

# Portugal

## *La Cour Suprême de Justice du Portugal*

[La Cour Suprême de Justice](#) [1]

## Historical Summary Review and Attributions

*in the 180 Years of Separation of Powers*

**(1821-2001)**

### **The Revolution of 1820 : Separation of powers**

When proclaiming the separation of powers and assigning the exercise of judicial power exclusively to judges, the "Political Constitution of the Portuguese Monarchy, established by the general extraordinary and constituent courts, congregated in Lisbon in the year 1821», made way for the remodeling of the Justice system in force until then. Such constitutional text, which was finished on September 23, 1822, offered Portugal the consecration of the establishment of a Supreme Court of Justice on the top of the new arising judiciary organization.

The 1820 Revolution left the Court's high tribunals behind ? which dome was the Court's Tribunal itself, located at the monarch's official residence for centuries ? which unfolded into different jurisdictional institutions, and of which we may point out the following three, due to their importance :

State Council, created in 1562 by Cardinal D. Henrique, to handle State affairs, which elements had the title of Conselheiros (?Council Members?) ;

Mesa da Consciência e Ordens (Table of Conscience and Orders), a royal tribunal created by King D. João III, on 1532, to deal with matters regarding the conscience of monarchs, and matters related to religious and military orders, which members also had the title of Conselheiros ;

Desembargo do Paço (Palace Justice), the Kingdom's supreme court, thrown into relief by King D. João II, and which had been being regulated from 1533, constituted by magistrates named Desembargadores, constituted by a President, a Mesa do Desembargo (Table of Justice), Repartição das Justiças e do Despacho da Mesa (Office of Justice and of the Table's Decision), and Repartição das Comarcas (District Office).

Under these institutions, there were the Relações Reinóis (or da Metrópole) ? Kingdom's (or Metropolis?) Courts of Appeal, thus constituted

Casa da Suplicação (House of Pleading), a second instance court which was constituted by the Desembargadores da Mesa Grande (Desembargadores of the Grand Table) ? presided by the Regedor das Justiças (Justice Alderman) ? and Mesa dos Desembargadores Extravagantes (Table of the Extravagant Desembargadores) ? which magistrates did not belong to the Staff ? as well as the Mesa dos Agravistas (Table of Judges judging the appeals of agravo), Mesa da Ouvidoria do Crime (Table of Crime Judges), Juízos e Ouvidorias (Chambers and Ouvidorias), which comprised the districts of the Southern half of the Country, as well as overseas territories, with the exception of Brazil and India (this House would later become Lisbon's Court of Appeal ? Tribunal da Relação de Lisboa, and it had the task to annually promote the Day of Justice) ;

Casa da Relação do Porto (Porto's House of Appeal), inheritor to the Casa do Cível de Lisboa (Civil House of Lisbon),

composed by a Governor, a Main Registry, an Auditing Office, an Executing Office and a Treasury, comprising the districts of the Northern half of the Country.

There also were the Relações Ultramarinas (Overseas Courts of Appeal), which covered the territories of India (one) and Brazil (four) :

Court of Appeal of India or Goa, founded in 1544 ;

Court of Appeal of São Salvador da Baía, which first Rules of Procedure are dated 1609 ;

Court of Appeal of São Sebastião do Rio de Janeiro, established on 1751 and changed into the Casa da Suplicação do Brasil (Brazil's House of Pleading) in 1808 ;

Court of Appeal of São Luís do Maranhão, created in 1812 ;

Court of Appeal of Vila do Recife de Pernambuco, created in 1821.

### **The role of earlier institutions as regards the Supreme Court of Justice**

Those were therefore the Kingdom's main high courts at the time the independence of Brazil was being planned, and the 1822 Constitution prepared. Some aspects of the above were inherited by the Supreme Court of Justice, and its respective Justices, as regards its structure and organisation, namely :

the condition of supreme court, which belonged to the Desembargo do Paço ;

the naming of President, which was used by the Desembargo do Paço, since the other Courts were run by Governors (Courts of Appeal), and Aldermen (Casa da Suplicação) ;

the title of Conselheiro which was given to the magistrates of the State Council and the Mesa da Consciência e Ordens ;

the robe and insignia of the Desembargadores which were at the Desembargo do Paço and the Casa da Suplicação (although the use of a cape over the robe was added for some time) ;

part of the organic organisation of the Desembargo do Paço, the Casa da Suplicação and the Casa da Relação do Porto, such as the Main Registry, the Treasury and the officership ;

the tradition followed in high courts, where the King's portrait was framed with a baldachin, and put in the Sessions' Room (this custom was later replaced by the permanent hanging of the portrait of Queen D. Maria II) ;

the annual ceremony of Justice Day, which was held at the Casa da Suplicação (later changed into the Official Opening of the Judicial Year).

However, it was not for some years later that the effective renewal of the system took shape. Portugal still had to await the decisive signs of the Liberal Revolution in the following decade, so that the constitutional principle of separation of powers would enter into force.

The Supreme Court of Justice would become the highest institution in the Kingdom's judicial hierarchy. The position of judge was reserved for citizens over 25 years of age, with a degree in Law, who had reached the top of their career, promoted by seniority. The latter would also be appointed by the King, on suggestion by the State Council.

When studying the constitutional text of 1822, one may conclude that the new organisation of the judicial power reflected some aspects taken from the 1791 French Constitution, and included some breakthroughs found in the Spanish Constitution of Cadiz, enacted on 1812. However, and as regards the way one may view the Supreme Court of Justice, its model surpassed the French and Spanish examples of that time, benefiting judicial independence: the Portuguese Supreme Court was conceived at the top of the judicial system, and its members would be magistrates belonging to the judiciary structure itself, whereas in France and in Spain, the high tribunals functioned in connection to the legislative power (the National Assembly and the Courts, respectively).

Therefore, the 1822 Constitution placed the Portuguese Supreme Court of Justice in a position which was extremely innovative for the time, even among previously established European congenerous institutions, as in the cases of Sweden (1789), France (1790), some Italian kingdoms (following the Napoleonic occupation), and Spain (1812), as

well as in the case of the United States of America Federal Supreme Court. In fact, most of Europe's high courts would be created subsequently, as occurred in the United Kingdom (1873/75), in Switzerland (1848), in Italy (1888), in Finland (1918), in Iceland (1920), and in Ireland (1924).

The 1826 Constitutional Chart, granted by King D. Pedro IV, also acknowledged the independence of the judicial power, assigning its exercise to Judges and jurors, and granting the position of magistrate as perpetual and irremovable. When establishing a Supreme Court of Justice, to be installed at the Kingdom's capital, and constituted by judges promoted among the senior judges of Appeal, the 1826 constitutional text retrieved the title of Conselheiro to distinguish those reaching that career top.

### **Mouzinho da Silveira and Silva Carvalho :The accomplishment of the new system**

The Constitution of 1838, concluded two years after the 1836 Revolution, allowed Conselheiros to participate in elections, and to exert the position of senators. Furthermore, said Constitution established the King's duty to appoint the conselheiros to the Supreme Court of Justice, and to grant privilege letters to magistrates, as well as to suspend judges, in accordance with the law. On the other hand, should the monarch be a minor, or impeached, and should there be no one to take up the Kingdom's regency, it would fall to the President of the Supreme Court of Justice to fill in that position. However, such a transitory regency of the Kingdom would be soon revoked by the Constitutional Chart of 1842.

As for the organisation of the new high court, the constitutional text of 1838 did not introduce many changes, and for a simple reason: the Supreme Court of Justice had already been operating since 1833; its competences and attributions were defined by a legal document issued on May 19, 1832.

The great worker of the new judiciary organisation, and thus of the Supreme Court of Justice, was Mouzinho da Silveira, who created the indispensable conditions to its establishment. However, the factions arising from the Liberal Revolution eventually dictated that its establishment was, in practise, accomplished by José da Silva Carvalho, then Minister of Justice, and subsequently the first President of the Supreme Court of Justice, assuming such office on September 14, 1833.

On September 23, 1833, the Supreme Court of Justice was installed in Lisbon, in the palace which formed the third of the six blocks of the Praça do Comércio (formerly the Terreiro do Paço - "Royal Palace's Public Square" - it suffered a violent earthquake in 1755, and was reconstructed under the orders of the then First Minister and Marquis of Pombal, Sebastião José de Carvalho e Melo). On that historic date, the population was invited to enter that remarkable building, and attend the entrance into office of the first Conselheiros appointed by King D. Pedro IV.

Less than ten years later, the New Judiciary Reform of 1841 arranged the structure of the Supreme Court of Justice, which took on the administrative work of the Crown's Attorney General's Office, and was organised in the following manner: Presidency, House, Civil Chamber, Criminal Chamber, Registry, Library, and Archives.

The President represented the court, supervised all work, counted the votes, acted as an umpire, watched over the administrative tasks, had the list of agenda posted, granted absence permits, signed the documents of his competence, ensured that the legislation was complied with, and requested replacement Desembargadores to the President of the Lisbon Court of Appeal.

Since 1932, the Supreme Court of Justice operated as a Plenary Court, with the Civil and Criminal Chambers. As a Plenary Court, constituted by the whole of the Conselheiros, it met every week, with the compulsory attendance of the Secretary and the Crown's Attorney General. Shortly after, when functioning in chambers, it began to meet by turns, for each chamber, and the number of weekly meetings rose to four.

The Supreme Court of Justice's Registry was headed by the Secretary, who was in the same professional category as a director-general, and assigned the work, by eight classes, from 1841: civil appeals; criminal appeals; appeals of the Fazenda Nacional (National Treasury); commercial appeals; crimes and document errors ascribed to conselheiros, other

magistrates, and the Public Prosecution Office; jurisdiction and competence conflicts; applications and documents available for consultation; applications regarding objects not pending in the Supreme Court of Justice.

The Public Prosecution, announced in 1822 and created in 1832, had the Crown's Attorney General's Office installed in the Supreme Court of Justice, its administrative work left to the latter's Registry, since the former did not own administrative services. The Crown's Attorney General and his respective assistants were the representatives of the Public Prosecution near the Supreme Court of Justice; the former only became autonomous in 1851.

### **The end of Constitutional Monarchy :from the First Republic to the Estado Novo**

On the dusk of Constitutional Monarchy, and with the establishing of the Republic in 1910, the period of instability which followed, motivated the executive and legislative powers to have some wishes of intruding into the judicial power. However, the 1911 Political Constitution of the Portuguese Republic re-confirms the independence of Justice. The judicial power was then consecrated as one of the national sovereign bodies, its organisation being the Congress of the Republic's responsibility, and its structure consisting in the Supreme Court of Justice, and the first and second instance courts.

At the same time that the Crown's Attorney General's Office was renamed the Republic's Attorney General's Office, the high courts are the object of a curious initiative by the First Republic: the political powers decide to distribute plaster busts of the Republic to all of them, a clear propaganda action which aims at confusing the image of the Republic with that of Justice, by associating the two through an intentional resemblance.

Subsequently, with the coming of Salazar to the Government's leadership, and the birth of what would be known as the Estado Novo (New State), the 1933 Constitution restates that the courts constitute one of the State's sovereign bodies, and considers that the Supreme Court of Justice is a common tribunal, composed by lifelong judges, irremovable, and not individually liable. The organisation of the judiciary system was then left to the National Assembly; the President of the Supreme Court of Justice, and the Republic's Attorney General were allowed to take a sit in the State Council (up until the latter was extinguished, in March 1975, following the Revolution of April 25 of the previous year, when the Revolution Council was temporarily created).

According to the constitutional text of 1933, the Supreme Court of Justice is also competent to supervise the elections for the Republic's Presidency.

### **Organisation and competence in the democratic regime**

In current judiciary organisation, the Supreme Court of Justice is the higher body in the hierarchy of judicial courts, without prejudice of the Constitutional Court's own competence.

As a rule, the Supreme Court of Justice only hears and determines on matter of Law, and is constituted by four Civil Chambers, two Criminal Chambers, and one Labour Chamber. There is also a Disputed Claims Chamber, which tries the appeals filed against the decisions issued by the Higher Judicial Council. This body establishes the number of judges which constitute each Chamber, whenever deemed necessary, and on the basis of the proposal of its President ? who is also the President of the Supreme Court of Justice. The latter assigns the judges to each Chamber, and may also give them his permission to change Chambers or to exchange places between themselves.

The Disputed Claims Chamber includes the senior Vice-President ? who presides it, through a casting vote ? and a judge from each of the other Chambers, yearly appointed, according to his seniority.

Under the direction of its President, the Supreme Court of Justice functions as a Plenary Court, in Plenary Specialised Chambers, and by Chambers.

The Plenary Court is constituted by the whole of the judges which constitute the Chambers, and may only function in the presence of, at least three quarters of the universe of active members. It is the Plenary Court's duty:

to judge the appeals against the decisions issued by the Plenary Criminal Chambers ;  
to hear and determine on concurrent jurisdiction conflicts among the plenary chambers and among chambers ;  
to exercise the rest of the competences the law ascribes it.

The Plenary Specialised Chambers function on the same terms as the Plenary Court, with the necessary adjustments. The following are their duties, according to each of their respective specialisations :  
to judge the President of the Republic, the President of the Assembly of the Republic, and the Prime Minister for any crime committed during the term of their office ;  
to judge the appeals filed against the decisions issued by the Chambers in first instance ;  
to unify Case Law, on the respective legal terms.

Should the matter of a conflict concern the specialisations of more than one chamber, the respective joined plenary chambers also have the duty to hear and determine on concurrent jurisdictions? conflicts among Courts of Appeal, or between those courts and first instance courts, or even among the latter, should they belong to different jurisdictions, or should their venue be the same as that of different Courts of Appeal.

It is essentially the chambers? duty, according to their respective specialization :

to judge the appeals which are not within the scope of competence of the plenary specialised chambers ;  
to judge cases of crimes committed by judges of the Supreme Court of Justice, judges of the Courts of Appeal, and magistrates of the Public Prosecutor?s Office working in such Courts, or persons treated as such, as well as actions forwarded against them because of their duties ;  
to hear and determine on jurisdiction and competence conflicts ; to hear and determine on the applications for habeas corpus by reason of unlawful arrest ;

With the exception of those cases in which it is the rapporteur?s duty to judge, or those which concern criminal previous inquiries, the chambers? trials are proceeded to by three judges, one of them having the task of rapporteur, and the others of associate judges.

When the number of judges required for the case?s examination and judgement on the cause are not achieved in a Chamber, other judges from a Chamber of the same specialisation are summoned, beginning with those immediately following the judge who?s signature is last on the case records; whenever it is not possible to summon the judges of the same specialisation, either those in the Social Chamber are summoned, if the fault occurs in a Civil or Criminal Chamber, or those in the Civil Chamber are resorted to, if the fault occurs in the Social Chamber.

### **Judges : access and staff of the Supreme Court of Justice**

The access to the position of judge near the Supreme Court of Justice is made through a merit curricular invitation to tender to juizes-desembargadores (judges of appeal), who are the judges of the Tribunais da Relação (Courts of Appeal), to magistrates belonging to the Public Prosecutor?s Office, and to other jurists of merit, on the following proportion for each five vacancies: three for the first ones, one the second ones, and one for the latter. The judges of the Courts of Appeal who are in the first fourth of the seniority list, and do not officially waive the invitation to tender, are necessary contesters; the remainder are deemed voluntary contesters.

The judges of the Supreme Court of Justice have the title of Conselheiro (Justices). The judge?s robe is the professional clothing common to all magistrates; Justices may wear a cape over the robe, and on solemn occasions, a necklace.

The staff of judges of the Supreme Court of Justice is currently constituted by 60 Justices. However, should any of the latter cease to render his services in order to take up certain positions (President of the Republic, Government member, Vice-President of the Higher Judicial Council or others, on a common or possible duty assignment), the staff is automatically added the respective number of places, which will be eventually suppressed when such judges return to their earlier position.

There may be also Justices further to the usual staff of judges, whenever the amount of work justifies it ? namely, due to the number or complexity of cases. However, such additional places become extinct when two years over the date of their opening have elapsed.

### **The President: election and attributions**

The judges constituting the staff of the Supreme Court of Justice elect their President from among themselves, by secret ballot, for a three-year term of office. The re-election for a third consecutive term of office is not admissible.

The President of the Supreme Court of Justice has precedence over all the judges, and it is his duty :

- to preside the Plenary Court, the Plenary Specialised Chambers, and any closed session he attends ;
- to ratify the schedules of the common sessions and to summon the extraordinary sessions ;
- to count the votes in closed sessions ;
- to vote every time the law establishes it, and signing in such cases the judicial decision ;
- to give office to the Court's Vice-Presidents, judges, Secretary, and to the Presidents of the Courts of Appeal ;
- to supervise the services of the Judicial Registry ;
- to enforce disciplinary actions over court officials regarding penalties which seriousness does not reach the application of a fine ;
- to perform any further duties provided by law.

Finally, the President of the Supreme Court of Justice is also, inherently, the President of the Higher Judicial Council, which is the management disciplinary body of the judiciary. The Council is composed by two councilors appointed by the President of the Republic, seven councilors elected by Parliament, and seven judges elected by their peers.

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