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Current Challenges and Future Direction for Strengthening Democracy through Constitutional Jurisdictions

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Your Excellencies,

First, I would like to present our gratitude to those who took part of the organization of this great event, especially the Chief Justice of the Constitutional Court of Indonesia Prof. Dr. Anwar Usman for the invitation and consideration.

Our thanks are extended to the Indonesian people in general and especially to the people of the City of Jakarta for their kind and welcoming reception in this beautiful city. It is a honour to be here.

According to the Panel Theme and following the dynamics that the event establishes, I would like to share with Your Excellencies Brief Notes on our experience as Constitutional Court, the Guardian of the Constitution of the Republic of Angola.
An approach about "Current challenges and future directions for strengthening democracy through constitutional jurisdictions", although represents today one of the most discussed topics in the field of constitutional justice, it motivates certain different opinions that have not found unanimity yet.

In Angola, constitutional jurisdiction was institutionalised in 1992 and has since been exercised by the Supreme Court (Superior Court of Common Jurisdiction).

The Constitutional Court, as it appears today, was institutionalised in June 2008, and so this year we are celebrating our 15th anniversary, with major challenges ahead, embodied in its affirmation as guardian of the Constitution of the Republic, with emphasis on strengthening the mechanisms for the defence of Fundamental Rights.

1. First Note (Inquiry on normative acts of the Legislative Power)

It is recognized that the normative acts of the Legislative Power, which are the acts practised by the Worthy Representatives of the Angolan people, the National Assembly, are subject to scrutiny through constitutionality review, aiming the consolidation of the Democratic State and the Rule of Law.

The Angolan legal system, as in many modern legal systems, the principle of the supremacy of the Constitution is enshrined in Article 6 of our Magna Carta, which provides as follows:

1. The Constitution is the Supreme Law of the Republic of Angola.
2. The State is subordinate to the Constitution and founded on legality, and must respect and enforce the laws.
3. Laws, treaties and other acts of the State, the Local Authority and public entities in general shall only be valid if they conform to the Constitution.

The principle of the supremacy of the Constitution, which has as its consequence the idea of constitutionality, provided in Article 226 of the CRA, justifies that acts of the State, more specifically those of a normative nature, are subject to review by the Constitutional Court.

For this reason, the idea that legislative acts embody the popular will and are manifestations of the popular will, i.e., in the language of Jean Jacques Rousseau, "the expression of the general will", today must be pondered and re-comprehended, since these acts are often not true expressions of the general interest.

Going further, presenting here a theory of the stratification of the "general will", and to say that the Constitution, also approved by Parliament, represents its highest level, the other "general wills" have to conform to the higher general will.

This premise grounds and legitimises the constitutional court as the holder of the last word on the validity of Parliament's legislative acts.

In order to guarantee that the normative acts of the Legislative Power may be subject to scrutiny by the Constitutional Court, the Constitution of the Republic of Angola provides, in Article 227, as follows:

All acts that embody violations of constitutional principles and norms are subject to constitutionality review, namely:

a) Normative acts;
b) Treaties, conventions and international agreements;
c) Constitutional revision;

d) Referendums.

The acts in question are scrutinised through abstract constitutional review, which may be preventive or successive.

Regarding to the preventive abstract review, Article 228 of the Constitution of the Republic of Angola (CRA), as well as Article 20 of Law 3/08 of 17 June - the Constitutional Procedure Law, establish that it applies to any legal instrument that has been submitted for promulgation, an international treaty submitted for ratification or an international agreement submitted for signature.

In terms of effects, it is worth mentioning that diplomas whose preventive constitutional review has been requested to the Constitutional Court cannot be promulgated, signed or ratified. Once the unconstitutionality of any of these diplomas has been declared, they must be vetoed, not ratified or not signed, under the terms of Article 229 of the CRA and Article 25 of the Constitutional Procedure Law.

As for the successive abstract review, this is applied to any rule published in the Official Gazette, and, under the terms of articles 230 and 231, both of the CRA, and article 26 of the Constitutional Procedure Act, the following entities have the legitimacy to trigger the process before the Constitutional Court:

a) The President of the Republic;
b) One tenth of the Members of the National Assembly in full exercise of their functions;
c) The Parliamentary Groups;
d) The Attorney General of the Republic;
e) The Ombudsman;
f) The Angolan Bar Association.

The declaration of unconstitutionality shall have general binding force and shall take effect from the date of entry into force of the rule declared unconstitutional and shall determine the re-enacting of the rule revoked, although this scope may be more restricted when legal certainty, reasons of equity or public interest of exceptional relevance require it.

2. Second Note (Rationale and need for control instruments)

As noted above, the concept of majority voting should not and cannot be invoked as a barrier to constitutional jurisdiction. Constitutional courts must be guided by a democracy capable of restricting politicized decision through constitutionality control.

There is an permanent bond, often overlooked by purely formal conceptions of democracy, between political democracy and those constitutionally established fundamental rights which operate as content limits or restrictions on the absolute will of majorities.

Indeed, the will of the electorate can only be expressed authentically when it is freely expressed; and it can only be expressed freely if each and every one is guaranteed the exercise of fundamental freedoms in addition to the right to vote: freedom of thought, press, information, assembly and association.

Liberation rights, on the other hand, are effective when sustained by the guarantee of social, economic and cultural rights, i.e. they are rights to benefits such as social protection, work, livelihood, health, education and information..

Without the realization of these rights and the corresponding public obligations, both political rights and liberation rights, whose norms enshrine them are of a programmatic nature, are destined to remain only on paper: because there is no participation in public life without a guarantee of minimum standards of living, nor the formation of conscious wills without education and information.

Therefore the constitutional court has the role of judging if a legislative act of Parliament corresponds to what is called the higher general will.

It was upon this conception that the Angolan Constitutional Court, on August 9, 2021, in a preventive review of the Constitution Revision Law, despite having considered that it respected the material, formal and circumstantial limits of revision of the Constitution, declared, through Judgment no. 688/2021, unconstitutional the article that states the obligation of the Constitutional Court and other bodies with special jurisdiction (Court of Auditors) to send annual reports on its activities to the President of the Republic and the National Assembly for knowledge, as it infringed the principle of separation of powers

established in the Constitution of the Republic of Angola and for considering that it placed the judiciary as a hostage to the other sovereign bodies.

On August 13 of the same year, the National Assembly conformed the law to the decision of the Constitutional Court purging the declared unconstitutionality and, on 16 August, it was published in the Official Gazette, I Series no. 154.

In the same sense, on October 9, 2013, the Constitutional Court, in a successive abstract review procedure requested by 22 Members of the National Assembly, declared, by Judgment no. 319/2013, partially unconstitutional some articles of the Organic Law approving the Rules of Procedure of the National Assembly (Articles 260, 268, 269, 270, 271) approved by Law 13/12 of 2 May.

Consequently, the National Assembly conformed the law to the decision of the Constitutional Court and amended the content of those articles declared unconstitutional.

Lately, doctrine and case law (jurisprudence), have attempting to confirm the fact defended by Italian case law, since the 1960s, the existence, in various legal systems, of manipulative Judgements or intermediate sentences.

Manipulative decisions, also called intermediary decisions, are those through which the constitutional judge not only pronounces on the conformity of the normative act with the Constitution, but also determines the criteria and the way in which that legislative act should be conformed.

Social evolution and the emergence of the rights of the third and fourth generations, as well as political evolution itself, demonstrate that it will not be enough for constitutional jurisdictions to perform only the function of a negative legislator as Hans Kelsen stated at the time, it is necessary that their decisions extend beyond the mere declaration of unconstitutionality.

In this same direction, the Angolan Constitutional Court, in the successive abstract review process requested by the Angolan Bar Association, on December 15, 2020, integrated, through Judgment no. 658/2020, as its jurisprudence the intermediate or manipulative decisions, where the Constitutional Court determined the effects of the decision, having conditioned its effectiveness to the verification of the conditions for its materialisation.

In that decision, in defence of the supreme values of the Constitution, the Constitutional Court not only declared the unconstitutionality, but determined the moulds and effects of the decision, i.e. its effectiveness.

To conclude, I would like to reiterate that the Angolan constitutional system is characterised by a committed constitutional jurisdiction with a healthy relationship with Parliament. In major decisions where the values, principles and fundamental rights enshrined in the Constitution are under consideration, the Constitutional Court has the last word and its role has not only been limited to the enforcement of rights, but also to ensuring that the construction of law takes place under the legitimate conditions of deliberative policy. As Hans Kelsen stated, "*In the absence of an organization such as the constitutional court, the legislator will have the final word on whether the conditions have been satisfied and the principle of constitutional legality will remain essentially ineffective*".

THANK YOU!