



***14th Judicial Year event of the Constitutional Court of Republic of Kosovo***

**“The Contribution of Constitutional Courts in Protecting and Strengthening Fundamental Values of Democracy, Rule of Law, and Fundamental Human Rights and Freedoms”**

**Prishtina, Kosovo – 22-25 October 2023**

Session I – “The Role of Constitutional Courts in Strengthening the Values of Democracy and the Rule of Law through Abstract Control of Constitutionality of Norms”

Mr. José Eduardo Figueiredo Dias – “The Role of Constitutional Courts in Strengthening the Values of Democracy and Rule of Law through Abstract Control of the Constitutionality of Norms – An overview of the Portuguese System”

Having accepted the kind invitation of the President of the Constitutional Court of Kosovo, Ms. Gresa Caka-Nimani – which does great honor to the Portuguese Constitutional Court – I was designated by the President to represent our Court due to his and Vice-President’s unavailability. The President sends his regards to Ms. Gresa Caka-Nimani, and he regrets not having the chance of being present.

My presentation is an overview of the Portuguese system from the perspective of the specific theme of our session. It is divided into 5 parts, focusing especially on the last one.

**Part I. The Constitution of the Portuguese Republic of 1976:** Portugal, unlike Kosovo, is an old country. It dates back to 1143, when our first King, D. Afonso Henriques, and Afonso VII of Leon and Castile (now Spain) signed the Treaty of Zamora, although papal recognition only arrived in 1179, with the *Bull Manifestis Probatum*. Although we are an old country, our current Constitution is quite recent, at least in comparison to those of many European countries.

After a 48-year period of dictatorship, a revolution established a democratic regime in Portugal on April 25<sup>th</sup>, 1974 (the “Revolution of Carnations”, as it is still called). One year later, following the first free elections in our country, a constituent assembly was elected with the mandate to draft a new democratic constitution, which came into force a year later, on 25<sup>th</sup> April 1976.

## **Part II. The Portuguese Constitutional Court**

The first constitutional amendment took place six years later. At the time, there was what was called the Council of the Revolution. This was a military institution, in which a body called the Constitutional Commission acted as the supreme judicial body in matters of constitutional review. The Constitutional Commission was extinguished with this amendment and the Constitutional Court was created, becoming responsible in the last instance for reviewing the constitutionality of laws in Portugal. The Court began its activity in April 1983, having celebrated this year its fortieth anniversary.

## **Part III. The democratic principle and the rule of law**

I would now like to emphasize the democratic principle and the rule of law as part of the basic principles, or fundamental axes, of the Portuguese Constitution. There is an intrinsic and express constitutional connection between these two principles. The Constitution refers to a “democratic rule of law”; regarding the democratic principle, we speak of a democratic state of law.

**Democratic principle:** there are multiple references to this principle in the Constitution, in which it is stated, for example, that the Portuguese Republic is based on the “the will of the people” (Article 1); that “[t]he Portuguese Republic is a democratic state based on the rule of law, the sovereignty of the people, plural democratic expression and political organisation” (Article 2); that sovereignty “lies with the people” (Article 3); and that it is the fundamental task of the State to guarantee “respect for the principles of a democratic state based on the rule of law” (Article 9); etc.

Among the constituent elements of the democratic principle in the Portuguese Constitution are the principle of the sovereignty of the people; the principle of representation;

the principle of separation of powers; the principle of suffrage; and the principle of proportional representation.

**The rule of law** is explicitly referred in Article 2 and Article 9(b)), which states that Portugal is a *democratic* state based *on the rule of law*. There are **three material assumptions** inherent to the principle: legality; constitutionality; and fundamental rights and freedoms.

Some of the **sub-principles that make the rule of law possible** are

- the principle of the constitutional state, which implies **the need for constitutional review** (Articles 277 and following);
- the principle of the independence of the courts and access to the law and the courts;
- the principle of legality of administration (subjection of the Administration to the law);
- the principle of protection of legitimate expectations;
- the principle of legal security;
- the principle of proportionality;
- procedural guarantees, especially in criminal proceedings – Article 32.

#### **IV. Constitutional review in the Portuguese Constitution**

Since the Constitution is the basic law of the country, the entire legal order must be in accordance with it (corollary of the Constitution as the Basic Law of a country) – it is necessary to ensure that the Constitution is respected by lower-ranking legal provisions.

In this framework, the Constitutional Court appears as the main actor of constitutional justice, with powers to decide, without the possibility of appeal, on questions of constitutionality.

There are four **types of constitutional review** laid down in the Constitution: anticipatory abstract review; **successive abstract review**; specific review; and unconstitutionality by omission. Only the second one interests us for the purposes of this panel, so I will only talk about successive abstract review.

## V. Abstract review of the constitutionality of norms in the Portuguese Constitution

I will very briefly address **7 aspects** about this type of constitutional review

**1. Early observation:** I will limit myself to discussing what we call “**positive unconstitutionality**”. In Portugal, we also have **unconstitutionality by omission**, which is a very original modality in terms of comparative law, but of little practical relevance. The Constitutional Court, in this case, verifies the non-compliance with the Constitution resulting from the lack of adoption of necessary legislative measures and informs the competent legislative bodies of the fact.

**2. Competent body:** successive abstract review is a *concentrated review*, which means it is reserved to the Constitutional Court. All Portuguese courts are competent to carry out concrete review regarding any questions of constitutionality raised in a specific case, with the possibility of appeal to the Constitutional Court, but only the Constitutional Court has the authority to deem a norm unconstitutional with general binding force.

**3. Initiative / legitimacy:** abstract constitutional review may only be requested by certain public entities, and it is not open to most citizens. These entities are the President of the Republic, the Speaker of Parliament, the Prime Minister, the Ombudsperson, the Attorney General, one tenth of the Members of Parliament and regional authorities (regarding legal provisions that affect the Autonomous Regions).

**4. Object:** successive abstract review is independent of any specific dispute pending a court decision. It scrutinizes legal provisions in force, whose formation process has already been completed, including their official publication.

All legal provisions are covered, notably constitutional review laws, legislative acts (including laws of Parliament, Government decrees and legislative decrees of the autonomous regions), international conventions, legal provisions issued by international organizations of which Portugal is a member, normative resolutions of Parliament, regulations of the Administration. On the opposite, political acts, administrative acts, and judicial acts and judicial decisions **are excluded**.

**5. Effects of a declaration of unconstitutionality:** a declaration of unconstitutionality has generally binding force and retroactive invalidation of the legal norm, meaning that the legal norm does not produce any effects from the beginning; and the impossibility for it to continue to be applied by any court or authority.

The general binding force of the declaration of unconstitutionality means that the declaration is binding on all constitutional bodies, courts and administrative authorities; we say it has *force of law*, meaning that the judgment has normative value, to the extent that it eliminates the rule from the legal system.

**6. Inexistence of unconstitutionality** (denial of the request for a declaration of unconstitutionality): the Constitutional Court never judges a legal provision constitutional. Rather, in a negative decision, there is a judgment of non-unconstitutionality. These decisions do not, however, have general binding effects.

**7. The importance of the request principle:** the Constitutional Court always acts at the request of people with legal standing and not on the initiative of any of its Justices. The request delimits the scope of the Court's jurisdiction to the provisions in question. However, Justices are not limited by the cause of action, and may deem the provision unconstitutional on different grounds.

I will finish my intervention underlying that successive abstract review is quite important in the Court's activity: not only in statistical terms, as we have many cases of successive abstract review before the court, but especially in its public repercussion and effects.