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The Judicial Constitutional Review for the Legislative Omission: A Comparative Study²

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Abstract

This paper attempts to present the constitutional and legal frameworks for the constitutional oversight of the legislative oversight in Portugal and South Africa and the various mechanisms that enable the Constitutional Court to monitor legislative oversight. The paper also presents the most critical repercussions that resulted from applying the constitutional oversight system over legislative oversight and the impact of these repercussions on rights and freedoms. It also addresses the quality and integrity of legislation and the effects of this oversight on the relationship between the constitutional judiciary and the parliament. The study uses two basic approaches: the comparative approach to compare South Africa and Portugal and the analytical approach to determine the repercussions of constitutional oversight on legislative oversight. The study seeks to answer several research questions that help clarify the mechanisms necessary to exercise this oversight.

Keywords: Constitutional Court, legislative omission, unconstitutionality, the rule of law.

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Sądowa kontrola konstytucyjności pominięcia ustawodawczego: Studium porównawcze³

Streszczenie

W niniejszym artykule podjęto próbę przedstawienia konstytucyjnych i prawnych ram nadzoru konstytucyjnego nad nadzorem legislacyjnym w Portugalii i Republice Południowej Afryki oraz różnych mechanizmów umożliwiających Trybunałowi Konstytucyjnemu monitorowanie nadzoru legislacyjnego. Przedstawiono również najbardziej krytyczne reperkusje wynikające z zastosowania systemu nadzoru konstytucyjnego nad nadzorem legislacyjnym oraz wpływ tych reperkusji na prawa i wolności. Autor odnosi się również do jakości i integralności ustawodawstwa oraz wpływu tego nadzoru na relacje między sądownictwem konstytucyjnym a parlamentem. W artykule zastosowano dwa podstawowe podejścia: podejście porównawcze w celu porównania RPA i Portugalii oraz podejście analityczne w celu określenia wpływu nadzoru konstytucyjnego na nadzór legislacyjny. Badanie ma na celu udzielenie odpowiedzi na kilka pytań badawczych, które pomogą wyjaśnić mechanizmy niezbędne do sprawowania tego nadzoru.

Słowa kluczowe: Trybunał Konstytucyjny, pominięcie ustawodawcze, niekonstytucyjność, praworządność.

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Introduction

The constitutional courts in most countries of the world work to preserve the fundamental rights and freedoms of individuals⁴ by protecting the constitution by the powers granted under the constitution, and all authorities must respect the constitution for the rule of law to be real and effective.⁵ Both the legislative and executive authorities must respect in their actions – positive and negative – the provisions of the constitution, and the constitutional courts in most countries monitor the legislation issued by the parliaments and the regulations issued by executive authorities and have the power to cancel either of them or rule them unconstitutional if they are deemed unconstitutional. These legislations or regulations include matters that contravene the Constitution.⁶

Although constitutional oversight of laws and regulations in the former form is the well-known and prevailing form in most countries of the world,⁷ there is another form that is applied only in some countries, which is constitutional oversight of legislative oversight, meaning that if the legislator neglects to regulate one of the fundamental rights stipulated in the constitution,⁸ the constitutional court

⁴ See G. Nassar, *Legislative performance of the People's Assembly and judicial review of the constitutionality of laws in Egypt*, Cairo, Dar Al-Nahda Al-Arabia, 2011, pp. 40–46; J. Arlrtaz, *L'incompétence négative à l'étranger*, "Les nouveaux Cahiers du Conseil Constitutionnel" 2015, 46(15).

⁵ For more details, see L. Sólyom, *The Role of Constitutional Courts in the Transition to Democracy: With Special Reference to Hungary*, "International Sociology" 2003, 18(1); M. Abu Halima, *Judicial Review over the discretionary power of the legislator: A Comparative Study*, Cairo, Dar Al-Nahda Al-Arabiya, 2015; Y. Abdullah, *The Situation of the Constitutional Court in Kuwait Regarding the Oversight of the Constitutionality of Legislative Omission, "A Rooting Analytical Comparative Study"*, "Journal of Law for Legal and Economic Research" 2023, 1(1).

⁶ See K. Aboelazm, *The Constitutional Framework for Public Policy in the Middle East and North Africa (MENA) Countries*, "International Journal of Public Law and Policy" 2021, 7(3), pp. 187–203; A. Al-Murr, *Judicial Review of the Constitutionality of Laws and Regulations in Their Main Features*, Rene Jean Debuy Center for Law and Development, 2003; E. Al-Ghafloul, *The Idea of Lack of Negative Jurisdiction for the Legislator (Comparative Study)*, Cairo, Dar Al-Nahda Al-Arabiya, Second Edition, 2003.

⁷ See G. Haji, *The Judicial Policy for the Constitutional Supreme Court: A Comparative Study*, Cairo, Dar Al-Nahda Al-Arabia, First Edition, 2012; G. AbdelRahman, *The Judicial Review on the Legislative Omission: An Analytical Comparative Study*, Cairo, Dar Al-Nahda Al-Arabia, 2016.

⁸ See H. Shahat, *The Constitutional Protection for the Right of Equality: A Comparative Study*, Doctoral thesis, Faculty of Law, Cairo University, Egypt, 2004; H. Hasan, *Processing the parliament's refusal to practice its legislative jurisdiction in positive law*, "Journal of Al-Mohaqiq El-Haly for Legal and Political Sciences" 2015, 7(4); K. Belgilaly, *The discretionary power of the legislator: A Comparative Study*, Doctoral thesis, Faculty of Law and Political Science, Abi Bakr Belkaid University, Tlemcen, Algeria, 2016–2017.

has the authority to rule that the neglect of regulating the right is unconstitutional, as this omission constitutes a waste of the provisions of the constitution.⁹

Portugal and South Africa are considered among the countries with organised constitutional oversight of legislative omissions.¹⁰ They are up there among the pioneers in this field¹¹. Still, this oversight entails many consequences and repercussions that may affect the relationship of the constitutional judiciary with the legislative authority, and all of this is within the framework of the principle of separation of powers; this type of oversight also affects the quality of legislation and many other matters.¹²

This study seeks to answer the following research questions:

- a. How is constitutional oversight of legislative omissions organised in Portugal?
- b. What are the constitutional mechanisms for monitoring legislative omissions in South Africa?
- c. What are the most critical repercussions of constitutional oversight or legislative omission of the constitutional protection of rights and freedoms?
- d. What are the most critical repercussions of constitutional and legislative oversight on legislation quality and integrity?
- e. What are the most critical repercussions of constitutional oversight of legislative oversight on the relationship of the constitutional judiciary to legislative authority?
- f. What are the most critical repercussions of constitutional oversight of legislative oversight on the constitutional judiciary?

Methodology

This paper makes use of several approaches, as it involves the application of a comparative method to compare Portugal and South Africa in terms of their organisation of constitutional oversight of legislative omissions, the competent authority for

⁹ See K. Zahra, *Legislative Omission and Constitutional Oversight on It*, Master Thesis, Abi Bakr Belkaid University, Algeria, 2013; L. Csink, P. Pasczolay, *Hungarian National Report for the 14th Conference of Constitutional Courts on "Problems of Legislative Omission in Constitutional Jurisprudence"*, Vilnius, 2008.

¹⁰ See M. Melchior, C. Courtoy, *L'omission législative dans la jurisprudence constitutionnelle, Rapport établi pour la Cour constitutionnelle de Belgique*, 4 décembre, 2007; M. Qasim, *The Monitoring of Legislative Omission by the Constitutional Judiciary, A Comparative Study*, Doctor's thesis, School of Law, University of Reading, UK, 2019.

¹¹ See M. Al-Aboudi, *Security Measures and Their Repercussions on the Personal Freedoms of Individuals*, Security Information Center, Police College, Egypt, 2010.

¹² See M. Al-Najjar, *In Judging the Unconstitutionality of Legislative Omission (Judicial Unconstitutionality Conditional)*, "Al-Dusturiyah Magazine" 2010, 17(8).

this role, as well as the scope of constitutional oversight of legislative omissions, and the authority of the constitutional courts in matters related to omissions. Legislative, in addition to evaluating the constitutional oversight of the legislative omission in each of them. An analytical approach has also been adopted to identify the most critical consequences of constitutional oversight of legislative oversight to answer the research questions.

Constitutional regulation of control over legislative omissions in Portugal

The system of constitutional oversight stipulated in the Constitution of the Republic of Portugal is characterised by a high degree of complexity¹³ due to the different types of oversight it encompasses. There is what is known as prior or preventive supervision and other abstract – or subsequent – supervision. Finally, there is oversight of the constitutionality of the legislative omission.¹⁴

The presence of legislative omission in Portugal means that there are rules stipulated in its constitution that have not been put into effect, violating the constitutionally established obligation.¹⁵ Therefore, Article (279) of the Portuguese Constitution entrusted the Revolutionary Council¹⁶ with the necessary powers to verify cases of legislator failure to comply with the provisions of the constitution. This is done by enacting the legislation required to implement the provisions of the new constitution.¹⁷ However, this authority became an inherent jurisdiction of the Portuguese Constitutional Court under Article 283 of the Constitution as of the effective date of the constitutional amendment issued in 1982.¹⁸

Therefore, the constitutional legislator in Portugal has organised a unique legal procedure that allows the Constitutional Court to monitor the presence or absence of unconstitutional legislative omissions;¹⁹ Article (283) of the Portuguese Consti-

¹³ See M. Amaral, *Modelo português de justiça constitucional. Análise crítica*, “Anuario Iberoamericano de Justicia Constitucional” 2007, 11, pp. 17–40.

¹⁴ See M. Amaral, *Um Tribunal como os outros. Justiça Constitucional e interpretação da Constituição*, “Estudos em Homenagem ao Presidente Rui Moura Ramos” 2016, I, pp. 381–442.

¹⁵ *The relations between the Constitutional Courts and the other national courts, including the interference in this area of the action of the European courts*. Available from: <https://www.confeucnstco.org/reports/rep-xii/Conclusions%20finales-EN.pdf>; M. Amaral, *Problemas da Judicial Review em Portugal*, *Themis*, “Revista da Faculdade de Direito da UNL” 2005, VI(10).

¹⁶ See case no. 39/1984, Tribunal Constitucional Portugal, Portuguese Constitutional Court.

¹⁷ See case no. 84/1984, Tribunal Constitucional Portugal, Portuguese Constitutional Court.

¹⁸ Portuguese Report for the 14th Congress of the Conference of European Constitutional Courts on *Problems of Legislative Omission in Constitutional Jurisprudence*, Vilnius, 2018.

¹⁹ *Ibidem*.

tution issued in 1976 and amended in 2005 stipulates “unconstitutionality due to legislative negligence: 1 – the Constitutional Court must monitor and review any violation or non-compliance with the provisions of the Constitution, resulting from negligence to take the necessary legislative measures to put the constitutional rules into effect.” This is based on a request from the President of the Republic, the Ombudsman, or the heads of regional legislative councils in case of violations of one or more of the rights of the independent restricted units. 2 – the Constitutional Court must, whenever it concludes that there is an unconstitutional legislative omission, prohibit the legislative body competent to do so”.²⁰

It is clear from the above that the Portuguese Constitution has adopted the idea of central oversight over the constitutionality of legislative oversight by assigning the Constitutional Court alone to carry out this oversight. However, the Portuguese Constitution did not stipulate any special procedures for monitoring legislative negligence. This was limited to the legal texts regulating the conditions and methods of litigation before the Constitutional Court. Therefore, the aspects of constitutional oversight over legislative negligence in Portugal will be addressed as follows:

A special authority to instigate oversight of legislative omissions

Article 283 of the Constitution of the Republic of Portugal assigned the jurisdiction to initiate oversight of the constitutionality of legislative oversight to three political bodies: the President of the Republic, the mediator of the people or justice, and the heads of regional popular councils. Article 134 of the Portuguese Constitution also stipulates that the President of the Republic is personally responsible for requesting the Constitutional Court to decide whether the provisions included or omitted by the legal or essential texts are unconstitutional.²¹

Moreover, although the Portuguese Constitution granted the heads of the regional popular assemblies the authority to initiate constitutional oversight over legislative omissions, as previously explained, it did not make this right absolute. Instead, it restricted its use by the necessity that the legislative omission, in this case, violates one or more established rights. Constitutionally independent territorial units;²² therefore, a constitutional lawsuit filed by the heads of autonomous

²⁰ See Article 283 of the Portuguese Constitution.

²¹ For more details, See case no. 39/1984, Tribunal Constitucional Portugal, Portuguese Constitutional Court. Also see case no. 84/1984, Tribunal Constitucional Portugal, Portuguese Constitutional Court.

²² See Portuguese Report for the 14th Congress... Also see case no. 84/1984, Tribunal Constitucional Portugal, Portuguese Constitutional Court.

regional councils challenging the constitutionality of the legislative omission unrelated to one of its constitutionally guaranteed rights will not be accepted.²³

It is also not permissible for individuals or the trial judge – like other forms of constitutional oversight in Portugal – to initiate constitutional oversight over legislative omissions, as the constitutional legislator does not recognise this right.²⁴ Although individuals have been allowed to resort to the Ombudsman to protect their rights and freedoms from the violation resulting from the neglect of public authorities to carry out their duties, in this case, the Ombudsman may refer the matter to the Constitutional Court to exercise its oversight over the alleged oversight.

Accordingly, the constitutional legislator in Portugal has limited those competent to bring a direct suit of unconstitutionality of legislative omission before the Constitutional Court to the persons referred to in their political capacity and has not granted individuals the right to file a direct suit of unconstitutionality before the court to dispute the legislative omission that violates their rights and freedoms. Ordinary courts can refer a legislative oversight that becomes apparent to them while examining a case before them to the Constitutional Court, given that the constitutional legislator did not recognise this status for it, in addition to having deprived the Constitutional Court itself of the authority to address the legislative oversight that it discovers while exercising its jurisdiction.²⁵

The body responsible for monitoring legislative omissions

Before the constitutional amendment issued in 1982, the Revolutionary Council monitored legislative omissions. Under this amendment, the Portuguese constitutional legislator established the Constitutional Court²⁶ and assigned it alone to monitor the constitutionality of legislative omissions.²⁷ Therefore, constitutional

²³ For more details, See case no. 39/1984, Tribunal Constitucional Portugal, Portuguese Constitutional Court. A.R. Brewer-Carías, *Judicial Review of Legislation And The Legislator*, [in:] *Constitutional Courts as Positive Legislators: A Comparative Law Study*, Cambridge 2011, pp. 13–40.

²⁴ See A.R. Brewer-Carías, *Constitutional Courts As Legislators On Matters Of Judicial Review*, [in:] *Constitutional Courts as Positive Legislators: A Comparative Law Study*, Cambridge 2011, pp. 173–192. H. Abdelkarim, T. El-Emara, *The Social Influences of Legislative Omission*, “Journal of Legal Sciences” 2019, 34(2).

²⁵ See A.R. Brewer-Carías, *Constitutional Courts As Positive Legislators In Comparative Law*, [in:] *Constitutional Courts as Positive Legislators: A Comparative Law Study*, Cambridge 2011, pp. 5–12; S. Abdel-Badi, *The Limits of the Constitutional Judge’s Review of the Legislator’s Discretionary Power (Comparative Study)*, Cairo, Dar Al-Nahda Al-Arabiya, 2019.

²⁶ See A.R. Brewer-Carías, *Synthesis Report: Constitutional Courts As Positive Legislators*, [in:] *Constitutional Courts as Positive Legislators: A Comparative Law Study*, Cambridge 2011, pp. 889–924; R. Shaban, *The Judicial Review on the Legislative Omission: A Comparative Study*, Doctoral thesis, Faculty of Law, Helwan University, Egypt, 2021.

²⁷ See Y. El-Gamal, *The Constitutional Judiciary in Egypt*, Cairo, Dar Al-Nahda Al-Arabiya, 2000.

oversight of legislative omissions in Portugal is considered central oversight, unlike other non-centralised oversight forms over the constitutionality of laws and regulatory decisions carried out by public law courts. This is because the Portuguese Constitution did not limit the jurisdiction of the Constitutional Court to protecting only the provisions of the constitution. Instead, it was assigned some functions and competencies in which legal considerations are mixed with political capacity, such as adjudicating disputes related to the internal elections of political parties.²⁸

Therefore, ordinary courts in Portugal can exercise oversight over the constitutionality of legislation or regulations that violate the provisions of the constitution. Still, they cannot supervise the constitutionality of legislative omissions since this oversight is entrusted to the Portuguese Constitutional Court alone.²⁹

This is even though the constitutional legislator in Portugal has allowed the Ombudsman – if citizens complain to them about the negligence of the public authorities, which is considered a reason for not activating their constitutional rights – to recommend to the concerned authority to amend the legal rules that prevent the implementation or adoption of a constitutional text or to adopt the necessary legal standards. The power to exercise the rights stipulated in the Constitution, especially in the case of partial legislative omission,³⁰ but the jurisdiction to decide on the constitutionality of this omission remains vested in the Constitutional Court alone,³¹ which may verify the presence or absence of a legislative omission³² if the matter is referred to it by the Ombudsman.

²⁸ See M. Al-Janabi, *The Constitutional Judge's Review of Legislative Abstinance*, Cairo, Dar Al-Nahda Al-Arabiya, 2022; See O. Al-Turkmani, *The Oversight Jurisdiction of the Palestinian Constitutional Court on Legislative Abstinance*, "A Comparative Analytical Study. Journal of Sharia and Law" 2022, 36(91).

²⁹ P. Ricardo, *The Portuguese Legal Framework of State Liability for Delayed Justice: The Relevance of ECtHR Case-Law*, "International Journal of Court Administration" 2024, 15(2), pp. 1–6; Also See S. Ali, *The Fact of The Separation of Powers in the Political and Constitutional System in The United States of America*, Doctoral thesis, Faculty of Law, Ain Shams University, Egypt, 1999.

³⁰ See A.R. Brewer-Carías, *Constitutional Courts' Interference With The Legislator Regarding Legislative Omissions*, [in:] *Constitutional Courts as Positive Legislators: A Comparative Law Study*. Cambridge University Press, 2011, pp. 125–172.

³¹ See S. Shandy, *The Administrative Judge's Authorities in Confronting and Filling the Legislative Deficiency in Administrative Law*, a working paper submitted to the second scientific forum of the Arab Union for Administrative Judiciary under the title "The Administrative Judge's Authorities in Directing the Administration and Filling the Shortage of Legislative," Cairo, 8–9 October 2017, working papers of the conference issued by the Arab Federation of Administrative Judiciary.

³² See S. Al-Dughili, *Legislative Omission in the Constitutional Judiciary*, "Mauritanian Journal of Law and Economics" 2018, 25, 2018; S. El-Din, *Necessity regulations and guarantees of judicial Review*, Alexandria, Munsha'at Almaearif, 1986; K. Aboelazm, *The success of the E-voting to Enhance the Political Engagement: A Comparative Study*, "Journal of Law and Sustainable Development" 2023, 11.

Scope of control over legislative omissions

The Portuguese constitutional legislator defined the scope of constitutional control over legislative omission as the omission to take legislative measures, that is, the ordinary laws necessary to put constitutional rules into effect. Therefore, the scope of direct constitutional control over omission is limited to the legislative measures needed to implement the provisions of the constitution. Suppose the constitutional rules effectively achieve the goals that the legislator seeks to execute.³³ In that case, constitutional oversight cannot be raised over legislative oversight, as there is no place to respond to oversight in this case.

Monitoring also extends to omissions attributed to an authority other than the legislative authority. Therefore, if the administration takes no action or refrains from exercising its powers in violation of the provisions of the Constitution, this abstention or omission cannot fall within the scope of direct constitutional oversight of legislative omissions.³⁴ Even administrative or judicial negligence may be based on legislative negligence.³⁵ However, administrative or judicial negligence may be subject to indirect constitutional oversight if the Ombudsman refers to administrative or judicial negligence that violates individual rights and freedoms to the Constitutional Court.

Moreover, the constitutional legislator in Portugal has subjected legislative omissions to constitutional oversight, whether this omission was total or partial. Although legal theorists in Portugal were divided as to when the complete legislative omission that is subject to constitutional oversight occurs, some argued that complete negligence occurred as soon as the time specified in the constitutional text for interference with legislation had passed. Others stipulated – in addition – that the stagnation or passivity of the legislative authority leads to obstructing the implementation of the constitutional plan drawn up by the constituent authority.³⁶

However, the jurisprudence of constitutional law in Portugal is almost unanimous in that starting to take legislative measures towards approving the necessary legal rules to pursue rights and freedoms is not enough to say that legislative

³³ See S. Salman, *Legislative omission and the possibility of imposing judicial review on it in Iraq*, "Journal of the Faculty of Law" 2019, 21(4).

³⁴ A. Azawi, *Criteria for the distribution of competence between the legislative and executive authorities (A comparative study in defining the scope of each of the laws and regulations in the Algerian political system) – Part One*, Algeria, Dar Al-Gharb for Publishing and Distribution, 2011.

³⁵ See: Y. El-Gamal, *op. cit.*, p. 180; K. Aboelazm, *The Development of the President's Authorities in the Egyptian Constitutions*, "Russian Law Journal" 2023, 11(2).

³⁶ See: A. Al-Shimi, *The Review of Legislative Omission from the Supreme Constitutional Court – A Comparative Study*, Cairo, Dar Al-Nahda Al-Arabiya, Third Edition, 2003; K. Aboelazm, *Supreme Constitutional Court Review of the Legislative Omission in Egypt in Light of International Experiences*, "Heliyon" 2024, 10(17).

omissions are not subject to constitutional oversight, as presenting a draft law is not sufficient to justify the negative behaviour of the legislative authority and remove it from the scope of constitutional oversight, if the draft law was not approved;³⁷ however, if the legislative body approved the law, the legislative omission is subject to constitutional oversight, given that the fact of publication is considered outside the control of the parliament.³⁸

The authority of the Constitutional Court regarding legislative negligence

The authority of the Constitutional Court in Portugal, under Article 283 of the Portuguese Constitution, is limited to merely revealing the existence of a case of legislative omission in violation of the provisions of the constitution and then notifying the competent legislative body of this omission,³⁹ to make the legislator aware of their failure to fulfil their constitutional obligations.⁴⁰ Then, it leaves them the freedom to intervene legislatively to put the constitutional rules that were violated due to unconstitutional legislative oversight into practice in a way that achieves the goals desired by the constitutional legislator.

Therefore, the rulings of the Constitutional Court within the scope of legislative omission are nothing more than revealing declarative rulings without any binding effects. The court cannot replace itself with the legislator by establishing the overlooked legislative rule or urging them to act by referring to a specific content or timing.⁴¹ In other words, the Constitutional Court has no choice but to acknowledge the existence or non-existence of the legislative omission,⁴² as the constitutional legislator did not give it any means that would enable it to force the legislator to take the necessary measures to avoid this omission. Therefore, the penalty resulting from the occurrence of an unconstitutional legislative omission in Portugal is limited only to the mere announcement or disclosure of this omission.⁴³

As a result, the Constitutional Court in Portugal ruled that the minimum wage was unconstitutional because of the basic needs of individuals' essential meeting beyond the needs of an unconstitutional lenitive existence omission.⁴⁴

³⁷ For more details, see L. Csink, P. Pasczoly, *op. cit.*, pp. 15–18; K. Aboelazm, *The Role of Judicial Review on the Acts of Sovereignty in Egypt*, "International Journal of Public Law and Policy" 2023, 31(1).

³⁸ For more details, see L. Sólyom, *op. cit.*, pp. 20–25.

³⁹ See A.R. Brewer-Carías, *Synthesis Report: Constitutional Courts...*, pp. 889–924.

⁴⁰ See A.R. Brewer-Carías, *Constitutional Courts As Positive Legislators...*

⁴¹ A.R. Brewer-Carías, *Constitutional Courts As Legislators On Matters...*

⁴² For more details, see L. Sólyom, *op. cit.*, pp. 25–28.

⁴³ See R. Shaban, *op. cit.*, pp. 201–208.

⁴⁴ J. Arlrtaz, *op. cit.*, pp. 27–31.

However, the Constitutional Court resorted to its authority to monitor the constitutionality of legislative omissions – in the context of subsequent oversight – to issue decisions of a normative nature to address regulatory gaps or loopholes,⁴⁵ including what the Constitutional Court ruled in Case No. 143/1995 regarding the unconstitutionality of the text contained therein. The bylaws of the bar association's statute, which prohibits combining public employment with the practice of a legal profession, except for law professors, are based on violating the principle of equality. With a normative ruling, the court decided equality between all professors in the permissibility of combining their jobs with practicing the legal profession, whether they are professors. To teach law or otherwise: this led to the expansion of the exception contained in the contested text to include all professors, whether they teach legal or other subjects.⁴⁶

Evaluation of oversight of legislative omissions in Portugal

Constitutional oversight of legislative oversight in Portugal is a unique contribution by the Constitutional Court to the embodiment of fundamental freedoms, the effectiveness of which depends on legislative rules, given the existence of a unique mechanism for judicial oversight of the risks of legislative oversight in the field of economic and social rights.⁴⁷ Therefore, this oversight is considered an effective mechanism in the hands of the Constitutional Court to ensure that the economic and social rights contained in the Constitution are implemented and to provide their continued guarantee and protection in the legal system.⁴⁸

However, the success of this instrument of constitutional oversight in Portugal depends on the institution of the Ombudsman; Which – together with the President of the Republic – represents the sole referral authority⁴⁹ to the Constitutional Court with regard to oversight of legislative omissions;⁵⁰ the constitutional legislator in Portugal recognises that the Constitutional Court has any positive role in confronting

⁴⁵ See R. Shaban, *op. cit.*, pp. 215–222.

⁴⁶ See H. Abdelkarim, T. El-Emara, *op. cit.*, pp. 143–144.

⁴⁷ J. Arlrttaz, *op. cit.*, pp. 32–33.

⁴⁸ T. Bustamante, E. Bustamante, *Constitutional Courts as Negative/Positive Legislators: The Brazilian Case*, [in:] A.R. Brewer-Carías (ed.), *Constitutional Courts as Negative Legislators*, Cambridge 2011; K. Aboelazm *et al.*, *Robotic Judges: A New Step Towards Justice or the Exclusion of Humans?*, *Journal of Lifestyle and SDGs Review* 2024, 4(4), 2024.

⁴⁹ See also: S. Abboud, *Refusal of the Legislative Authority to Do Its Job*, Master Thesis, Faculty of Law, Alexandria University, Egypt, 2019; W. Al-Shennawy, *The Role of Constitutional Courts as Positive Legislators (A Comparative Analytical Originality Study)*, *Journal of Legal and Economic Research* 2017, 62.

⁵⁰ See Abu E. Halima, *op. cit.*, pp. 34–36; See K. Aboelazm, *The Role of Digital Transformation in Improving the Judicial System in the Egyptian Council of State: An Applied Study from a Comparative Perspective*, *Journal of Law and Emerging Technologies* 2022, 2(1), 2022, pp. 11–50.

legislative omissions and treating them judicially, and limits its oversight role to simply verifying the conditions for the existence of unconstitutional legislative omissions, then notifying the legislative authority of this omission so that it can intervene to enforce the provisions of the constitutional texts,⁵¹ and did not give it the right to include in its ruling the legal rules necessary to remedy a legislative omission, or to set a deadline within which such omission must be fixed;⁵² the legislator also did not indicate the effect of the legislative authority's refusal to address the legislative omission after being notified by the Constitutional Court of this omission.⁵³

As a result, the constitutional regulation of oversight of legislative omissions in Portugal has limited its effectiveness, given that the constitutional judge has no authority to confront legislative omissions themselves. Their role is limited to merely revealing the existence of unconstitutional legislative omissions and notifying the legislative authority of this omission in a way that makes decisions. The Constitutional Court is locked into legislative authority if it wants to use or neglect it. Therefore, the role of the constitutional judge is nothing more than an advisory role to the legislator, far from the idea of monitoring the constitutionality of laws.⁵⁴

The Constitutional Court in Portugal has no legal means to force the legislative authority to intervene to address the legislative omission. Thus, constitutional rights remain without absolute protection until the legislator intervenes to address this unconstitutional omission,⁵⁵ given that the ruling declaring the legislative omission unconstitutional cannot be implemented. Bringing about any changes in the legal system and its effectiveness depends on the National Assembly's initiative to address the legislative omission on its own and at the time it determines that.⁵⁶ In addition, limiting the scope of direct constitutional oversight to legislative negligence without administrative and judicial negligence could compromise fundamental rights and freedoms⁵⁷ by violating some of their aspects in the regulatory texts issued by the subsidiary legislative authority.

⁵¹ See K. Aboelazm, *The Debatable Issues in the Rule of Law in British Constitutional History and the influence in the Egyptian Constitutions*, "International Journal of Doctrine, Judiciary and Legislation" 2023, 4(2), 2023, pp. 521–568; See M. Al-Najjar, *op. cit.*, pp. 38–41.

⁵² See O. Al-Turkmani, *op. cit.*, p. 39.

⁵³ See A. Al-Dulaimiu, *From Negative to Positive Legislator? Response to Unconstitutional Legislative Omission as a Case Study in the Changing Roles of Constitutional Courts*, Thesis of Doctor, School of Government & International Relations, Griffith University, Australia, Queensland, 2018, pp. 58–62; K. Aboelazm *et al.*, *Public-Private Partnership: A New Policy to Ameliorate the Quality of Public Utility Services to the Public*, "Journal of Lifestyle and SDGs Review" 2023, 4(4).

⁵⁴ See S. Ali, *op. cit.*, pp. 40–41.

⁵⁵ See A. Al-Dulaimiu, *op. cit.*, pp. 65–66.

⁵⁶ See O. Al-Turkmani, *op. cit.*, pp. 41–43.

⁵⁷ See A. Al-Dulaimiu, *op. cit.*, pp. 70–74.

However, some jurists⁵⁸ believe that this oversight is not devoid of all power despite the weakness of constitutional oversight of legislative negligence in Portugal. The mere threat of a ruling by the Constitutional Court condemning one of the legislative negligence cases is sufficient to bring the legislative authority back onto the right path. Instead, simply taking procedures to challenge the unconstitutionality of the omission may be enough to urge the legislator to intervene legislatively;⁵⁹ In addition, as of the date on which the Constitutional Court announces the legislative omission, the legislature's discretion to intervene with legislation is no longer possible to adhere to, or it is not obligated to intervene.⁶⁰

Legal regulation to control legislative omissions in South Africa

Social and economic rights are considered one of the pillars of building the new democracy in South Africa after 1994⁶¹, which had a significant impact in urging the constitutional legislator to include a set of rights that represent the constitutional obligations of the parliament and the President of the Republic, in the promulgated Constitution of the Republic of South Africa. 1996,⁶² to ensure respect, protection, promotion, and development of fundamental rights,⁶³ and the fulfilment of these obligations requires a positive stance on their part to put these rights into practice.⁶⁴ Therefore, the failure of the legislator to fulfil these obligations leads to a violation of constitutional standards.⁶⁵

In the implementation of this, the Constitutional Court of the Republic of South Africa, in its Decision No. 20 of 2012, placed the responsibility of the public authorities for carrying out their duties in detaining prisoners in a safe place that guarantees their right to human dignity and provides them with appropriate health care services that allow every prisoner to enjoy a healthy life, and that the negligence of public authorities in the implementation of these duties violates the provisions of the constitution and the law, and their responsibility arises from a failure to

⁵⁸ *Ibidem*, s. 75.

⁵⁹ See M. Qasim, *op. cit.*, pp. 80–86.

⁶⁰ For more details, see A.R. Brewer-Carías, *Constitutional Courts As Positive Legislators In Comparative...*

⁶¹ See A. Idris, *Suitability Review in the Constitutional Judiciary: A Comparative Study*, Cairo, Dar Al-Nahda Al-Arabiya, First Edition, 2011.

⁶² A. Al-Murr, *op. cit.*, p. 97.

⁶³ See A. Azawi, *op. cit.*, pp. 56–57.

⁶⁴ See R. Shaban, *op. cit.*, pp. 199–203.

⁶⁵ See M. Melchior, C. Courtoy, *op. cit.*, p. 83.

respect the rule of law. This is based on the fact that the state has a positive constitutional obligation under Article 7/2 of the constitution to work to protect the rights contained in the Bill of Rights and that the state failed to provide a health care system for prisoners that would enable them to exercise their rights to human dignity and physical integrity, and to be detained in prison. Conditions consistent with the right to human dignity stipulated in the constitution, including ensuring that they practice sports and providing adequate housing, nutrition, and medical treatment at state expense, have failed to fulfil its constitutional obligations.⁶⁶

To ensure that the President of the Republic and the parliament fulfil their constitutional obligations, Article 167/4/AH of the Constitution of the Republic of South Africa, issued in 1996 and amended in 2013, stipulates that the Constitutional Court has exclusive jurisdiction to determine whether the parliament or the President of the Republic has violated a constitutional obligation.⁶⁷ This means that the court has the authority to declare the parliament or the President of the Republic in breach of their legislative obligation in some issues.

Now, the legal organisation for oversight of legislative omissions in the Republic of South Africa will be addressed, and this oversight will be evaluated as follows:

Legal regulation to control legislative Omissions

The text of clause (e) of the fourth paragraph of Article 167 of the Constitution of the Republic of South Africa shows that the constitutional legislator has authorised the Constitutional Court alone to monitor the breach by the parliament or the President of the Republic of their obligation to legislate on some issues, whether the breach was total, by abstaining from legislation altogether, or Partly by organising the legislative issue in a way that contradicts the provisions of the Constitution.

Accordingly, the concept of legislative negligence in South Africa differs from that in Portugal, as the constitutional legislator in South Africa considered the failure of the parliament or the President of the Republic to comply with the obligations imposed by constitutional texts as legislative negligence that violates the constitution.⁶⁸

However, the constitutional legislator in South Africa did not grant persons or ordinary courts the right to raise the jurisdiction of the Constitutional Court to monitor legislative omissions on the occasion of a dispute before the ordinary courts, like other forms of constitutional oversight,⁶⁹ which means that the Constitutional

⁶⁶ See M. Qasim, *op. cit.*, pp. 182–193.

⁶⁷ See M. Melchior, C. Courtoy, *op. cit.*, pp. 91–92.

⁶⁸ See A. Al-Murr, *op. cit.*, pp. 51–52.

⁶⁹ See S. Salman, *op. cit.*, pp. 18–21.

Court exercises its jurisdiction to monitor legislative omissions on its initiative – and in the exercise of its authority to monitor constitutionality in general.⁷⁰

However, some jurists⁷¹ have argued that there is nothing in the legal organisation of constitutional oversight in South Africa that prevents persons from resorting to the Constitutional Court by requesting a determination that the parliament or the President of the Republic has violated their constitutional obligations whenever the trial court has authorised them to do so; or what prevents the case from being referred to court by the regular courts or the Supreme Court of Appeal, considering that the legislative omission violates the provisions of the Constitution like other constitutional violations.

The scope of the Constitutional Court's jurisdiction in South Africa to monitor legislative oversight is not limited only to the parliament's breach of its legislative obligations but also extends to include the President of the Republic's breach of their constitutional obligations. However, the constitutional legislator did not clarify the legal impact resulting from the failure of the parliament or the President of the Republic to fulfil their constitutional obligations,⁷² and in particular, the authority of the Constitutional Court regarding this violation. Therefore, the court can issue a ruling after the constitutionality of the legislative omission. It may also call upon the competent authority to address this omission.⁷³

In this regard, some legal scholars⁷⁴ have argued that the Constitutional Court may complete the legislative text by introducing overlooked legal provisions until the text becomes consistent with the provisions of the constitution. Especially in protecting economic and social rights, the court's role was not limited to simply ruling it unconstitutional. Instead, the court may intervene, order preventive measures, or go beyond the contested text and establish fair and equitable procedures according to the case before it.⁷⁵

The policy of the Constitutional Court in South Africa has varied in addressing legislative omissions. Sometimes, it is satisfied with revealing the existence of the omission and stopping declaring the invalidity of the censored text for a certain period to allow the legislator to address the omission. At other times, it intervenes directly to address the omission itself. In its decision No. 10 of 1999, Article 25/5 of the Foreigners' Entry and Residence Law No. 96 of 1991, amended in 1996, was unconstitutional, which stipulates the right of foreign spouses to obtain permanent

⁷⁰ See S. Al-Dughili, *op. cit.*, p. 23.

⁷¹ See J. Arlrtaz, *op. cit.*, pp. 17–19.

⁷² See S. Al-Dughili, *op. cit.*, pp. 24–25.

⁷³ See J. Arlrtaz, *op. cit.*, pp. 32–37.

⁷⁴ See S. El-Din, *op. cit.*, p. 26.

⁷⁵ For more details, see L. Sólyom, *op. cit.*, pp. 54–55.

residency in South Africa once they request it without conditions. This is because it neglects to grant this right to homosexual foreigners who have a stable relationship.⁷⁶ Then the court required that the text of the article above be read as including the phrase “Life partnership or partner, in a permanent same-sex” .⁷⁷

Whereas, in its decision issued on March 11, 2004, in Case No. 40 of 2003, it annulled the order of the Cape Town High Court and replaced it with its order by acquiring the word “spouse” mentioned in Inheritance Law No. 81 of 1987 to include the remaining partner of a monogamous Islamic marriage; the phrase “surviving spouses” contained in the Surviving Spouses Welfare Law No. 27 of 1990 should consist of the surviving partner of a monogamous Islamic marriage, based on the fact that the omission of income from the surviving partner of Muslim spouses if there are no polygamous spouses as a beneficiary of the provisions of The two laws above constitutes a violation of the right to human dignity and a violation of the principle of equality.⁷⁸

It also recently stated in its decision issued in December 2005 in Cases No. 60 of 2004 and 10 of 2005 that the general legal definition of marriage – and in particular Marriage Law No. 25 of 1961 – contradicts the provisions of the constitution since it neglected to allow same-sex couples to enjoy the rights and benefits they enjoy. Couples of different sexes stopped declaring the invalidity of the texts containing this definition for twelve months from the date of issuance of the decision to allow the parliament to correct these defects. If the parliament does not fix it within this period, Section (30/1) of the Marriage Law No. 25 of 1961 must be read immediately so that the phrase “or the spouse” means the spouse appearing after the words “or the spouse” in the marriage contract.⁷⁹

Assessing oversight of legislative omission in South Africa

Some in jurisprudence⁸⁰ have argued that the legal regulation of oversight of legislative negligence in South Africa has adopted the maximum form of oversight of the constitutional breach resulting from silence or legislative negligence, as it did not leave any room for freedom for the legislative authority. Thus, the decision to legislate remains in the hands of the judicial authority. In the hands of the legislative authority, which is a far cry from the function of monitoring the constitutionality of laws carried out by the constitutional judiciary, as it is primarily a legal function.

⁷⁶ See H. Abdelkarim, T. El-Emara, *op. cit.*, p. 73.

⁷⁷ See S. Al-Dughili, *op. cit.*, p. 30.

⁷⁸ For more details, see L. Sólyom, *op. cit.*, p. 57.

⁷⁹ See H. Abdelkarim, T. El-Emara, *op. cit.*, p. 76.

⁸⁰ See M. Qasim, *op. cit.*, pp. 195–196.

The tendency of the Constitutional Court in South Africa to complete the legislative deficiency makes it a constitutional judge and a partner of the legislative authority in exercising legislative jurisdiction.⁸¹

However, the exercise of this role by the Constitutional Court in South Africa is not unsupported by the texts of the Constitution, as the constitutional legislator itself has generally authorised the courts to develop the principles of public law to implement any right stipulated in the Charter of Rights⁸² if the legislation does not contain texts that put this right into effect. This justifies the Constitutional Court's approach to completing the shortcomings in the legislative text.

The repercussions and effects of constitutional oversight on legislative omissions

Although the jurisprudential attempts made so far have been unable to address this complex mechanism of constitutional oversight adequately, it cannot be denied that oversight of legislative oversight is considered a tool for achieving a balance between public authorities,⁸³ which leads to the stability of legal relations. It also ensures that the legislative authority is confronted with negativity regarding the activation of constitutionally stipulated rights and freedoms. In addition, it represents a tool for maintaining the quality and integrity of legislation.

Despite the advantages of constitutional oversight over legislative oversight, this type of oversight is surrounded by many concerns, given that bypassing the constitutional judge in undertaking that oversight leads to tension in the relationship between the constitutional judiciary and the legislative authority. It also weakens society's confidence in the constitutional judiciary's rulings, undermining its competence to exercise constitutional oversight.

Conclusion

The constitutional and legal frameworks for legislative oversight in Portugal and South Africa have been presented as the various mechanisms enabling the Constitutional Court to monitor legislative oversight. The paper also shows the most critical repercussions that resulted from the application of the constitutional over-

⁸¹ See S. Al-Dughili, *op. cit.*, pp. 33–35.

⁸² For more details, see L. Sólyom, *op. cit.*, pp. 60–63.

⁸³ See M. Qasim, *op. cit.*, s. 197.

sight system over legislative oversight and the impact of these repercussions on rights and freedoms, as well as their impact on the quality and integrity of legislation, as well as the effects of this oversight on the relationship between the constitutional judiciary and the parliament. The study uses two basic approaches: a comparative approach to compare South Africa and Portugal and an analytical approach to determine the repercussions of constitutional oversight on legislative oversight. The study sought to answer several research questions that help clarify the mechanisms necessary to activate this oversight.

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