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7TH JUDICIAL YEAR OF THE CONSTITUTIONAL COURT OF KOSOVO

INTERNATIONAL CONFERENCE

JUDICIAL REVIEW IN PORTUGAL

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Mr. Deputy Prime Minister of the Republic of Kosovo
Madam President of the Constitutional Court of the Republic of Kosovo
Mr. President of the Supreme Court of the Republic of Kosovo
Mr. Minister of Justice of the Republic of Kosovo
Your Excellences, the Presidents of other Constitutional Courts
Dear Colleagues of the Constitutional Courts of Kosovo and other countries
Remaining Judicial Dignitaries and Public Officials
Distinguished Guests.

I feel privileged and grateful to take part in this international conference convened by the Constitutional Court of Kosovo on the occasion of the 7th year of its activity. My presence here renews and reinforces the ties of friendship and complicity between the institution I represent and the institution whose existence, importance, and endurance we celebrate today.

I am honored to send you, Madam President, heartfelt regards from the President of my Court, and I rest you assured that the Constitutional Court of Portugal cherishes and nurtures its historical association with the Constitutional Court of Kosovo. An association — if you allow me a benign little breach of protocol — strengthened by the fact that among your colleague justices sits a remarkable Portuguese jurist.

The association between our institutions is nonetheless more than just a fortunate accident. It was forged and flourished on a solid common ground of public values and institutional culture. Indeed, the constitutional experiences of Portugal and Kosovo mark the beginning and the end points of a long wave of democratization in which the establishment of a specialized jurisdiction entrusted with '*the final authority for the interpretation of the Constitution and the compliance of laws with the Constitution*', to borrow the eloquent wording of the Constitution of Kosovo, features rather prominently.

In Portugal, the Constitutional Court was created in 1982, following the first (and perhaps most profound to date) revision of the Constitution of 1976, and it

became one the hallmarks of the consolidation of democracy and the rule of law along the lines of those European countries that spearheaded the transition to liberal democracy in the aftermath of the Second World War as well as of those which would follow in their footsteps after the collapse of the Soviet Union.

The establishment of a Constitutional Court has been a standard feature of the transition to democracy all over Europe, and Portugal is no exception. However, the Portuguese model of constitutional review deviates from the European standard in a number of respects worthy of both theoretical and practical interest — differences that emerge precisely in the area of so-called 'incidental control' of constitutionality that is the subject of today's conference. What I mean to do is to give you the measure of those differences and share with you some thoughts about their import in the architecture of constitutional democracy. It goes without saying that in the ten or so remaining minutes of my presentation, I cannot but paint the promised picture with a very broad brush.

What is the *standard model* of constitutional justice in Europe? I suppose it can be summed up in the following three features.

First, the authority to strike down laws is exclusively assigned to a court of specialized jurisdiction whose judges are typically appointed for a non-renewable term in office following a special procedure regulated in the Constitution. This is the main distinguishing feature between the so-called 'concentrated' model, originally conceived by the Austrian jurist Hans Kelsen in the 1920s, and the 'diffuse' model that developed in the United States in the early 19th c. following the landmark Supreme Court decision in *Marbury v. Madison*.

Second, issues of constitutionality may be brought before the Constitutional Court in two quite different ways: either at the request of public authorities empowered to do so by the Constitution — a procedure labeled 'abstract review' — or in the context of a dispute in which a constitutional issue has been brought to light — what is known as 'incidental control'. In the latter case, the ordinary

judge suspends the lawsuit and sends the proceedings to the Constitutional Court for preliminary review of the constitutionality of the contentious law.

Third, the effect of a judgment deeming a law unconstitutional in the context of incidental control is not merely that it cannot be applied to the dispute that triggered the Constitutional Court's review but that the law is effectively (even if not literally) repealed from the statute books, and cannot therefore be applied by any public authority or relied upon by any private actor in the future. In other words, the decisions of the Constitutional Court have an *erga omnes* (as opposed to a merely *inter-partes*) binding force.

According to my (admittedly perfunctory) reading of the Constitution of the Republic of Kosovo, these three standard features of the European model of constitutional justice are fully present in the country's institutional arrangements. There is also the quasi-standard feature embodied in Article 113/7, which provides that: "*Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law.*" The right of individuals to address complaints to the Constitutional Court for violations by public authorities of their fundamental rights is yet another — apart from abstract review and incidental control — way of bringing the Constitutional Court into business. I call it a *quasi*-standard feature because it exists in some but not by any means in all systems of constitutional justice that conform to the European model; the most prominent examples of the procedure are the German *Verfassungsbeschwerde* and the Spanish *recurso de amparo*.

In Portugal, on the other hand, constitutional justice does not follow the European model in critically significant respects.

First, while there is a specialized constitutional jurisdiction — a Constitutional Court staffed by judges selected through a particular procedure for a non-renewable term of nine years in office — it is not exclusive. In fact, the

Portuguese Constitution assigns to all courts the power to refuse the application of a law on account of its unconstitutionality.

Second, and perhaps most importantly for the purposes of today's conference, the mechanism of incidental control does not take the paradigmatic form of preliminary review but that of a system of appeals from the decisions of ordinary courts on the constitutional issue. If an ordinary court refuses the application of a law on account of its unconstitutionality, the Public Prosecutor is legally bound to appeal that decision immediately to the Constitutional Court. If, on the other hand, the constitutionality of a law applicable to the dispute is questioned by one of the parties to the lawsuit and the ordinary court decides against it, the litigant can only appeal to the Constitutional Court on that issue once all ordinary appeals have been exhausted. In sum, in the context of incidental control, the Constitutional Court functions as a supreme appellate body — albeit its competence is confined to the issue of whether the applicable law violates the constitution — as opposed to a court of preliminary review.

Third, a judgment deeming a law unconstitutional in the context of incidental control is binding only *inter-partes*, meaning that the law at stake remains in force after the judgment. The wide gap thus opened between abstract review and incidental control is narrowed by an option allowing the Court on its own initiative or at the request of the Public Prosecutor to subject to abstract review any law that has been ruled unconstitutional three times in the context of incidental control — a mechanism that, truth be told, is seldom put into practice.

Finally, there is no procedure comparable to that established by Article 113/7 of the Constitution of the Republic of Kosovo — no remedy, that is, inspired by the *Verfassungsbeschwerde*.

As you might have perceived already, these characteristics place the Portuguese system of constitutional justice in a peculiar middle point between the monist or diffuse model, epitomized by American-style judicial review, and the dualist or concentrated model, the dominant one in Europe. The Portuguese is indeed a

mixed system of constitutional justice. That alone attracts de interest of comparative lawyers, legal theorists, and constitutional judges.

The peculiarly mixed character of the Portuguese system raises two interesting questions. First, how did it turn out to be so different from the model prevailing in the other European countries that embraced judicial review of legislation after the Second World War? Second, is it a system that merges felicitously the virtues of the diffuse and concentrated models, or is it a hopeless jumble that makes no sense in theory and generated a bad practice?

There are no consensual answers to these questions, among either academics or practitioners. I will nonetheless make brief remarks about each of them.

First, the question of historical origins. Judicial review of legislation of the diffuse variety arrived in Portugal in 1911 when the first Republican Constitution was enacted. In fact, the very wording of Article 204 of the Constitution of 1976 – which empowers ordinary courts to strike down unconstitutional laws – is heavily indebted to Article 63 of the Constitution of 1911 and reproduces almost *verbatim* Article 122 of the Constitution of 1933. Nominally speaking, then, judicial review arrived in Portugal many decades earlier than in other European countries, and it did so through the influence of the Brazilian Constitution of 1891, which in turn borrowed it from the United States. I say *nominally* because there is considerable evidence — both empirical and theoretical — that the courts did not (indeed, they could not) put any proper system of judicial review into effect until the transition to democracy in the last quarter of the twentieth century. Although the issue is contentious, I am skeptical of the view that Portugal had something that might properly be called constitutional justice before any other European country. But the mere fact of textual tradition, even if mute in practice, helps explaining how the diffuse elements of the present-day Portuguese system came to be.

Second, the issue of the system's assessment. My understanding is that its operation has brought to light two main problems.

On the one hand, the appeals system appears to be theoretically incoherent and practically ill-advised. Theoretically incoherent because either one believes that constitutional justice is sufficiently different from ordinary justice to justify the institution of a specialized jurisdiction or one believes that judicial review of legislation should remain within the province of ordinary courts. In this domain, it seems that *tertium non datur*. Practically ill-advised because ordinary judges — particularly supreme court judges — often resent the authority of constitutional judges to overturn their decisions, judges that are either academics foreign to the ranks of the judiciary or career judges who cannot by definition hold a higher rank than their supreme court colleagues.

On the other hand, the strictly *inter-partes* effect of the Constitutional Court's rulings is a source of legal uncertainty. The addressees of a law deemed unconstitutional in the context of incidental control will have a hard time figuring out whether it is valid and applicable law, for while formally speaking it is very much so, it is obvious that if the issue is raised again there is a good chance that the law will be set aside, and indeed a past opinion by the Court is likely to be offered as a ready-made reason for that. However, there is no assurance of that being the case; the Court may rule differently on an appeal than it did in the past, a possibility enhanced by the fact that incidental control is carried out in panels of five judges. Moreover, while a decision may be (and indeed it must be when the Prosecutor's Office is a party) appealed to the plenary of the Court if it contradicts a past ruling, the judgment arrived at is not binding on the plenary itself for the future, as there is no official doctrine of *stare decisis* at the Court.

These are apparently important flaws of the Portuguese system of judicial review of legislation — flaws that justify a serious reflection about whether it should not be reformed in a direction that would bring it closer to the standard model in Europe. But they should not overshadow the fact that the Court has managed to serve constitutional justice for nearly three and a half uninterrupted decades. That alone is evidence of resilience and functionality. Perhaps the

criticism that comes from within only confirms the popular wisdom behind the proverb that 'the grass is always greener on the other side of the fence.'

Be that as it may, it is about time I reward your patience and attention with my silence. Thank you very much.

Pristina, 27 October 2016.