

Citation

CHICAGO: K. Szostak, *Comparative Analysis of the Constitutionality Inspection Models in Portugal and in Poland*, „Przegląd Prawa Konstytucyjnego” 2023, no. 4, pp. 311–324, <https://doi.org/10.15804/ppk.2023.04.23>

APA: Szostak, K. (2023), *Comparative Analysis of the Constitutionality Inspection Models in Portugal and in Poland*, „Przegląd Prawa Konstytucyjnego” no. 4, pp. 311–324, <https://doi.org/10.15804/ppk.2023.04.23>

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**Comparative Analysis of the Models of Constitutional
Review in Portugal and in Poland**

Keywords: constitutional court, constitutional crisis, constitutionality inspection, diffuse inspection, concentrated inspection

Słowa kluczowe: kontrola konstytucyjności, sąd konstytucyjny, kryzys konstytucyjny, kontrola rozproszona, kontrola skoncentrowana

Abstract

The article critically analyses the models of the constitutionality inspection adopted in Portugal and in Poland. For this purpose the comparative method has been applied, comparing Portuguese and Polish approaches. Theoretical aspects of the constitutionality inspection are discussed and the notions of the centralised and the diffuse inspection model are introduced. Then the paper analysis the actual inspection practices in both countries discussing the diffuse and concentrated inspection separately. Constitutional rules pertaining to the direct effect of the constitutions, constitutional jurisdiction of judges and operation of the constitutional courts are considered. The article concludes that in both

countries different models of constitutionality inspection operate. In Portugal operates the mixed constitutionality inspection model while in Poland, despite views advocating for permissibility of the diffuse control, the centralised model functions.

Streszczenie

Analiza porównawcza modeli kontroli konstytucyjności w Portugalii i w Polsce

Artykuł krytycznie analizuje modele kontroli konstytucyjności przyjęte w Portugalii i w Polsce. W tym celu zastosowano metodę komparatystyczną, porównującą rozwiązania portugalskie z polskimi. Przedstawiono kwestie teoretyczne związane z pojęciem kontroli konstytucyjności oraz przedstawiono pojęcia kontroli skoncentrowanej i rozproszonej. Następnie w publikacji przeanalizowano faktyczne modele kontroli w obu państwach z osobnym rozważeniem kontroli rozproszonej i skoncentrowanej. Rozważono przy tym zasady konstytucyjne dotyczące bezpośredniego stosowania konstytucji, konstytucyjnej jurysdykcji sędziów i działania sądów konstytucyjnych. Artykuł kończy się konkluzją, że w obu krajach funkcjonują odrębne modele kontroli konstytucyjności. W Portugalii funkcjonuje model mieszany, podczas gdy w Polsce, pomimo poglądów o dopuszczalności kontroli rozproszonej, funkcjonuje model scentralizowany.

✱

I. Introduction

Constitutions can effectively have the highest binding legal power only if there are effective methods to enforce it. The constitutionality inspection may be delivered by judges of a special judicial body (concentrated inspection) or by ordinary judges (diffuse inspection)¹. Legal systems that only allow concentrated constitutionality inspection are said to have the “centralized” or “consolidated” model². Such a solution has been promoted by Hans

¹ O. Aronson, *Between Diffuse and Concentrated Judicial Review: An Israeli Hybrid and its Alternatives*, “Bar Ilan University Public Law Working Paper” 2011, p. 3.

² P. Jabłońska, *Konstytucyjne podstawy rozproszonej kontroli konstytucyjności prawa*, “Przeegląd Sądowy” 2020, no. 11–12, p. 27.

Kelsen³. When both concentrated and diffuse inspections are allowed, the model is “mixed”⁴.

The concentrated inspection is delivered by a special judicial body and is typically effective *erga omnes*, thus it can derogate statutorily provisions with the generally binding force. On the other hand, the diffuse inspection is made by ordinary courts and is effective *inter partes*, thus unconstitutional provisions are not derogated in the legal system, but are not being applied in the specific proceeding. The diffuse inspection is “concrete”, which means that it is made for a specific proceeding, and the effects of unconstitutionality are restricted to a specific dispute. Conversely, concentrated inspection is typically abstract, especially when initiated by a constitutional challenge⁵.

In this article, I will examine the constitutionality inspection models in two European countries: Poland and Portugal. My analysis aims to determine the model of constitutionality inspection implemented in each country.

II. Constitutionality inspection in Portugal

The current Constitution of Portugal was adopted in 1976⁶. The concentrated inspection is made by the Constitutional Court and the diffuse inspection is made by all other judges. Portugal introduced the diffuse legislation inspection to its constitution in 1911, as the first country in Europe, and formally preserved it during Salazar’s dictatorship⁷. The Constitutional Court was established by the 1982 constitutional amendment, earlier the concen-

³ H. Kelsen, *Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution*, “The Journal of Politics” 1942, vol. 4, no. 2.

⁴ A. Kustra-Rogatka, *Kontrola konstytucyjności prawa w państwach UE w świetle ewolucji sądownictwa konstytucyjnego w Europie*, “Studia Iuridica Toruniensia” 2019, vol. 23, pp. 141–142.

⁵ J. Mazak, *The European model of constitutionality review of legislation*, Venice 2020.

⁶ Constitution of the Republic of Portugal, https://www.constituteproject.org/constitution/Portugal_2005.pdf (30.04.2023).

⁷ G. de Almeida Ribeiro, *Judicial Review of Legislation in Portugal: Genealogy and Critique* [in:] *Comparative Constitutional History. Volume One: Principles, Developments, Challenges*, eds. F. Biagi, J.O. Frosini, J. Mazzone, Brill Publishers 2020, p. 206.

trated inspection was delivered by political bodies, primarily by the Council of the Revolution⁸.

Under the Portuguese system, judges have the right to perform the constitutionality inspection on their own. Article 203 of the Constitution makes them subject “only to law”. “Law” here denotes the whole, hierarchical legal system. Performing the diffuse constitutionality inspection is obligatory for judges. The subsequent article of the Constitution prohibits judges from applying norms that contravene the Constitution. *Lex non distinguit* the scope of this prohibition includes not only the secondary legislation but also statutes and other primary legislation. As per Art. 204, judges must also refrain from applying norms that are not contrary to any specific provision of the Constitution but are not in line with the constitutional principles. Thus, every Portuguese court has constitutional jurisdiction, regardless of the type of court and its position in the hierarchy of instances. Even public administration bodies have the authority to evaluate the conformity of legal provisions with the fundamental rights guaranteed in the Constitution⁹.

The concentrated constitutionality inspection in Portugal is carried out by the Constitutional Court. It occupies the highest position in the constitutional jurisdiction order¹⁰. According to Art. 222 of the Constitution, the Court is comprised of 13 judges, out of which 10 are elected by the Assembly of the Republic and the remaining 3 judges are co-opted. The Assembly elects judges by a 2/3 qualified majority, which requires the cooperation of the two main political parties¹¹. There is the constraint that 6 judges must be chosen from judges of other courts and the rest from jurists. As in Poland, the term of office of the Court judges lasts 9 years and is not renewable.

⁸ P. Trovão do Rosário, G. Gadelha, D. Gomes, *O Tribunal Constitucional Português e a Justiça Constitucional*, Coimbra 2023, p. 159.

⁹ A. Cortes, T. Violante, *Concrete Control of Constitutionality in Portugal: A Means Towards Effective Protection of Fundamental Rights*, “Penn State International Law Review” 2011, vol. 29, no. 4, p. 762.

¹⁰ P. Mikuli, *Zdekoncentrowana sądowa kontrola konstytucyjności prawa. Stany Zjednoczone i państwa europejskie*, Kraków 2007, p. 58.

¹¹ N. Garoupa, L. Tiede, *Judicial Politics in Portugal* [in:] *The Oxford Handbook of Portuguese Politics*, eds. J.M. Fernandes, P.C. Magalhães, A. Costa Pinto, Oxford University Press 2023, p. 171.

The Constitutional Court is eligible to conduct two types of constitutionality inspection. Firstly, it can conduct the concrete inspection, which is effective *inter partes*. This type of inspection is similar to the inspection that ordinary courts perform while delivering the diffuse inspection¹². Secondly, the Court is competent to conduct the abstract inspection which is effective *erga omnes* and has the general binding power. This inspection resembles constitutionality inspection in most of the other European countries (including Poland). The abstract inspection only accounts for approximately 2% of cases before the Court¹³.

The concrete control made by the Constitutional Court (also known as the “specific review”) is always preceded by the ordinary court’s ruling (Art. 280). An appeal against the ruling to the Constitutional Court is made either by the Public Prosecutor or by parties of a dispute. The Public Prosecutor is obliged to make an appeal to the Court if an ordinary court in its ruling refused the application of any norm contained in an international agreement, a legislative act or a regulatory decree on the ground of its unconstitutionality or breaching of an act with higher legal force (illegality). Parties of the dispute may appeal against a ruling if the ordinary court applied any unconstitutional or illegal norm. Only the party who has raised the question of unconstitutionality or illegality of a norm during the proceeding before the ordinary court is eligible to make an appeal against the verdict applying that norm to the Constitutional Court.

Consequently, the appeal must be restricted to the question of unconstitutionality or illegality of a specific legal norm (the same is true for the Court’s abstract review discussed below). The matter of the Court’s consideration is always a legal norm, rather than the merit of an appealed case¹⁴. The Court combines the functional and formal understanding of legal norms¹⁵. In line with the

¹² V. Comella, *Constitutional Courts and Democratic Values: a European Perspective*, Yale University Press 2009, p. 169.

¹³ In 2022 the Constitutional Court decided in total 25 abstract review cases and 1426 specific review cases (excluding complaints against orders rejecting the admission of the appeal). For years 1983–2022 these numbers are respectively 837 (including 8 omission cases) and 35 141. Cf. Portuguese Constitutional Court, *Constitutional Court Judgments and Decisions*, <https://www.tribunalconstitucional.pt/tc/en/tribunal-estatisticas.html> (16.07.2023).

¹⁴ A. Cortes, T. Violante, *op.cit.*, p. 765.

¹⁵ *Ibidem*, pp. 769–773.

functional approach, it reconstructs legal norms from numerous legal sources and is not concerned only with the literal wording of legal provisions¹⁶. In line with the formal understanding, the Court occasionally scrutinizes legal norms that are not general and abstract in the traditional sense, as long as they are established by a normative authority and derive from a legislative act¹⁷. The Constitutional Court's ruling on the norm, given upon the appeal, is treated as *res judicata* and the case returns to the court that issued the appealed ruling¹⁸.

The subsequent abstract control in Portugal is initiated by the mechanism known as the constitutional challenge, although this notion has not been used in the Constitution. There are a few explicitly listed bodies, which have the right to initiate the challenge. Moreover, the Constitutional Court reviews the constitutionality or legality of legal norms, which were found to be unconstitutional or illegal in three different concrete proceedings before the Court (Art. 281 (3)) at the request of its judges or Public Prosecutor¹⁹. Additionally, there is a mechanism of the preventive abstract constitutionality control of a norm contained in the legislation that has been sent for presidential signature. It may be initiated by the President of the Republic and in a limited scope also by the Prime Minister and 1/5 of the Assembly members (Art. 278). Interestingly, a legislative organ may confirm the norm, which was found unconstitutional by the Court, with the 2/3 qualified majority (Art. 279 (2)).

As Art. 281 (1) of the Portuguese Constitution states, the matter of the challenge is the constitutionality or legality of a legal norm, as it was in the case of the concrete review. Verdicts declaring unconstitutionality take effect from the moment at which norms came into force (*ex tunc*)²⁰. Nevertheless, when required for the purposes of legal security, reasons of fairness or an exceptionally important public interest, the grounds for which must be given, the Constitutional Court may determine a more restricted scope for the ef-

¹⁶ Cf. Judgment of the Portuguese Constitutional Court of 3 May 1984, file ref. no. 40/84.

¹⁷ Cf. Judgment of the Portuguese Constitutional Court of 15 February 1985, file ref. no. 26/85 and Judgment of the Portuguese Constitutional Court of 29 June 1988, file ref. no. 156/88.

¹⁸ P. Mikuli, *Zdekoncentrowana sądowa...*, p. 83.

¹⁹ P. Trovão do Rosário, G. Gadelha, D. Gomes, *op.cit.*, p. 164.

²⁰ A. Kustra-Rogatka, *op.cit.* p. 146.

fects of its verdict (Art. 282 (4)). Rulings issued in examined cases stand unless the Constitutional Court decides to the contrary in relation to a norm that “concerns penal or disciplinary matters or administrative offenses and whose contents are less favorable to the accused person” (Art. 282 (3)).

Additionally, the Portuguese Constitution enables the Constitutional Court to examine the constitutionality of a legislative omission (Art. 283). The proceeding may be initiated by President or Ombudsman (or an autonomous region) if without legislative action constitutional norms are not executable. The notion of “omission” covers both the situation of absence (“pure” or “absolute” omission, when there is no legislation at all) and situations when the existing legal norm is inadequate, insufficient or deficient (“relative omission”)²¹. After declaring unconstitutional omission, the Constitutional Court notifies the competent legislative authority, without specifying a date to issue legislation²². The procedure is rarely used, in years 1983–2022 the Court decided 8 omission cases. In Poland there is no such mechanism of legislative omission review as the absolute omission can never be challenged before the Polish Constitutional Court (although from its own initiative it has a right to signal legal gaps to legislative bodies)²³.

III. Constitutionality inspection in Poland

The current Polish Constitution was adopted in 1997²⁴. Although it has been in effect for over 25 years legal scholars still have not agreed as to which mod-

²¹ Portuguese Constitutional Court, *Problems of Legislative Omission in Constitutional Jurisprudence. Portuguese Report for the XIVth Congress of the Conference of European Constitutional Courts*, Vilnius 2008, https://www.confueconstco.org/reports/rep-xiv/report_Portuguese%20_en.pdf (15.07.2023), pp. 14–15; A.R. Brewer-Carías, *Constitutional Courts as Positive Legislators* [in:] *General Reports of the XVIIIth Congress of the International Academy of Comparative Law*, eds. K.B. Brown, D.V. Snyder, Springer 2012, pp. 560–565.

²² A. Łabno, *Trybunał Konstytucyjny w Portugalii* [in:] *Sądy konstytucyjne w Europie*, t. 3, *Hiszpania, Portugalia, Turcja*, ed. J. Trzcíński, Warszawa 1999, pp. 127–128.

²³ M. Tarasek, *Trybunał Konstytucyjny a kontrola zaniechań legislacyjnych*, “Przegląd Prawa Konstytucyjnego” 2014, no. 1 (17).

²⁴ Constitution of the Republic of Poland of April 2, 1997 (Dz.U. No. 78 item 483 as amend.).

el of constitutionality inspection of primary legislation the Constitution had adopted.

The permissibility of the diffuse inspection is a matter of controversy. Article 8 of the Constitution provides the Constitution to be the supreme law of Poland. The same article further stipulates that constitutional provisions are directly applicable, “unless the Constitution provides otherwise”. Professor Piotr Tuleja has rightly pointed out that there are literally no provisions that would provide otherwise²⁵. Article 178 of the Constitution states that judges are subject only to the Constitution and statutes. As governmental regulations and other secondary legislation are not mentioned, all legal scholars agree that ordinary courts’ judges are eligible to perform their own diffuse constitutionality inspection of the secondary legislation. However, when it comes to primary legislation (parliamentary statutes and equivalent acts of international law) the disagreement continues. Proponents of the centralized model perceive the constitutional wording of judges being subject to statutes as precluding the diffuse inspection, while the proponents of the diffuse model stress that judges are first of all subject to the Constitution, which is the supreme law, and according to their views it may enable or even require judges to perform the diffuse inspection²⁶.

Article 193 stipulates that any court “may refer a question” to the Constitutional Court regarding the conformity to the Constitution of a normative act (thus both primary and secondary legislation). Proponents of the centralized model interpret the word “may” in this constitutional provision as having the meaning of “must” and argue that judges are obliged to make the referral. Proponents of the diffuse model perceive the same word as only expressing possibility and argue that it is up to the discretion of judges whether they make the referral or not²⁷. However, the fur-

²⁵ P. Tuleja, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2019, p. 48.

²⁶ P. Jabłońska, *op.cit.*, p. 25.

²⁷ Cf. Judgment of the Court of Appeal in Gdansk of May 5, 2017 (file ref. no. III AUa 2004/16, LEX no. 2365607) “A court may raise a constitutional question to the TK only if it does not know the answer to the question (the one who asks is the one who does not know). if one were to assume that it should also do so if the answer to the question is obvious for it, the question would cease to be a question and would become a ‘motion for a declaration of unconstitutionality’”.

ther part of the same Art. 193 restricts this obligation or discretion. The constitutional question may only be referred “if the answer to such question of law will determine an issue currently before such (making referral) court”. For proponents of the diffuse model, it implies that the constitutional question may not be referred if a court is able to determine an answer itself, even if the word “may” from the first part of this provision actually has an obligatory meaning²⁸.

In its well-established jurisprudence, the Constitutional Court has coined the concept of the “presumption of constitutionality of a statute”. According to this concept, every new statute is assumed to be in line with the Constitution. Not only public administration but also judges are bound to apply statutory norms unless they were declared unconstitutional by the Constitutional Court²⁹. Traditionally the vast majority of legal scholars had been arguing for the centralized model. The diffuse inspection was not considered permissible, with the possible exception of the review of an obviously unconstitutional provision or a provision duplicating a provision previously declared unconstitutional by the Constitutional Court (the so-called “obvious and duplicative unconstitutionality”)³⁰. Recently many scholars who previously supported the centralized model have switched their positions and are now standing for the permissibility of the diffuse model³¹. Some of them promote the “doctrine of necessity” as a utilitarian justification for their change in opinion in the context of the Constitutional Court crisis³².

The diffuse constitutionality inspection of statutory norms is indeed more and more frequently carried out by the courts. It does not always take place openly, sometimes it is performed under the guise of pro-constitutional interpretation. Few judges hold that the diffuse constitutionality inspection is immanently embedded in the Polish legal system, most

²⁸ P. Mikuli, *Doktryna konieczności jako uzasadnienie dla rozproszonej kontroli konstytucyjności ustaw w Polsce*, “Gdańskie Studia Prawnicze” 2018, vol. 11, p. 637.

²⁹ P. Radziejewicz, *Wzruszenie „domniemania konstytucyjności” aktu przez Trybunał Konstytucyjny*, “Przegląd Sejmowy” 2008, vol. 5, no. 88.

³⁰ R. Hauser, J. Trzciński, *Prawotwórcze znaczenie orzeczeń TK w orzecznictwie NSA*, Warszawa 2008, p. 26.

³¹ P. Radziejewicz, *Kryzys konstytucyjny i paradygmatyczna zmiana konstytucji*, “Państwo i Prawo” 2020, no. 10, p. 11.

³² P. Mikuli, *op.cit.*, p. 642.

derive their authority to perform it from exceptional circumstances, such as the delegitimization of the Constitutional Court and slowness of the proceedings before it³³.

The Constitutional Court is competent to perform the abstract and effective *erga omnes* concentrated inspection. The composition of the Court is outlined in Art. 194 of the Polish Constitution, which specifies that it consists of 15 judges. These judges are elected with the absolute majority of votes by the lower chamber of the Polish parliament (*Sejm*). Each judge holds an individual term of office lasting nine years, which cannot be renewed. Unlike ordinary judges who are also subject to statutes, Constitutional Court judges are subject only to the Constitution (Art. 195) with the organization and mode of proceeding being specified by a statute (Art. 197).

The jurisdiction of the Constitutional Court primarily covers issues of constitutionality inspection. It adjudicates on the conformity of statutes and international agreements to the Constitution and on the conformity of legal provisions issued by central state organs to the Constitution. Consequently, both primary and secondary legislation is covered by its jurisdiction. Furthermore, the Constitutional Court has a competence to examine conformity with other than Constitution legal acts which are higher in the hierarchy than the act in question. Specifically, it examines the conformity of a statute to ratified international agreements and the conformity of legal provisions issued by central State organs to ratified international agreements and statutes (Art. 188). Hence, the Constitutional Court may also adjudicate on the conformity of a governmental regulation (secondary legislation) to statutes, particularly to the statute that provided the basis for the regulation.

The most frequent method of initiating constitutionality inspection before the Polish Constitutional Court is through the constitutional challenge. The application for the subsequent inspection may be submitted by a few explicitly listed state bodies (Art. 191). The preventive constitutionality inspection, which is conducted before a statute comes into force, is also envisaged. The challenge for the preventive inspection may be brought only by the Pres-

³³ J. Podkowiak, *O przyczynach, przejawach i skutkach rozproszonej kontroli konstytucyjności ustaw (w świetle orzecznictwa sądów powszechnych i Sądu Najwyższego)*, "Studia Prawnicze" 2022, no. 2.

ident. If the Constitutional Court adjudicates that the statute is constitutional, the President is obligated to sign it (Art. 122 (3)).

Constitutionality inspection before the Constitutional Court may as well be initiated by the constitutional question from any court. According to already discussed Art. 193 of the Constitution, the constitutional complaint of a person whose constitutional freedoms or rights have been infringed initiates constitutionality inspection of a statute or another normative act “upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution” (Art. 79).

Legal provisions that were declared unconstitutional cease their binding force from the day of publication of a verdict or another day specified by the Constitutional Court. Under the current constitution, the verdicts are final, thus cannot be undermined by the Parliament. Even though their effect is *ex nunc*, they serve as a basis for reopening of closed proceedings that were based on unconstitutional legislation (Art. 190).

The functioning of the Polish Constitutional Court is a subject of fierce criticism. Three of its judges were illegitimately elected for the seats already taken by nominees of the outgoing Sejm in 2015 from whom the President has never taken the oath³⁴. ECHR in the judgment on the case of *Xero Flor w Polsce sp. z o.o. v. Poland* stated that their participation breaches the right to a fair hearing and the right to a court established by law provided by the Convention³⁵. Even the legitimacy of its current president is contested³⁶. The number of cases handled by the Court has significantly decreased and the idea of the diffuse inspection has gained importance³⁷.

³⁴ Cf. Judgment of the Polish Constitutional Court of December 3, 2015, file ref. no. K 34/15, OTK ZU 2015, no. 11 item 185 (Dz.U. 2015, item 2129).

³⁵ Judgment of the ECtHR of 7 May 2021, *Xero Flor w Polsce sp. z o.o. v. Poland*, application no. 4907/18.

³⁶ M. Maładziński, *Kryzys wokół Trybunału Konstytucyjnego w latach 2015–2018*, Warszawa 2018, pp. 30–84; D. Sitnicka, *Ciąg dalszy telenoweli w TK*, 13 April 2023, <https://oko.press/tk-rozprawa-narada> (30.04.2023).

³⁷ W. Tumidalski, *Trybunał nie orzeka. Na rozstrzygnięcie czekają sprawy warte miliardy złotych*, 10 March 2023, <https://www.rp.pl/sady-i-trybunaly/art38100321-trybunał-nie-orzeka-na-rozstrzygnięcie-czekają-sprawy-warte-miliardy-złotych> (30.04.2023).

IV. Conclusions

The constitutionality inspection model adopted in Portugal is the mixed model under which both diffuse and concentrated control is delivered. In Poland, despite views advocating for permissibility of the diffuse control, the centralized model of the statute's inspection is in place.

In both Poland and Portugal, judges of the constitutional courts are elected by parliament and legislation may be declared unconstitutional under the procedure of the constitutional challenge. In Portugal, there is an instrument of the constitutional appeal against ordinary court's verdicts. When made against a verdict applying unconstitutional norms, it resembles a constitutional complaint, save the Portuguese Constitutional Court examines the appeals in the concrete review. In Poland, there is a procedure of the constitutional question of ordinary courts which does not exist in Portugal, since Portuguese judges may perform their own diffuse inspection. Both constitutional courts perform the preventive and subsequent abstract inspection. Moreover, the Portuguese Constitutional Court performs the concrete inspection triggered by constitutional appeals, which accounts for the vast majority of decided cases.

Portuguese ordinary courts' judges have the power to dismiss unconstitutional statutory norms on their own, but their decisions can subsequently be challenged before the Constitutional Court. Conversely in Poland, according to the prevailing doctrine of the constitutional law, they have no right to do so. In the context of the current controversy around the Constitutional Court, the effectiveness of the centralized constitutionality inspection in Poland seems to be endangered.

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