

SYNOPSIS OF THESIS FOR REGISTRATION FOR LL.D (year 2002)

REVIEW OF CONSTITUTIONALITY IN PORTUGAL

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Following topic is very interesting for Indian students for comparative analysis between Portugal and India or vice versa.

Topic

The topic of the thesis is “Review of Constitutionality in Portugal ”.

Introduction

The Portuguese Constitution is very interesting for an Indian reader , as it is based on the Continental system. Portugal has a long Constitutional history from 1822 onwards, though at times it fluctuated between democratic and dictatorial tendencies, with the dictatorial Constitution of 1933 lasting for around four decades. The present Constitution of 1976 was promulgated after the overthrow of fascist regime of Dr. Salazar , and had the benefit of modern ideas in Europe. It underwent four revisions, some of them drastic in order to prepare Portugal for the entry into the European Union as well as to equip Portugal to the present global market trends.

Review of Constitutionality of legal and constitutional norms is an important feature of the Portuguese Constitution. Part IV, Section I of the Portuguese Constitution deals with Review of Constitutionality The concept though partly similar to the issue of unconstitutionality in India widely differs from it in several aspects. Hence it is worthwhile to carry an analysis of the concepts, methods used, and the institutions concerned with the Review of Constitutionality.

Objectives

Following are some of the objectives for the study:

- 1) To trace the concept of Review of Constitutionality in Portugal .
- 2) To analyze the different doctrines associated with the constitutionality of constitutional and legal norms.
- 3) To analyze the Constitutional provisions dealing with the Review of Constitutionality.
- 4) To collect the views of legal experts in Portugal on the raging debate about the possibility of declaring a Constitutional norm in the original or revised version as unconstitutional.
- 5) To analyze case law in Portugal on the issue of Review of Constitutional norms.
- 6) To assess the judicial machinery in Portugal for the Review of unconstitutionality of legal norms.

Research Issues

- Whether Review of Constitutionality in Portugal differs from the concept of unconstitutionality found among common law countries.
- Whether the establishment of Constitutional court in Portugal has modified its earlier theory of strict separation of Powers.
- Whether the Review of Constitutionality has brought about a change to the approach of case –law i.e. the theory of Precedent.

Methodology:

It is decided to analyze the Constitutional provisions found in Part IV , Sec. I i.e. Arts.277-283 . Also the case law on the topic from the Constitutional Court will be analyzed. It is also decide to collect material by way of interviews with judges and legal experts in Portugal in order to have their views and opinions on the subject, as well as to find from them the problems and issues on the field of constitutionality of legal or constitutional norms.

Contents.

The thesis will be divided into six chapters. The first introductory chapter will contain material such as historical background , legal and constitutional doctrines etc. relevant to the study. The second chapter will be devoted to the concepts and doctrines relevant to the Review of Constitutionality such as General Review , unconstitutionality by omission etc.. The third chapter will deal with the Organs of Constitutional Justice and the effects of their rulings. The fourth chapter will deal with the authorities that can move the judicial machinery to adjudicate on the issue concerning Review of Constitutionality The fifth chapter will analyze the case law. The last chapter will contain summary, conclusions and suggestions.

Chapter I: Introduction

This introductory chapter will deal with the preliminaries such as the importance of study, methodology, constitutional history , history of Constitutional Courts in Europe and Portugal, the Judicial System in Portugal (i.e. Courts, Tribunals and the Constitutional Court), concepts of decisions in *concreto* and *abstracto* etc. (A decision in *concreto* applies to a particular case and the norm continues in force though the court decides that it as unconstitutional in application to the particular case. . Therefore it can be applied by another court as constitutional in another case if it is the view of that court. Whereas a decision in *abstracto* , it has a binding general force of law and invalidates the norm. It cannot be applied by any court or authority.

Chapter II: Concepts and Doctrines on Review of Constitutionality

The chapter will examines some of the following concepts and doctrines:

2.1 Cocept of Constitutionality

2.2 Constitutionality with respect to International Law (Can international Law be unconstitutional?)

2.3 Positive Unconstitutionality –Discussion on the doctrine when a rule of law contravenes a provision of Constitution or a principle enshrined therein .

- 2.4 Unconstitutionality by Omission-Discussion on the doctrine when there is an omission by an organ to enact legislation and the omission contravenes the Constitution . (In such case the Constitutional Court communicates to the respective competent organ).
- 2.5 Constitutional Review of Normative Acts. – Review limited to normative acts including the revision of Constitution, international Conventions, normative acts of President of Republic, emergency, laws of Assembly of Republic etc but excludes political, administrative and judicial acts as a general rule).The chapter will discuss in minute details what is included under normative acts and what is excluded.
- 2.6 Revision of Constitution and pre- Constitutional norms- Doctrinal discussion.
- 2.7 Unconstitutionality of Foreign norms.- whether possible and what is its effects.
- 2.8 Preventive Review of Constitutionality – Example when a law waiting for the signature of the President of the Minister of Republic as the case may be is declared as unconstitutional.
- 2.9 Unconstitutionality on violation of the provisions of the Constitution and unconstitutionality for violation of principles enshrined in the Constitution.
- 2.11 Indirect or Mediate Unconstitutionality – One norm violates another a norm and hence causes the problem of unconstitutionality.
- 2.12 Material, Organic and Formal issue of Constitutionality- (Material when it concerns the content, organic concerning a norm related to jurisdiction etc. and formal, i.e. on process of making the act.)
- 2.13 Unconstitutionality of original or revised Constitutional norm- Doctrinal debate and case law of Constitutional Court.
- 2.14 Present and Past Unconstitutionality- authoritative vies with illustrative cases.
- 2.15 Total and Partial Unconstitutionality
- 2.16 Discussion on Positive Decision on unconstitutionality and a Negative Decision: A positive decision by Constitutional court may lead to nullity ex. jure but a negative decision i.e denial of request to declare unconstitutional is not an affirmation that it is constitutional and does not prevent other courts in their *concreto* decisions from refusing to apply the norm if they feel it is unconstitutional.
- 2.16 Interpretation in conformance with Constitutionality
- 2.17 Constitutional Revision and Unconstitutionality – On norms which are constitutional which may become unconstitutional on Revision of Constitution, and norms which are unconstitutional may cease to be so on Revision.

Chapter III – Organs of Constitutional Justice.

- 3.1 Introduction : Basically all courts of justice under Art. 204 cannot apply any rules that as per them contravene the provisions of the Constitution or the principles contained in them. However the decision are in *concreto* i.e. apply to that case only and do not invalidate the norm. Hence another court may apply the norm if it feels it is constitutional. However the Constitutional Court has the power to declare a Constitutional norm unconstitutional with a general binding force which bind all other courts i.e decision in *abstracto*
- 3.2 Courts and Art.204
- 3.3 Constitutional Court : Composition and Powers.
- 3.4 Constitutional Court: Problems and issues. (Views of various authorities on the Constitutional Court.).

Chapter IV- Authorities Concerned with Review of Constitutionality.

Certain authorities under special circumstance and with respect to particular norms in specified cases can move the Constitutional Court requesting for a Review of Constitutionality.

- 4.1 The President of Republic – May request for international treaties, other instruments submitted for his signature etc.
- 4.2 The Minister of the Republic – similar discussion.
- 4.3 The Prime Minister – To what matters and under what circumstances etc.
- 4.4 Deputies of the Republic – Discussion on number required , which decrees etc.
- 4.5 The Ombudsman and the Attorney General
- 4.6 Others.
- 4.7 Appeals from Courts of Justice
- 4.8 Effects of the rulings of the Constitutional Court. (There are diverse effects from a need of veto by the President to nullity depending on how the case came to the Constitutional court such as at request of a particular authority or as a constitutional appeal from the courts of justice etc.)

Chapter V: Cases from the Constitutional Court.

The Constitutional Court has given certain landmark cases creating a new Constitutional history in Portugal. It is decided to discuss some of the cases to bring out the dynamics of case law today in Portugal.

5.1 Cases on Constitutionality of Constitutional provision

There are few cases concerning the constitutionality of a constitutional provision . But so far not a single constitutional provision in Portugal has been declared as unconstitutional. In a landmark case the Constitutional Court refused to declare Art. 57(1) and (4) as unconstitutional .Art. 57 (1) guarantees the right to strike and Art. 57(4) states that lock outs are prohibited. This apparent injustice was brought before the Constitutional Court. The concerned article appears under the Fundamental Rights and Duties in Part I under the chapter of Rights , Freedoms and Guarantees of Workers. The Constitutional Court refused to declare the article as unconstitutional. The study will analyze this case in depth.

5.3 Important cases on unconstitutionality of Legal Norms.

Chapter VI –Concluding Chapter

This chapter will contain summary, conclusions and suggestions.

- 5.1 Summary
- 5.2 Conclusions
- 5.3 Suggestions.