by the Constitutional Court in the legal system, notably in what regards the interpretation of the Constitution, is far more limited than many constitutional judges are prepared to accept as sufficient proof of their importance. Moreover, the main subject of review and object of policing shifts from one conception to the other: judicial decisions and ordinary judges according to the expansive view; legislative choices and the political process according to the restrictive view. The underlying issue is whether the Constitutional Court ought to be *the judge of the judges* or *the judge of the legislature*.[71]

---

[68] Acórdão n.º 318/2021.

[69] See Ronald Dworkin, *A Matter of Principle* (Cambridge and London, Harvard University Press, 1985) 33-71. Dworkin characterizes the Supreme Court of the United States as 'the forum or principle'. The fact that the Supreme Court is a court of general jurisdiction *ex ratione materiae* reinforces my point: in a system of concentrated judicial review of constitutionality, a forum of constitutional principle tends to become a court of general jurisdiction, for 'a total constitution provides the general normative standards – even if stated in terms of abstract principle – for the resolution of all legal and political conflicts that occur in its jurisdiction.' The quotation is from Mattias Kumm, 'Who Is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law', 7 *German Law Journal* 341 (2006), 344.

[70] See Kelsen, *supra* note 24, 1503-1507; García de Enterría, *supra* note 3, 63-94.

[71] See Acórdão n.º 695/2016, standing for a relatively restrictive view, which provoked several concurring opinions. For a similarly restrictive view, see Cardoso da Costa, *supra* note 35, 208-209 (fn. 12).

The doctrine or canon of 'constitutionally conforming interpretation' brings this conundrum into broad daylight for the very reason that it straddles the realms of ordinary and constitutional adjudication, testing the coherence of any attempt to set up a hard border separating them. The more the system accepts the canon as part of the conventional and exclusive business of ordinary adjudication, the more it leans towards the restrictive view. The more it takes conforming interpretation as a form of judicial review in disguise, the more it leans towards the expansive view. The roles are reversed when it comes to constitutionally conforming interpretation conducted by the Constitutional Court itself: the greater its authority in that domain, the greater the tendency for it to become an omnipotent, omniscient, and omnipresent reality in adjudication. In the Portuguese system of judicial review of constitutionality, with its peculiar regime of appeals in incidental control and various forms of abstract review, constitutionally conforming interpretation is both ubiquitous and slippery – an indispensable part of the toolkit of constitutional adjudication and a puzzling doctrine in whose womb aporias easily develop. The practice of this one system, notwithstanding its irreducible particularity, arguably documents and illustrates in eloquent fashion the structural issues predicated of all systems with a specialized constitutional jurisdiction, thereby setting the stage for a deeper theoretical reflection.