



Co. Co. A.

*Comparing Constitutional  
Adjudication*



UNIVERSITY  
OF TRENTO - Italy  
Faculty of Law

**Summer School 2014**

CONSTITUTIONAL ADJUDICATION IN EDUCATION LAW:  
A COMPARATIVE APPROACH WITHIN THE COUNCIL OF EUROPE

*Free movement for teachers*

by Isabel Pires Rodrigues

## Abstract

2

The free movement of workers is one of the four fundamental freedoms of the internal market and applies both to the public sector and to the private sector.

In the public sector the exception set out in paragraph 4 of Article 45 TFEU must be interpreted to include only those activities that involve, cumulatively, the exercise of public authority and the assignment of responsibilities to safeguard the general interests of the State.

The criteria must be assessed case by case with regard to the nature of the tasks and responsibilities involved, according to the so-called functional approach rather than the approach by sector, always keeping in mind the purpose of the exception, i.e., if the position requires a "special relationship of allegiance" included in the bond of nationality.

In Portugal, Article 15 (1) of the Constitution establishes the general principle of equal rights and duties between nationals and foreign citizens, from which free access by non-nationals to the profession of early childhood educator and of teacher of basic and secondary education follows.

**Keywords:** Teachers, free movement, non-discrimination, public sector, constitutional.

## 1. Rules on the free movement of workers of the public sector in Portugal

In Portugal the right to have access to public functions is integrated in the constitutional catalog of fundamental rights - cf. Article 47 (2) of the Constitution - "All citizens have the right of access to public service in conditions of equality and freedom, usually by means of competition."<sup>1</sup>

3

Admission requirements for the exercise of public functions are subject to a reservation of parliamentary legislation, pursuant to Articles 18, 47 and 165 (2) (b) et), Constitution of the Republic of Portugal (hereinafter CRP), i.e, only the requirements set by law may be cause for exclusion<sup>2</sup>.

From this "normative block" results the right to equality of opportunity and treatment regarding access to public employment, training, career promotion and other conditions of work, as well as the prohibition of direct or indirect discrimination on grounds, in particular, of the place of origin, language and nationality.

However, Article 8 (a) of Law no. 12-A/2008 allows some posts in the public sector to be reserved for nationals by providing, as the legal requirement of a public employment relationship, "the Portuguese nationality, if not waived by the Constitution, international convention or special law "<sup>3</sup>. We will analyze this aspect next.

---

<sup>1</sup> The translation of all legislative and judicial sources is by the Author.

<sup>2</sup> Recruitment requirements and admission to the competition are set out in Article 8 of Law no. 12-A / 2008, of 27th of February, which approved the regime of contracts, careers and salaries of public administration workers. The rules on equality and non-discrimination to observe in concluding employment contracts in public functions are contained in Articles 13 and 14 and 6 and 7, of the Regime and of the Regulation, annexed to Law no. 59/2008 of 11 of September, respectively.

<sup>3</sup> This standard has clarified the nationality requirement in order to bring it into line with Article 15 of the Portuguese Constitution and Article 45 (4) of the Treaty on the Functioning of the European Union (hereinafter TFEU), since the rule contained in Decree-Law no. 204/98, July 11, was did not comply with the constitutional text.

### 1.1. Posts reserved for nationals - Article 15 (2) of the Portuguese Constitution

Article 15 (1) of the CRP establishes the general principle of equal rights and duties between nationals and foreigners<sup>4</sup>, to exclude immediately afterwards, in paragraph 2, "political rights, the exercise of public functions that are not predominantly of technical character and the rights and duties reserved by the Constitution and the law to Portuguese citizens<sup>5</sup>. "

Recalling the main doctrinal positions on the matter, and expressed in previous opinions, the Advisory Council to the Attorney General's Office reasoned that "the constitutional idea (...) must, however, want to exclude the exercise by foreigners of public functions involving the exercise of public authority, within the administration (management and leadership functions), and concerning third parties (acts of authority)<sup>6</sup>."

The Advisory Council quotes, at this point, Jorge Miranda<sup>7</sup> in the section where the constitutionalist alerts to "the fact that the reference to public functions of a predominantly technical nature has to be understood either in terms of the provision, or in its relation to Article 15 (1) [of the Constitution]. On the one hand, public functions are generally forbidden to foreigners - not exactly because of their

<sup>4</sup> Article 15 (1) CRP: ". Foreigners and stateless persons residing in Portugal enjoy the same rights and are subject to the same duties as Portuguese citizens" Gomes Canotilho states that "the general principle of Portuguese law is parity, equality or, perhaps better, the extension to foreigners of the rights granted to the Portuguese "Moreira, Vital and Canotilho Gomes, José Joaquim, in *Constituição da República Portuguesa Anotada*, Volume I, Coimbra Editora, 2007, note to Article 15. See also Gouveia, Jorge Bacelar and Coutinho, Francisco Pereira in *Enciclopédia da Constituição Portuguesa*, Quid Iuris on the rights granted to foreigners, 2013, p. 147-149.

In the area of civil rights the principle of equality is provided in Article 14 of the Portuguese Civil Code.

<sup>5</sup> See Miranda, Jorge, *Manual de Direito Constitucional*, Volume III, 2nd edition, Coimbra, p.133 - in the sense that was the review of 1971, of the 1933 Constitution, which introduced the authorization to exercise the functions of a predominantly technical character by foreigners in Article 7 (2) (current 15 (2)).

<sup>6</sup> Opinion no.236/90 of the Advisory Council to the Attorney General's Office.

<sup>7</sup> Miranda, ob, cit., p.138 et seq.

connection to political rights, but because of their immediate and necessary relevance to administrative or state authority (hence, Articles 21, 269, 270 and 168 (1) (u) [CRP]). On the other hand, the opening, of functions that have a predominantly technical nature, to foreigners is compatible with the principle of equal treatment of Portuguese and foreigners. Public functions that are predominantly technical are – in a declarative interpretation - those functions in which the technical factor prevails over any other, (...). The only criterion to distinguish these functions is the prevalence of the technical factor, and is based both on the text and on the advantage (not just on the need) of such duties being? carried out by foreigners (and even in competition with the Portuguese). This advantage does not exist regarding functions with reduced technical component or management functions related with functions of authority.

He concludes that "in accordance with Article 15 (1) and (2) of the Portuguese Constitution, foreigners have, in principle, the same rights and are subject to the same duties as Portuguese citizens, except, among others, for the 'exercise of public functions that are not predominantly technical "in nature, or for functions where the exercise of public authority predominates. There is no conflict between the aforesaid restriction (...) concerning the access of foreigners to public functions, and the EU principle of free movement of workers, enshrined in Article 48 of the EEC Treaty [now 45 TFEU], (...), so, in this light there is incompatibility between the European Union law and the Portuguese constitutional rule. "

We follow the opinion of Jorge Miranda and of the Advisory Council to the Attorney General's Office regarding their conviction that there is no conflict between the Portuguese constitutional standards and EU law. The Advisory Council and the

Administrative Supreme Court and the current doctrine have agreed that the constitutional reference to "functions of predominant technical character" should not be contrasted with "functions of a technical nature" but to those functions in which the exercise of public authority predominates. Such a consistent interpretation of Union rules has meant, inter alia, that the professions of doctor, nurse, teacher, principal of public school, and others that do not involve the exercise of public powers or the safeguarding of the general interest of the State, are not reserved to nationals. That interpretation has also led to legislative changes in order to match Portuguese law to EU law, such as the change that allowed access of EU citizens to the professional activity of seafarers (cf. Decree-Law no. 280/2001 of 23<sup>rd</sup> of October) through the transposition of directives in the matter, especially Directive 98/35/EC of the Council of 25<sup>th</sup> of May on the minimum level of training of seafarers, which amended the 94/58/EC Directive, of the Council, of 22<sup>nd</sup> of November 1994, transposed into national law by Decree-Law no. 156/96, of 31<sup>st</sup> of August.

Nevertheless, the Ziller Report<sup>8</sup>, in the part on Portugal, raised some reservations due to the wording of Article 8 (a) of Law no. 12-A/2008, of 27<sup>th</sup> of February, that subjects the establishment of a public employment relationship to a nationality requirement, if it is not waived by the CRP or other standards,<sup>9</sup>.

The report considers that, although the criteria followed in posts reserved for Portuguese citizens can correspond to the criteria established for the implementation

---

<sup>8</sup> *Vide*, Jacques Ziller - *Free Movement of European Union Citizens and Employment in the Public Sector – Current issues and state of play, Parts I and II*, in <http://ec.europa.eu>. Part II, p. 129 et seq.

<sup>9</sup> "Article 8 - Requirements - The establishment of a public employment relationship depends on the fulfillment, by the worker, in addition to other established by law, of the following requirements: a) Portuguese Nationality, if not waived by the Constitution, international convention or special law; (...).

of Article 45 (4) TFEU, the differences in wording, the space left for interpretation, the absence of reference to EU law, the lack of standard terms of recognition of professional experience and seniority in other Member States, and the deficient monitoring of the practical application of national law, not being in itself contrary to EU law "can generate obstacles to free movement, especially with regard to the exercise of the right of free movement of Portuguese citizens.<sup>10</sup>". Nevertheless, the report seems not to have considered, since it does not quote, legislation in force at the date that established such clauses, namely, rules on equality and non-discrimination to observe in the conclusion of employment contracts in public functions, contained in Articles 13 and 14 and 6 and 7, of the Regime and of the Regulation annexes to Law 59/2008 of 11 September, respectively.

The Ziller Report recognizes, however, that the interpretation made by the Portuguese authorities seem very close to the EU criteria and includes positive aspects, namely, the legislative changes arising from the implementation of directives and, in the specific case of the Teaching Career Statute, the express openness of the profession to other Member States' nationals.

With reference to Professor Ziller's praise of the regime of the Teaching Career Statute in Portugal, we will recall, in the next paragraph of our study, that it was not always like that.

This prevailing conformity of the Portuguese national law to EU law justifies the low rate of litigation on the issue and the small number of ECJ rulings relating to Portugal.

---

<sup>10</sup> Jacques Ziller, *ob.cit.*, Part II, p. 132.

## 1.2. The particular case of the teaching career

In Portugal, access to the career of early childhood educator and teacher of primary and secondary education, in the public sector, is regulated by Decree-Law no. 139-A/90, of 28<sup>th</sup> April <sup>11</sup>, which approved the Career Statute of Early Childhood Educators and Teachers of Primary and Secondary Education (hereinafter ECD). Rules on recruitment of teachers and educators are listed in Decree-Law no. 132/2012, June 27<sup>th</sup>, and those relating to the selection procedure of school principals are contained in Article 21 of Decree-Law no. 75/2008, of 22<sup>nd</sup> April<sup>12</sup>, which approves the legal regime of autonomy, administration and management of public pre-school, primary and secondary education.

Positive legislation does not have any nationality requirement in the recruitment or in the exercise of the public functions mentioned. And so much so that, in practice, Portuguese public schools have non-national educators, teachers and school principals, , on their staff<sup>13</sup>.

But it was not always so. We recall that, upon publication, Article 22 (1) (a) of the ECD, established “Portuguese nationality or being a national of a country that, by force of legislative act of the European Economic Community, international convention or special law, has access to public functions in Portugal” as a general requirement for admission of teaching staff. This standard came to be declared unconstitutional by the

---

<sup>11</sup> Amended by Decree-Laws nos. 105/97 of 29<sup>th</sup> of April, 1/98, of 2 January, 35/2003, of 27<sup>th</sup> of February, 121/2005, of 26<sup>th</sup> of July, 229/2005 of 29<sup>th</sup> of December 224/2006, of 13<sup>th</sup> of November, 15/2007, of 19<sup>th</sup> of January, 35/2007, of 15<sup>th</sup> of February, 270/2009, of 30<sup>th</sup> of September, 75/2010, of 23<sup>rd</sup> of June, and 41/2012 of 21<sup>st</sup> of February.

<sup>12</sup> Amended by Decree-Law No. 224/2009, 11<sup>th</sup> of September, and republished by Decree-Law No. 137/2012, of 2 of July.

<sup>13</sup> See the statistics of the European Commission in the “*Document de Travail des Services de La Commission – Libre circulation des travailleurs dans le secteur public*, December 2010, p. 2, in <http://ec.europa.eu..>

Constitutional Court Ruling no. 345/2002 because it breached Article 15 (1) and (2) of the Portuguese Constitution on the following grounds:

The Constitutional Court invoked the characterization of the current exception in paragraph 4 of Article 45 TFEU, made by the ECJ in that it contemplated only cases of functions that assume the exercise of political power, considering the safeguarding of national interests of the State and other public entities. This exception is no longer applicable to functions that "nevertheless depend on the State or other public entities, do not imply participation in activities which compete to the public administration."

The Court argues that, "specifically in the education sector, the exclusion of all jobs of nationals of other States cannot be justified by considerations relating to the protection of national identity, because this interest, whose protection is legitimate - as recognized in Article 6 (3) of the European Union Treaty, in the version now in effect - can be effectively safeguarded by means other than the general exclusion, and because nationals of other Member States must, in any way, such as nationals of those States, fulfill all the conditions required for the recruitment, especially those relating to education, experience and language skills."

The Court reasoned that "the constitutional status of the foreigners allows exceptions to the principle of equal treatment, as unequivocally results from a clear reading of the constitutional norm. Nevertheless, these deviations are restrictions to this principle and to that extent - which is a key aspect of the system of rights and freedoms - are subject to Article 18 (2) of the Constitution regime, being, as such, limited to the necessary to safeguard other constitutionally protected rights or interests."

The Court concludes that such a measure of proportionality "is not observed in the standard under analysis. Either because the technicality of the teaching function acquires prominence of expression and intensity when contrasted to the size of the public authority that is inherent, or because (or also because) an activity like teaching, as it is generally understood, does not affect, by nature, that essential core of national sovereignty - (...) - has become unreasonable and disproportionate a standard, such as this one, which excludes admission to tender for provision of teaching staff under the Staff Regulations approved by Decree-Law No. 139-A/90 – (...) – those who do not have Portuguese nationality or do not fit into any of the situations described in the final part of the norm."

Returning to the rules of Portuguese law on access to the teaching profession by non-nationals, and having concluded that there are no posts reserved to nationals in this matter, next we will consider the procedure to be followed by non-nationals for the recognition of qualifications, experience and language requirements required for the exercise of the profession<sup>14</sup>. Thus, citizens of the EU or EEA wishing to pursue a teaching career in Portugal, or Portuguese citizens wishing to see their professional qualifications for teaching, obtained in another Member State or outside the EU, recognized, must apply for the recognition of their professional qualifications for the purpose acquired in the "General Direction of the School Administration", and present evidence of their nationality, diplomas, certificates and other evidence, the course plan of studies, recognition by the Member State of origin that the qualifications of the

---

<sup>14</sup> This procedure results from Law no. 9/2009, of 4th of March, transposing into national law Directive no. 2005/36/EC, of 7th of September, on the recognition of professional qualifications, Ordinance no. 967/2009, of 25th of August, regulating the recognition of professional qualifications of teaching staff, and Dispatch no. 22238/2009, of 7th of October, which regulates the proof of proficiency in Portuguese.

applicant constitute a professional qualification, indicating the level of education and the area or areas, and a Portuguese language domain certificate issued by the Portuguese Evaluation Center of the Portuguese Language<sup>15</sup>.

Depending on the subject and the level at which it will be taught, different levels of the Common European Framework of Reference for Languages are applicable<sup>16</sup>. The director general of the School Administration has the competence to decide on the recognition of qualifications for teaching. His decision contains an indication of the recruitment group and of the field of teaching in which the applicant is authorized to teach, as well as the professional grade obtained. The approval may be conditional upon the completion of an adaptation period or an aptitude test. If, however, it is not, the applicant is able to enter the career by the general path applicable to nationals<sup>17</sup>.

### 1.3 The Portuguese Constitutional Court case law<sup>18</sup>

#### I.

#### **Ruling No. 345/02 of the Constitutional Court - Summary**

The Ombudsman requested, pursuant to Article 281 (2) (d) of the Constitution and Article 51 (1) of Law 28/82 of 15<sup>th</sup> of November, the declaration of unconstitutionality, generally binding, of the rule contained in Article 22 (1) (a) of Decree-Law No. 139-A/90, of 28<sup>th</sup> of April, which approved the Statute of the career of Kindergarten, Basic

<sup>15</sup> See combined provisions of Articles 1 and 47 of Law no. 9/2009 and Article 3 of Decree no. 967/2009.

<sup>16</sup> Thus, the deeper knowledge of Portuguese (C2 level) is required of candidates for early childhood educators and teachers of primary education, as well as candidates for lower secondary education in groups no. 200 (Portuguese, Social Studies and History), no. 210 (Portuguese and French), no. 220 (Portuguese and English), and to group no. 300 (Portuguese) in secondary education. The minimum level of proficiency in Portuguese is B2 and respects the teaching of subjects such as arts and musical education. The minimum level of C1 applies to all recruitment groups not mentioned in the norm..

<sup>17</sup> in Decree-Law no. 132/2012, cfr. Article 5 of Decree no. 967/2009.

<sup>18</sup> In [www.tribunalconstitucional.pt](http://www.tribunalconstitucional.pt)

and Secondary Education Teachers, understanding that this rule violates Articles 13, 18 (2), 47 (2) and 165 (1) (b) of the Constitution.

12

The norm in question makes access to the competition for recruiting teachers require Portuguese nationality or the nationality of a country that, by international standards, has access to public service in Portugal.

The legislator argued that, in the particular case of early childhood educators and teachers of primary and secondary schools, there are special reasons to justify the restriction of positions to Portuguese citizens. Although these teachers do not participate properly in the practice of public authority, they are, along with families, in earlier stages of education, privileged community agents of the social integration of children and youth and of the transmission of values, behaviors and national principles. Moreover, a sense of authority that is stronger for the younger students must be conferred on them. Finally, it is certain that teachers necessarily have, though not predominantly, functions involving public authority, such as the power to evaluate and disciplinary power over students. All these factors justify the requirement of Portuguese nationality, "given the continued public interest, the educational needs of children and young people and the powers of authority of teachers, it is reasonable to exclude, in teaching degrees and in the establishments concerned, those who are not Portuguese."

The Constitutional Court decided to declare the rule contained in Article 22 (1) (a) of the Statute of the Career of Early Childhood Educators and Teachers of Primary and Secondary Education, approved by the Decree- Law 139-A/90, of 28<sup>th</sup> of April, unconstitutional for violating the provisions in Article 15 (1) and (2) of the Constitution.

Reasons presented by the Constitutional Court: the technicality of the teaching function has prominence and intensity of expression as opposed to the public authority inherent to it, and also because an activity like teaching, so generally understood, does not affect, by nature, that essential core of national sovereignty. So it finds that a rule is disproportionate and unreasonable, as in this case, which excludes admission to the contest for the provision of teaching staff under the Statute approved by Decree-Law No. 139-A/90 - which ensures the status of public function under the professional rights and duties provided for in this Statute – those who do not have Portuguese nationality or do not fit into any of the situations described in the final part of the norm,

## II.

Given that the Portuguese Republic covers the territory of the mainland and of the two autonomous regions of the Azores and Madeira, with autonomous regional governments, recently the Constitutional Court ruled on whether the teachers of the Autonomous Regions may apply to the competition for teachers organized by the Ministry of Education and Science.

Previously, the inverse issue had been addressed in a 2003 judgment.

### **Ruling No. 449/2013 of the Constitutional Court - summary**

Proceedings from the Administrative and Fiscal Court of Ponta Delgada (Azores), in which the appellant is the public prosecutor and the defendant is the teachers' union

of the Azores. It is an appeal to the Constitutional Court, pursuant Article 70 (a), (c) and (e) of the Law of the Organization and Functioning of the Constitutional Court (LTC).

14

Anticipating the judgment on the main proceedings, pursuant to Article 121 (1) of the Code of Administrative Courts Procedure, the decision was upheld. The administrative court refused "to apply the rule which excluded from the scope of the extraordinary external competition associates of the applicant who, fulfilling the other requirements, have rendered effective service teaching for at least 365 days in the 3 years immediately prior to the date of the opening of the competition, under a fixed-term contract of employment in public functions in public schools in the Azores Autonomous Region. Also, declared 'unlawful was the exclusion of members of the applicant on the grounds of having taught in public schools that are dependent on the Azores (Regional Ministry of Education and Training) and not on the Ministry of Education and Science'; and ordered 'the defendant to accept the candidacy of members of the applicant who, fulfilling the other requirements, have provided effective teaching service with professional qualification for at least 365 days in the 3 years immediately preceding the date of the opening of the tender, under a fixed-term contract of employment in public functions in establishment of public education in dependence of the Azores Autonomous Region (Regional Ministry of Education and Training) '.

The Constitutional Court decided to declare Article 2 (1) (a) of Decree-Law no. 7/2013 of 17<sup>th</sup> of January unconstitutional, for violating Articles 13 (1) and 47 (2) of the Constitution of the Portuguese Republic, to the extent that the norm contains a differentiation of treatment that is not objectively founded, violating the principle of

equality. The Court has held repeatedly that the principle of equality enshrined in Article 13 of the Constitution - That Article 47 (2) is a specific projection, while stating that all citizens have the right of access to the public service on an equal basis, usually by tender - "does not prevent, taking into account the conformational freedom of the legislator, if he can (if he must) establish differentiations of treatment point is that those differentiations are reasonable, rational and objectively justified."

#### **Ruling No. 450/2013 of the Constitutional Court - summary**

This judgment is very similar to the previous decision and differs only in that the defendant is the democratic union of teachers of the Azores.

Thus, also in this case, the Constitutional Court decided to declare Article 2 (1) (a) of the Decree-Law no. 7/2013 of 17<sup>th</sup> of January unconstitutional, on grounds of the violation of Articles 13 (1) and 47 (2) of the Constitution of the Portuguese Republic.

#### **Ruling No. 466/2013 of the Constitutional Court – summary**

This judgment is similar to the previous decision, differing only as to the defendant, which in this case is the democratic union of teachers of Madeira.

Thus, also in this case, the Constitutional Court decided to declare Article 2 (1) (a) of Decree-Law no. 7/2013 of 17<sup>th</sup> January unconstitutional, on grounds of the violation of Articles 13 (1) and 47 (2) of the Constitution of the Portuguese Republic.

In the present case, where the applicant is the public prosecutor and the defendant the democratic union of teachers of Madeira, a compulsory appeal was filed on May 13 of 2013 in compliance with Article 280 (3) of the Constitution of the Portuguese

Republic (CPR) and of Articles 70 (1) (a) and (e), and 72 (3) of the Law of the Constitutional Court (LTC), against the judgment of the Administrative Court of Funchal, on May 8, 2013 (pages 84-114), which refused to apply the extracted rule of Article 2 (1) (a) of Decree-Law no. 7/2013 of 17<sup>th</sup> January and the final part of (1) (a) of Part IV of the Regulation of the External Extraordinary Competition for Selection and Recruitment of Teaching Staff in Government Establishments of Preschool Education and Primary and Secondary Education (hereinafter only referred to as "Contest Rules"), contained in Notice no. 1340-A/2013, published in the 'Official Gazette', 2nd Series, no. 19 of 28th January 2013.

The Constitutional Court decided to declare Article 2 (1) (a) of Decree-Law no. 7/2013 of 17<sup>th</sup> of January unconstitutional on the grounds of violating Articles 13 (1) and 47 (2) of the Constitution of the Portuguese Republic.

### **Ruling No. 232/2003 of the Constitutional Court – summary<sup>19</sup>**

In accordance with Article 278 (2) of the Constitution of the Portuguese Republic, and 57 and subsequent Articles of Law no 28/82 of 15<sup>th</sup> November, the Minister of the Republic for the Autonomous Region of the Azores requested an anticipatory review of the constitutionality of the rule contained in Article 25 (7) of the Competition Rules of the teachers of Preschool and Primary and Secondary Education, adopted by Article 1 of the Decree of the Regional Legislative Assembly of the Azores No. 26/2003 as well

---

<sup>19</sup> \*This situation is the opposite of the previous judgments. The norms involved limited the right of free movement of teachers from the mainland.

as the rule in Article 2 of this Decree, applicable to the tender of teaching staff for the academic year of 2003/2004.

The request is based on the fact that there are doubts about the constitutional conformity of the regional system of ranking the candidates in the contests of the teaching staff.

17

The Court did not rule on the unconstitutionality of the provision that gave precedence in ranking of candidates to those with professional qualifications and that agreed to be provided for a period not less than three years over those who have, at least, three years of teaching experience in a public school in the Azores.

However, the Court ruled on the unconstitutionality of the provision which establishes that, in order to be provided, candidates must satisfy the condition of having served for at least three years in a public school in the Azores.

It is not unreasonable to think that a special connection to the Azores encourages roots in this region and, by doing so, the stability of its teaching staff. However, the terms by which such a bond is achieved is contrary to the objective pursued and proves to be arbitrary or without adequate justification.

The Constitutional Court ruled that such conditions do not embody mere preference, but authentic conditions of access to a particular type of contests, discriminating, in violation of Article 47 (2) of the Constitution, all applicants that do not meet them.

## **2. Conclusion**

The exercise of these rights of European citizenship, confirmed and built by the particularly willful case law of the ECJ would not have been enough to make a citizen

of a Member State a citizen of the Union if it had not been developed, in parallel and progressively, more formal rights associated with the transfer of sovereignty, such as the right to the exercise by non-nationals of functions in the public sector of the host Member State.

It would be interesting if the EU law moved towards the recognition of the right to “transfer” or “posting”, to the “requisition” or to the current “transfer of public interest” (in Portugal) or other legal figures, sustained in a non-bureaucratic process that promoted real mobility of teachers and other workers in the public sector in the EU, as if it were a single country.

Such a procedure would imply previous work by the Member States, to allow them to know the exact qualifications of the workers in their public administrations, and which of these workers would be available for migration. So that, when a Member State launches a transfer offer for a particular job profile, the others would be able to know if they possess it. Similarly, if a Member State has a staff worker that has lost his/her job, due to the termination of service for example, mobility offers suiting the qualifications of that worker could be consulted/checked on an electronic platform. The procedure could also be triggered by the employee, framed by specific rules to prevent the emptying of the public administrations in some Member States with less favorable remuneration and social conditions and the consequent labor and social dumping in richer Member States. Thus, the worker might have the initiative in case of placement in requalification, or similar, to meet with family members residing in the host Member State, and in any case as long as the Member States involved do not object.

In the beginning, the process could cover only one field of public activity, or a category of workers, and, if the experience proves to be successful, extended to other fields or occupational categories.

A system of real mobility, in addition to the advantages in meeting and matching offers and demands in the public sector in the EU, would create a uniform community of workers in this sector, contributing to the desired harmonization between Member States.