'Law Reform' in Portugal. An Overview

Inês Marinho*, Inês Inverno** & António Manuel Abrantes***

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1. Introduction to the Portuguese legal system

The Portuguese legal system is a Civil Law one, sharing many of the characteristics of a legal system such as the French, the Italian and the Spanish legal systems. As such, its legislative procedure and techniques are usually distinct from those of Common Law jurisdictions, and one of the examples of such differences is precisely regarding that legal reform tools.
The system of government is a semi-presidential one and the form of state is a unitary one, according to article 6 of the Portuguese Constitution. That being said, it should be noted that the archipelagos of Madeira and Azores benefit from a special status under the Portuguese constitutional and legal order, since they possess regional autonomy.

1.1. *Main elements of the Portuguese legislative procedure and process*

The Portuguese legislative drafting process is mixed, undertaken by professional legal drafters at the National Parliament and the Government, as well as by Lawyers and non legal experts in each field. A distinction needs to be made between the government bills/ law proposals to be presented by the government in parliament, and law projects presented by members of parliament (or their political party groups). In the first case, the common practice is that Government bills and their law proposals (to be presented in Parliament) are drafted by the lawyers or professional drafters of the relevant Department who are experts in that field of law, as well as by non-legal experts in the specific field. Overall, and upon entering the governmental legislative procedure, each government bill or law proposal is analysed and reviewed by drafting experts in the Council of Ministers. In the case of law proposals of the Government, and upon entering the legislative procedure of the Parliament, the proposal is again analysed and reviewed by drafting experts of the Parliament. In the second case, law projects presented by members of Parliament are prepared by them (or/and their staff); upon entering the legislative procedure of the Parliament, the projects are analysed and reviewed by experts in drafting within the Parliament.
In the Portuguese jurisdiction, the legislative powers are divided between the National Parliament, the Government, the Regional Assemblies and Regional Government.
The National Parliament has significant legislative power (articles 161, 164 and 165 of the Portuguese Constitution). It has legislative competence in all matters, except those reserved to the Government (article 161, paragraph c) of the Portuguese Constitution). On the other hand, article 164 of the

* Inês Marinho is researcher in the Rules for legislative drafting in Portuguese-speaking countries/regions of the Lisbon Centre for Research in Public Law, at the University of Lisbon School of Law.
** Inês Inverno is research fellow in the Rules for legislative drafting in Portuguese-speaking countries/regions of the Lisbon Centre for Research in Public Law, at the University of Lisbon School of Law.
*** António Manuel Abrantes is an external researcher in the Rules for legislative drafting in Portuguese-speaking countries/regions of the Lisbon Centre for Research in Public Law, at the University of Lisbon School of Law, and a guest lecturer at the Católica Lisbon School of Law.

Portuguese Constitution lists the matters of exclusive competence ('*reserva absoluta*') of the National Parliament (e.g. election of the state organs, the referendum regimes, national defence). Finally, article 165 of the Portuguese Constitution lists the matters of shared competence between the National Parliament and the Government (e.g. state and capacity of persons, rights, liberties and freedoms, taxes and fiscal system, monetary system). Under this article, an authorization law can be passed so that the Government can legislate in the same matters, although it is an explicit authorization which limits considerably the Government's leeway. This is the reason why the Portuguese Constitution refers to this competence as a non-absolute competence ('*reserva relativa*').

The Government in Portugal also has general legislative power, as per Article 198 of the Portuguese constitution. This legislative power, although extensive, is in fact limited by the division of legislative powers mentioned above (mainly in Articles 161, 164, 165 and Articles 197 and 198). Pursuant to what was already explained, the government may adopt decree-laws on all subject matters which are not included in the 'reserved competence' of the Parliament (*cf*. subparagraph a) of No. 1 of Article 198). Also, as mentioned above, the Government may however legislate, but upon explicit authorization by law of the Parliament, regarding matters of the non-absolute competence of the Parliament, within strict limits. Additionally, the Government may also legislate, regardless of the reserved competence of the Parliament, when developing the principles or the «general bases of the legal regimes contained in laws that limit themselves to those principles or general bases» (*cf*. subparagraph a) of No. 1 of article 198 of the Constitution)[1], which again has procedural limits. Finally, and mentioned before, the Government may present proposals of law to the Parliament (*cf.* paragraph a) of No. 1 of Article 197 of the Constitution). Since these proposals are adopted by members of Parliament, and, therefore, become a law of Parliament, the limits within articles 161, 164 and 165 do not apply.

As mentioned, Madeira and Azores have a special status under the Portuguese constitutional and legal order, possessing regional autonomy (Article 6 No. 2 of the Portuguese Constitution). The Constitution develops the political and legal framework of these regions in its articles 225 to 234. This framework is further developed at an infra-constitutional level by the statutory laws that are applicable to these regions: Law No. 13/91, from June 5, establishes the Political-Administrative Statute of the Autonomous Region of Madeira, Law No. 2/2009, from January 12, establishes the Political-Administrative Statute of the Autonomous Region of Azores. The enactment of the statutory laws, as well as their amendments, must be approved by the Portuguese Parliament (Assembly of the Republic), following a proposal of the regional legislative assemblies (article 226 of the Portuguese Constitution). Both Madeira and Azores have legislative powers as per Article 228 of the Constitution: on the one hand, article 228 (1) states that «the legislative autonomy of the autonomous regions applies to the matters that are set out in the respective political and administrative statute and do not fall within the exclusive competence of the entities that exercise sovereignty»; on the other hand, article 228 (2) provides that «in the absence of specific regional legislation on matters that do not fall within the exclusive competence of the entities that exercise sovereignty, the current legal norms shall apply in the autonomous regions». In practice this is a rather complex system, as there is no general definition of regional interest, a key concept to delimit the legislative powers of the Autonomous Regions. The legislative powers of Madeira and Azores are exercised by their respective Legislative Assemblies (article 232 of the Portuguese Constitution).

Finally, attention should be given to '*Provedor de Justiça'* (ombudsperson), which is the National Human Rights Institution, as its legal mandate focusses on the protection and promotion of fundamental rights, not only in the search for a just solution in face of actions or omissions by the

[1] This is a rather disputed rule of the Portuguese Constitution. See J. Miranda & R. Medeiros, *Constituição Portuguesa Anotada*, Book II, Coimbra Editora, Coimbra, 2006, pp. 695 *et seq.*

administration. The '*Provedor de Justiça'* takes action in 'law reform' by requesting the revision of legislation (article 281.º, No. 1 paragraph d) of the Constitution of the Portuguese Republic) and the request of constitutional review by omission (article 283.º of the Constitution of the Portuguese Republic).

2. The Portuguese 'Law Reform' system

The Portuguese jurisdiction has no Law Reform Agency as such. 'Law Reform' (including in terms of codification or revision) is generally carried out by the National Parliament, the Government (and its departments), the Regional Legislative Assemblies, the '*Provedor de Justiça' (ombudsman)*, as per the legislative power division presented above. Note should be given special codification, less pursued than Civil Law jurisdiction, codification is one of the traditional forms of legislating in Portugal, although in recent years, less pursued, in comparison with the adoption of specific pieces of legislation and with a more limited scope.

Within the government, special note should be given to the '*Centro de Competências Jurídicas do Estado'* (*JurisAPP*), the department with general competences in legal representation and holding responsibility for giving advice to the Executive on 'law reform' in a more comprehensive manner. In the justice area, the *'Direção-Geral da Política da Justiça' (DGPJ*) also deserves especial mention. It is a department within the Ministry of Justice and its main purpose is to give technical support within the scope of legislative production and legal assessment, to monitor the policies and the strategic planning for the sector, to organise and promote the resort to arbitral courts and to the peace courts as well as to other alternative dispute resolution means, to coordinate the external affairs and the cooperation in the justice area, being also responsible for the statistical data in the Ministry of Justice. The DGPJ is responsible for conceiving, preparing, analysing, evaluating and technically assisting in the implementation of legal initiatives, measures, policies and programmes within the Ministry of Justice's scope of competences.

Whilst there is no law reform agency, nor a law reform procedure as such, there are some tools, especially in the context the government's legislative procedure, which have been implemented as of the last decade and before half in order to define priorities and help when considering whether or not a legislative intervention is needed. This is mainly done though impact evaluation procedures.

Additionally, in specific cases, there can be *ad hoc* commissions or working groups, usually created by the government, envisaging broader or major reforms. This was the case in the major legislative amendment to the Criminal and Criminal Procedural Code, which culminated with the reform of both in 2007, and more recently with the reform of the Administrative Procedure Code (2013). These commissions or working groups are composed of legal drafters, professors of law and experts in the specific legal/technical fields.

2.1. Ex ante *impact evaluation*

Currently, the formal procedure for impact evaluation is centred in the *ex ante* impact evaluation, and it pertains to the legislative procedure of the Government. The formal procedure of *ex ante* economic impact assessment is fairly[2] new and was created by Resolution of the Council of Ministers No. 44/2017,

[2] Regardless, it was an issue which was discussed amongst authors, and its importance was underlined by several authors. *See*, for example, C. Blanco de Morais, *Manual de Legística – Critérios Científicos e Técnicos para Legislar Melhor* Verbo, 2007, pp. 330-331, 343-352, 379-463 and 673-675; C. Blanco de Morais, *Guia de avaliação de impacto normativo*, Almedina, Coimbra, 2010, pp. 17-22, 21-24, 27-60 and 69-125; N. Garoupa & V. Vilaça, 'A Prática e o Discurso da Avaliação Legislativa em Portugal', 2006 (October-December), *Legislação: Cadernos de Ciência de Legislação*, No. 44, pp. 5-29; N. Garoupa,

of March 24, which implemented – initially, as a pilot project, and, as of 9th of June of 2018, in full mode – the model of the economic impact assessment, which has been built into the legislative procedure chain (as an integral part of the legislative procedure) and whilst this impact assessment is based on the standard cost model[3].

Prior to the adoption of these resolutions, there were already some mechanisms in order to undertake some form of impact assessments. For example, and mentioned before, the Regulation of the Council of Ministers (RofCM) of the current Portuguese government determined that the Minister of the Presidency of the Council of Ministers and Administrative Modernization has to issue a mandatory opinion on new pieces of legislation adopted by the government which encompass the increase of administrative burdens or other context-related costs (mainly for decree-laws). Moreover, an explanatory note has to be included with every draft of decree-law or proposal of law by the government, and must contain a summary of the burdens to citizens and enterprises.

The coordination of the system of *ex ante* impact assessment relies on the Minister of the Presidency of the Council of Ministers and Administrative Modernization (*cf.* § 2 of the operative part of Resolution of the Council of Ministers No. 44/2017, of March 24). Moreover, a specific unit (Regulatory Impact Assessment Technical Unit - UTAIL) was set up within JurisAPP. The UTAIL provides support to the cabinets of the members of the Government, in liaison with the respective departments, within the context of the impact assessment procedure[4].

It is also noteworthy that a gender impact evaluation procedure was recently adopted, through Law No. 4/2018, of February 9, of the Portuguese Parliament. This new legislation is applicable to both legislative acts of the Government and of the Parliament (*cf.* Article 2 of this law).

2.2. Ex post *impact evaluation*

In Portugal there is no formal institutional procedure for *ex post* evaluation. Notwithstanding, there are cases where *ex post* evaluation is formally required by legal acts[5], as there are cases where this impact evaluation has taken place regarding major policy programs[6], but it is on case-by-case situation.

The aforementioned Resolution of the Council of Ministers No. 74/2018, of June 8, brought some developments in this regard, stipulating that *ex post* evaluations may be undertaken, upon determination of the Secretary of State of the Presidency of the Council of Ministers, but with the specific aim of monitoring the effects of a legal regime in terms of red tape costs. This possibility includes both decree-laws and laws. That being said, it remains a case-by-case analysis, as above mentioned.

2.3. *Legislative and administrative simplification*

Alongside the investment on impact evaluation, over the past years there has been an intense effort in the Portuguese legal system to simplify legislative procedures. As an example, we can point to the '*Simplegis*' programme that was launched by the Portuguese Government in 2010, which pursues three

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Racionalizar a Produção Legislativa em Portugal, in Jornal de Negócios, 22nd of January 2007 (available at http://www.jornaldenegocios.pt/opiniao/detalhe/racionalizar_a_producao_legislativa_em_portugal).

[3] *See* https://www.jurisapp.gov.pt/custa-quanto/

[4] *See* Activity report of UTAIL of 2017, at https://www.jurisapp.gov.pt/media/1019/30012017-utail-relatorio-atividades.pdf, pp. 3-6.

[5] See, e.g, in the last ten years, Article 6 of Decree-Law no 66/2015, of 29th of April (regarding online gambling); Article 19 of Decree-Law no 12/2013, of 25th of January; Article 53 of Decree-Law no 17/2018, of 8th of March.

[6] See, e.g., the evaluation of the measures adopted with programme Simplex+ (2016).

main goals: 1) to simplify legislative procedures, in order to decrease the number of laws and rectifications, and to decrease (and eliminate) eventual delays in the transposition of EU Directives; 2) to improve the citizens' and corporations' access to the existing legislation, by improving their participation and by making the laws more understandable; 3) to improve the application of the legislation, by elaborating Guidelines for their correct implementation and by assessing the impact of their application.
This programme is nowadays included in the general legislation within the transversal legislative and administrative simplification efforts, in 'Simplex' programme[7]. A set of measures must be implemented every year, with the purpose of making the life of citizens and enterprises, and well as their relationship with the administration more streamlined and less administratively burdensome. This yearly programme contemplates the '*Legislar Melhor*' (Better legislation) measure and the '*Revoga +'* (Repeal +) measure.
Regarding the latter, and whilst, indeed, the Portuguese legal system does not have a specialized body in charge of identifying obsolete legislation and drafting Statute Law Repeals Bills, nor a periodic mechanism to review and repeal obsolete primary legislation - such task is carried out by the Parliament or by the Government, in the normal use of their respective legislative powers. Recently the government has undertaken such effort, as evidenced by the recently approved Decree Law No. 32/2018, of May 8[8], which declares that dozens of legislative acts, between 1975-1980, are no longer in force.
Also, within this endeavour of better regulation, and whilst the concept of rewrite within the Common Law System, does not seem to exist in Portugal, it is worth adding that there is a practice which has similar characteristics to this tool: the practice of writing summaries of the content of the legislation, in simple plain Portuguese and English. These summaries are written by '*Imprensa Nacional - Casa da Moeda*, S.A.' (INCM) and are available in the database '*Diário da República Eletrónico*', with free and open access to the public.

3. Challenges

There are, of course, challenges due to this rather decentralized system of legislating and of undertaking legislative changes and 'law reform'. But many of them are being addressed by more dialogue between entities with legislative powers and through the evaluation impact mechanisms and the legislative simplification programmes being executed, mainly though the government.
Additional challenges derive from the fact that there is no specialized body in charge of consolidating existing legislation (although one of the most important tools for consolidating existing legislation consists in the republication of a law, following its amendment by another law. The republished version of the revised law is inserted into an Annex to the revising law. This procedure is mandatory in some specific cases provided for in article 6 of Law 74/98), which means that sometimes it is not entirely clear which legal text is in force or it demands from the citizen or the enterprise a rather complex interpretation process.
In this context, also, legal restatement has a meaning in the Portuguese legal order that is different from the meaning that it has in jurisdictions under the Common Law System, since this tool is mostly used in the sense of arranging consolidated texts of existing enactments in order to improve general accessibility to the law. This practice is carried out both in the public and in the private sector and it may assume two

[7] https://www.simplex.gov.pt/
[8]https://dre.pt/web/guest/legislacao-consolidada//lc/115530796/201807060100/exportPdf/normal/1/cacheLevelPage?_LegislacaoConsolidada_WAR_drefrontofficeportlet_rp=indice

different forms. On the one hand, legal restatement may assume the form of presenting to the public the updated version of a specific law at a certain moment. This is mostly done through the means of digital databases, which may be operated by public entities (see, for instance, the database '*Diário da República Eletrónico*' operated by '*Imprensa Nacional-Casa da Moeda*, S.A.' (INCM), or the database '*Legislação*' operated by the Attorney General's Office of the Lisbon District, both with free access to the public) and private entities (see, for example, the databases '*DataJuris*' or '*Jusnet*', which possess a restricted access and are operated by private corporations). All these databases are meant to present to the public the exact version of the legislation that is in force at that moment (as well as the changes that it has undergone), aiming at making the law more accessible to the citizens. On the other hand, it may assume the form of a private codification that is framed for the dissemination of the existing legislation in some specific areas of law. This practice is exclusively undertaken by legal publishers in the private sector, through the means of publication of compendia of legislation in certain areas of law (e.g. publication of compendia of legislation that complement the Portuguese Legal Codes, or publication of compendia of European and international legislation). These compendia are designed to improve accessibility to the ordinary citizen of existing legislation within certain areas of law.

Nonetheless, the complications involved (for example, tracking recent amendments) may still prove a challenge to such citizens.

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