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It is my very great honor to represent my Court at the jubilee of the Constitutional Court of Korea. On this occasion, the bonds of friendship and complicity between the two institutions are ritually reinvigorated and reinforced. That is as magnificent a tribute to the global significance and phenomenal success of constitutional justice as one could possibly imagine. We should bear that in mind and nurture the thought of it in these times of uneasiness and uncertainty.

My subject today is constitutional justice in Portugal.

The Constitutional Court of Portugal was established in 1983, following the first revision of the Constitution of 1976. The institution of Constitutional Courts has been a standard feature of the post-WWII transition to democracy all over Europe. In what concerns that, Portugal was no exception. However, the Portuguese model of constitutional justice deviates from the European standard in a number of respects worthy of attention — differences that emerge particularly in the area of so-called 'incidental control' of constitutionality.

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. 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 nineteenth century following the landmark Supreme Court decision in *Marbury v. Madison*.

Second, issues of constitutionality may be brought before the Constitutional Court in two 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 *inter-partes*) effect.

A fourth feature that may be called quasi-standard is the procedure enabling individuals to address to the Constitutional Court complaints against decisions by public authorities that infringe upon certain fundamental rights. 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 such procedure are the German *Verfassungsbeschwerde* and the Spanish *recurso de amparo*.

In Portugal, on the other hand, constitutional justice departs from the European standard in a number of significant respects.

First, while there is a specialized constitutional jurisdiction — a Constitutional Court staffed by judges selected through a particular procedure (out of the thirteen members, ten are elected by a parliamentary supermajority and the remaining three are co-opted by those that have been elected) 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, the mechanism of incidental control does not take the usual 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 (*Staatsanwalt*) 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 (much more frequently) 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.

Finally, there is no procedure comparable to the *Verfassungsbeschwerde*.

As you might have perceived already, these traits place the Portuguese system of constitutional justice in a peculiar middle ground 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.

This peculiarly mixed character of the Portuguese system is puzzling. How did it turn out to be so different from the model prevailing in the other European countries that embraced judicial review of legislation in the three so-called 'waves of democratization' that unfolded in the latter half of the twentieth century?

The question pertains to the historical roots of Portuguese-style judicial review.

Judicial review of legislation of the diffuse variety was established officially in Portugal in 1911, when the first Republican Constitution came into force. 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 it reproduces almost *verbatim* Article 122 of the Constitution of 1933. The latter, it should be highlighted, was the constitutional charter of an authoritarian regime.

But this brief account only complicates the puzzle. How was such precociousness even possible?

We must recall that, in Continental Europe, the institution of judicial review of legislation was not a product of chance. It was not an isolated or accidental event. It became possible – indeed necessary − by means of structural transformations in

European legal culture in the latter half of the twentieth century – notably, the transition from a culture of *legality* to a culture of *constitutionality*. Such transition comprised three main features familiar to constitutional historians.

The first feature was the decline of confidence in parliamentary legislation as the paramount guarantee of individual rights and social justice. The notion that the legislature ought to be subject to legal constraints – unthinkable in the previous century (may I recall that the word '*loi*' recurs nine times in the elegantly brief *Declaration of the Rights of Man and Citizen* of 1789) – suddenly, and for well-known reasons that I will not restate in this context, seemed not just appropriate but indispensable. This is what Carl Schmitt, in a famous essay, called "the crisis of parliamentary democracy".

The second feature was the development of methodological tools suited to the special task of interpreting and enforcing a constitution, a distinctive type of law on account of its peculiar openness, longevity, legitimacy, rigidity, and concision. Principles and methods utterly foreign to the legal culture of the previous century − such as the unity of the constitution, proportionality analysis, levels of scrutiny, and institutional dialogue − became commonplace among constitutional lawyers. That represented a veritable scientific revolution, originating in Weimar Germany under the label '*Methodenstreit*', and involving the leading luminaries of public law at the time: Carl Schmitt, Herman Heller, Rudolf Smend, and Hans Kelsen.

The third feature was the idea that the power to strike down democratic laws is not an ordinary judicial prerogative but a function to be performed by a specialized institution with relatively robust political credentials. It takes a special kind of legitimacy for a majority of judges to strike down a law passed by a majority of elected lawmakers, particularly when the judges second-guess a legislative judgement concerning the relative weight or strength of competing rights, principles, policies, and the like. That is, of course, the philosophical basis of constitutional courts. It is on account of their peculiar character and function that Kelsen immediately described them as 'negative legislators', as opposed to regular or ordinary courts that belong in the judiciary.

None of these three essential features of contemporary European constitutional culture were precociously present in Portugal. They could not have been, since they are

associated with the social, political, and intellectual predicament of the last three quarters of the twentieth century in Europe.

True, on the other side of the Atlantic the idea of judicial review was discovered and had its career going nearly a century and half earlier. But Portugal did not share with the United States any of the characteristics that made the precocious birth of judicial review of legislation possible over there, namely the absence of pre-modern institutions, the elective nature of the executive office, the federal structure of the constitutional order, a legal culture shaped by the common law, and the strong legitimacy of the judiciary.

In *Marbury v. Madison*, Chief Justice Marshall famously wrote that:

'If two laws conflict with each other, so if a law be in opposition to the Constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.'

These words made no sense in a legal culture faithful in the emancipatory force of parliamentary legislation, the expression of a *volonté general* not subject to any standards of rightness outside or above itself. It made even less sense in a political atmosphere in which the constitution was not understood to proceed from 'we the people' but to embody a *modus vivendi* between two irreconcilable and co-original sources of authority: the monarchical principle and the parliamentary principle. In such a political and legal culture, the concern was not to tame the legislature but to tame the executive.

The same John Marshall wrote in another famous opinion *(McCulloch v. Maryland*) that:

'A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit (…) would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. It's nature, therefore, requires, that only its great outlines should be marked, its important objects be deduced from the nature of the objects themselves. (…) [W]e must never forget – concluded Marshall – that it is a Constitution we are expounding.'

Again, these words made no sense in a legal culture lacking in the methodological resources to deal with the constitution as both law properly so called – a binding legal standard – and a unique law – not a variety of the statutory form but a distinctive type

of law. Educated in the canons of late modern legal thought – legalistic, formalistic, and scientistic – civilian public lawyers saw no appeal in constitutional law. As the great nineteenth century administrative lawyer Otto Mayer wrote 'constitutional law passes, administrative law stays'. Constitutions became the subject of the emerging discipline of political science.

How, then, did Portugal come to have judicial review of legislation before any other European country – since 1911?

The historical reconstruction may be divided into four parts arranged in chronological order.

1. *The Constitutional Monarchy of 1826.*

In 1826, the king of Portugal established a constitutional charter. This was Portugal's second written constitution. It is also the longest standing constitutional law to this day: from 1826 to 1910, with a brief interlude in the years of 1836 to 1842. The charter of 1826 replaced the constitution of 1922 – the first liberal constitution. It was notoriously more conservative than its predecessor, particularly considering the place of the crown within the frame of government.

Throughout the charter years, there was chronic parliamentary instability. The king dissolved the parliament frequently and called for elections. In the meantime, the country was deprived of a functioning legislative body. To cope with that, the executive would sneak in the legislature's shoes and enact what were then called 'dictatorial decrees' – basically, executive-made statutes. Once a new election took place and parliament reconvened, the dictatorial decrees were retrospectively validated by so-called 'indemnity bills'. Since there was no basis for this in the constitution, which assigned legislative power to Parliament alone, the Supreme Court of Justice in a total of two cases refused to apply these laws, deeming them unconstitutional.

Some constitutional lawyers point to these cases as evidence of Portuguese exceptionalism. But that is a long shot. Apart from the paltriness of the sample – two cases is hardly evidence of anything general – these cases are not instances of judicial review of legislation, as it was practiced across the Atlantic and as we know it today. Instead, they were instances of judicial review of executive power: they were about

enforcing the legislative prerogative of Parliament against executive encroachment. They are at home in nineteenth century European constitutionalism, which was all about taming the executive power of the crown and nothing about protecting rights against the legislature. What was at stake, therefore, was parliamentary supremacy.

2. *The Republican Constitution of 1911*.

In 1910, the monarchy was overthrown, and Portugal became a Republic. A new constitutional document was drafted in 1911. Article 63 of the constitution established the power of the judiciary to strike down laws.

The strange body was transplanted from Brazil. Brazil had been independent since 1825 and it became a republic in 1889. The Portuguese republicans drafting the constitution of 1911 quite naturally sought inspiration in the Brazilian constitution of 1891, which had been drafted nearly single-handedly by a man called Ruy Barbosa, a careful student of American constitutional law. Unsurprisingly, the United States was the model republic for the countries of the New World.

Barbosa borrowed three landmark constitutional elements from the Unites States: federalism, abolitionism, and judicial review. While slavery was abolished in Portugal in the late eighteenth century, the country lacked the continental scale for the kind of federal arrangement devised by the Founding Fathers. Therefore, of the three elements the Brazilians had borrowed from the Unites States the one that the drafters of the Portuguese constitution of 1911 borrowed from the Brazilians was judicial review.

Nevertheless, this had no impact in practice: there are scarcely any examples of the courts in this period using the power to strike down unconstitutional laws. As a matter of fact, then, there was no entrenched *practice* of judicial review.

3. *The Authoritarian Constitution of 1933*.

In 1926, the First Republic came to an end. A coup d'état staged by a military faction established an authoritarian and conservative regime. In 1933, a new constitutional document was drafted. It was what is called in constitutional theory a 'sematic constitution', as opposed to a 'normative constitution', as it was never meant to limit political power – to be a judicially enforceable norm − but to legitimize the regime – to wrap it in constitutional paper.

When the issue came up of what to do about judicial review of legislation, which the previous constitution had nominally established, the real debate among the drafters was whether the courts should have the power to strike down laws on formal grounds, particularly when the executive enacted legislation *ultra vires*. Judicial review on substantive grounds – that is, striking down laws on *substantive* due process grounds – was easily accepted. This might seem striking but in fact it suited the project of a sematic constitution. Since the constitution contained a generous bill of rights but then discreetly granted to the legislature the prerogative of restricting them as public welfare required, substantive due process meant very little in practice. The constitution *sub rosa* recognized political omnipotence. For the drafters, the difficult issue was whether legislation *by the executive* in areas that the constitution reserved to the legislature should be policed by the courts. So again judicial review had no actual career going in the long years of the dictatorship.

4. *The Democratic Constitution of 1976.*

This brings us to the last episode in the drama.

The current constitution came into force in 1976, in the wake of the Revolution of April 25, 1974. The constitution-making process reflected a compromise between two rival sources of legitimacy, the so-called 'revolutionary legitimacy' represented by the military and the democratic legitimacy represented by a freely elected Constituent Assembly. The compromise was officially grounded in two framework agreements between the military establishment and the political parties.

The original version of the Constitution struck an ideological compromise: it purported to reconcile the constitutional ideals of liberal democracy and revolutionary transformation. Article 1 provided that 'Portugal is a sovereign Republic, based in human dignity and popular will, and committed to building a classless society'. Article 2 stated that 'the Portuguese Republic is a democratic state, based in popular sovereignty, in the fundamental rights and freedoms as well as democratic pluralism of political opinion and organization, with the goal of enabling the transition to socialism through the creation of the conditions required for the exercise of democratic authority by the working classes.' The Constitution was long, detailed, eclectic, and relatively hard to amend. It was all of these things because in spite of their diverse ideological

commitments, the political actors involved the process had a shared interest in entrenching in the constitutional document the bulk of their political programs.

Yet, notwithstanding its so-called 'hyper-rigidity', consisting in a regime that establishes temporal and substantive limits to the power to amend the Constitution, and requires a majority of two thirds of the effective Members of Parliament to enact an amendment, the Constitution was amended seven times — an average of nearly one every five years. This happened because the political parties attuned with liberal democracy had from the beginning the consistent support of a very large majority of the electorate, reflected in the parliamentary representation. In fact, major modifications ensued from the amendment processes – especially the first three, in 1982, 1987, and 1997 —, which purged the text of a good deal of its 'revolutionary' heritage.

In its original version, the Constitution established a so-called Council of the Revolution chaired by the President of the Republic and staffed by the military. The Council had competence in three areas: it was the legislative chamber in military affairs; it was an advisory board to the President; and it was the guardian of the Constitution, namely of its 'revolutionary' elements.

In the negotiations that led to the second framework agreement between the military and the parties, the military proposed that the Council's competence as a guardian of the Constitution should follow a simple model: it should hold the power of abstract review of the constitutionality of any laws enacted by Parliament and the power of incidental control whenever, in a pending lawsuit, the constitutionality of the applicable law is questioned by the competent court. In both of these capacities, the Council would be assisted by a Constitutional Commission whose members were to be chosen among the most distinguished jurists of the country. The Commission would act as an advisory board in abstract review and as a deciding one in incidental control. The proposal was something like the European model of constitutional justice with a militaristic and revolutionary twist.

The concern of the political parties was that this would give too much power to the Council of the Revolution and would lead to an excessive politicization – in a revolutionary and militaristic direction – of constitutional interpretation. Their counter-

proposal was that incidental control should be replaced by what they called a 'Portuguese tradition' of diffuse control. In other words, it should be in the hands of ordinary courts, instead of a revolutionary organ. Eventually, a middle ground was reached: a mixed system of incidental control where ordinary courts exerted diffuse judicial review while the Constitutional Commission operating within the Council of the revolution functioned as a supreme appellate body. In the domain of abstract review, the Council of the Revolution held exclusive power.

In 1982, when the Council of the Revolution was abolished and its powers were distributed among other institutions – the legislative power in military matters was absorbed by Parliament, the advisory role was entrusted to a civilian Council of State, and a newly created Constitutional Court became the guardian of the constitution −, the system nonetheless retained its original features. Accordingly, in the domain of incidental control, the Constitutional Court was devised as a court of appeals, as opposed to a court of preliminary review. A system that had been designed not with any particular concern of theoretical coherence or practical functionality in mind, but to balance the revolutionary and democratic powers in the constitution-making process, lasted well beyond its own contingent premises.

This leads me to a final point: the performance of this peculiar system of constitutional justice. My understanding is that its operation has brought to light two main problems.

On the one hand, the coherence of the system of appeals is questionable. Either one believes that constitutional justice is substantially different from ordinary justice, in terms of both its required legitimacy and in terms of its method, and that calls for a *specialized jurisdiction*, or one believes that judicial review of legislation should follow the so-called 'commonwealth model' and remain within the province of ordinary justice. In this domain, it seems that *tertium non datur*.

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 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 same issue is raised there is a good chance that the law will again be ruled unconstitutional. But there is no assurance of that being the case; the Court may rule

differently in a future appeal on the very same issue, a possibility enhanced by the fact that incidental control is carried out in panels of five judges.

I suppose these are important flaws of the Portuguese system. But they should not overshadow the fact that my Court has managed to serve constitutional justice for nearly three and a half uninterrupted decades. That alone is evidence of resilience and functionality.

Constitutional Courts were established to prevent the degeneration of popular rule into a tyranny of the majority. Although they operate superficially as counter-majoritarian forces, routinely destroying the fruits of the legislative process, their ultimate goal is to strengthen liberal democracy – to assure that all legitimate interests and viewpoints have a voice in collective self-government and that popular deliberation takes place in the atmosphere of mutual respect and concern that is vital to government among equals.

Such an exalted aim may be served in innumerable forms and be achieved in a variety of ways. In light of that, the petty shortcomings and inconsistencies of any particular system lose much of their significance, and the criticism that comes from within goes some way in sanctioning the popular wisdom of an old proverb: ‘the grass is always greener on the other side of the fence.’