THE INDEPENDENCE OF A MERITORIOUS ELITE: THE GOVERNMENT OF JUDGES AND DEMOCRACY

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"It is not idle speculation to inquire which comes first, either in time or importance, an independent and enlightened judiciary or a free and tolerant society. Must we first maintain a system of free political government to assure a free judiciary, or can we rely on an aggressive, activist judiciary to guarantee free government? While each undoubtedly is a support for the other, and the two are frequently found together, it is my belief that the attitude of a society and of its political forces, rather than its legal machinery, is the controlling force in the character of free institutions".

Robert H. JACKSON, *The Supreme Court in the American System of Government*, Cambridge, Mass.: Harvard University Press, 1955, p. 81.

SUMMARY: 1. The organization of the Judiciary; 2. The world of the courts; 3. The constitutional Judge; 4. The process of judicial selection; 5. The participation of "non-professionals" in judicial decisions; 6. Judges as makers of law; 7. The question of legitimacy

I. THE ORGANIZATION OF THE JUDICIARY

1. The Judiciary is one of the "less dangerous" [1] among the state powers in the overall functioning of the system of government. It is an

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[1] Cf. ALEXANDER BICKEL, *The Least Dangerous Branch. The Supreme Court at the Bar of Politics*, Indianapolis, New York, 1962.

independent, irremovable and impartial power, operated through a professional and responsible magistracy. The administration of justice is, par excellence, a *public service*.

But the Judiciary is also a passive power. The courts do not have the power to seek disputes. They can only act upon complaints and actions, according to the due process of law. And they pronounced "what the law is" (*juris dicere*). Thus, the courts do not have the right of initiative or the power to deny justice. They are instead subject to the principle of application.

Nevertheless, the function of "administering justice in the name of the people" [2] can be exercised by different orders of courts. Basically, there are two types of courts: the ordinary courts of common jurisdiction and administrative and fiscal courts of specialized jurisdiction (generally, resolving the conflicts arising from administrative and fiscal legal relations).

Given this constitutional division of the judicial system into more than one jurisdiction, it is usual to keep the expression "judicial function" for the ordinary courts of justice and the expression "jurisdictional function" to the exercise of competence assigned to specialized courts.

Although not composed entirely of professional judges, the Constitutional Court [3], with jurisdiction on constitutional matters, or the Court of Auditors [4], with specific jurisdiction in relation to the assessment and monitoring of expenditure and public accounts, are part of the jurisdictional order, but not necessarily of the Judiciary.

The Constitutional Court, moreover, has not even been constitutionally inserted in the chapter relating to the courts, and it enjoys a special title in its constitutional framework [5]. Therefore, it should be held to have been instituted as an "autonomous jurisdiction".

2. The Public Prosecutor's Office (Ministério Público) is not part of the Judiciary. Constituted by an independent and professional magistracy, it represents the state and defends the interests determined by law, takes part in the implementation of the criminal policy, as defined by the organs

(2) Cf. Article 204/1 of the Constitution.
(3) Cf. Articles 209/1, Introduction, and 221 of the Constitution.
(4) Cf. Articles 209/1/*c* and 214 of the Constitution.
(5) Cf. Part III, Title VI, Articles 221 ff.

of sovereignty, institutes criminal proceedings and defends democratic legality [6].

Although enjoys autonomy, under the law [7], the Public Prosecutor's Office does not share the characteristic of independence which is intrinsic to the Judiciary.

The prosecutors are part of a single, indivisible, responsible and hierarchically subordinate order. They are bound by criteria of legality and objectivity, even though they are subject to directives, orders and instructions emanating from the Attorney-General's Office, its superior body, and in particular the Attorney-General, with internal subordination within the same body to judicial magistrates of a higher grade [8].

Note that the Attorney-General, who is head of the Attorney-General's Office, the highest body of the Public Prosecutor's Office, is freely appointed and dismissed by the Government [9].

So the public prosecutors are part of an autonomous body, parallel to but independent of the Judiciary, and like the Judiciary its judicial magistrates cannot be suspended, promoted, retired, dismissed or in any way have their position changed, except as provided by law [10].

The Public Prosecutor's Office enjoys a "status" distinct and differentiated from the Judiciary. But the Constitution recognizes it, together with the judges of the Judiciary, as comprising the justice system [11].

3. Even the most primitive and inorganic societies institutionalized courts early on and assigned them the task of settling disputes. And if the law is today an act of public authority, the expression of the "general will", then the judge, mediator between the law and the case, can only be a public authority, and occupy, as a result, a *public magistracy*.

The judges are themselves founding elements of the system of administration of justice. And they exercise an eminently public power. As such,

(6) Cf. Article 219/1 of the Constitution.
(7) Cf. Article 219/2 of the Constitution, and Law No. 60/98, August 27 (: Statute of the Public Prosecutor's Office).
(8) Cf. Articles 219/3 and 220 of the Constitution, and Articles 2, 12/2/*b* and 76 of Law No. 60/98, August 27 (: Statute of the Public Prosecutor's Office).
(9) Cf. Article 113/*m* of the Constitution. The Attorney-General is appointed and dismissed, in accordance with a Government proposal, by the President of the Republic.
(10) Cf. Article 219/4 and 5 of the Constitution.
(11) Cf. Part III, Title V, Section IV, Articles 219 and 220 of the Constitution.

they decide disputes in which the interests of the litigants are balanced. In this triangular relationship, it is the judge who occupies the prominent position, the apex of the triangle, and must, as such, "pronounce the law".

In modern democratic and constitutional systems it is the Constitution that determines the selection of judges and establishes their respective functions and powers. Therefore, the Judiciary is organized according to *constitutional law*.

For these reason the Constitution authorizes the existence of "specialized jurisdictions", accepting that a particular type of litigation may be settled by a specific type of judge, endowed with a "natural competence". This competence may be set out in the "subject matter" (*ratione materiae*), *i.e.*, by reason of the subject in hand, or "territorially" (*ratione loci), i.e.*, by reason of a given jurisdiction, usually the home of one of the litigants.

Sometimes the law authorizes that such competence may suffer con-ventional or contractual accommodations, through clauses conferring competences, included in public or private contracts.

Finally, government tends to set up chambers or arbitration courts, and administrative authorities, called "independent", or even authorizing judges to adjudicate "in equity", as if they were truly arbitrators or mediators. Thus, the judges develop a real competition to traditional arbitration. It suffices that the parties have agreed on this and that the rights in dispute are freely available. An activity that also can constitute a free public service [12].

4. In Portugal the judicial system is hierarchically structured. This hierarchical organization is intended to address three main issues, namely:

- the need to rectify the decision rendered in "error", which is why it seems desirable that a higher court composed of older and more prudent judges should review the matter in dispute; and,
- whether an error occurred or not, the law also provides for the existence of a "double" appeal in civil and criminal matters, *i.e.*, the possibility of "appeal" in favor of the party deemed not satisfied with the decision of the first instance;
- finally, for reasons of uniformity of the law.

[12] Cf. Law No. 63/2011, December 14 (: Legal Status of the Voluntary Arbitration), and Law No. 78/2001, July 13 (: Legal Status of the Justices of the Peace).

The creation of the Courts of Appeal and the Supreme Court of Justice, in the common order, and the Central Courts and the Supreme Administrative Court, in the administrative order, responds to this aim.

Moreover, historical reasons and the need to democratize the justice system have contributed to the institutionalization of a parallel process of specialized jurisdictions.

This specialization materializes today within the court's jurisdiction in the separation of the criminal courts and civil courts in the common order. Even the appellate courts (Courts of Appeal and Supreme Court of Justice, in the common order, and Central Courts and the Supreme Administrative Court, in the administrative order), are organized and divided into sections with ordinary jurisdiction.

Finally, the relationship between national courts and courts of the same nature at the international or supranational level, such as the European Court of Human Rights (ECHR) or the Court of Justice of the European Union (CJEU), is complex, both technically and in psychological terms.

II. THE WORLD OF THE COURTS

1. In the courts of law judges occupy a special position. Career judges, usually appointed by the government for life, after a public recruitment process or aptitude exam for the post, or "popular" judges, formerly appointed via election or by drawing lots (for instance, jurors in certain types of cases), should have a dignity. This dignity is not reduced to the robe. It should, rather, be interior.

But there are mixed systems that blend the two magistracies in a single college, such as in the United States, where the judges are both appointed by the government (in particular, federal judges) and elected (usually at the state or local level).

This system has the advantage of combining the science of the professional judge, the so called "robed" judge, with the science of "not robed" judges, often regarded as more able.

In Portugal members of the Judiciary are always appointed by *public nomination*, and, as a rule, through a *public recruitment process* [13].

[13] Cf. Article 47/2 of the Constitution, and Articles 40 ff of Law No. 21/85, July 30 (: Statute of the Judges), Articles 57, 61, 65, 68 and 70 of Law No. 13/2002, February

Only the Justices of Peace [14], established recently, are not robed judges, but still, they settle disputes of less relevance. At any rate, they perform essentially "extra-judicial" functions.

So, we cannot say that in Portugal the system is characterized by a sharing jurisdiction between the robed judges and the popular judges. Judges always occupy a position, an *office*. The judge is, in short, a *public officer*.

But alongside the judges who judge there is another type of judicial officers. These, however, belong to a hierarchical and autonomous jurisdictional order — the Public Prosecutor's Office. As such, the public prosecutors are not part of the Judiciary and so they do not enjoy the guarantees of independence which is inherent to the exercise of the judicial function.

The representative and managing body of both judicial bodies, the judges and public prosecutors, is autonomous. For judges the Constitution institutionalizes the Supreme Judicial Council [15], for judges in the administrative and fiscal courts, the Supreme Council of the Administrative and Fiscal Courts [16]. The representative and managing body of the public prosecutors is the Supreme Council of the Public Prosecutor's Office [17].

2. Outside the courts of law operate the judges of criminal investigation. These judges, as the name indicates, do not settle disputes, they examine cases. As such, they belong to the judicial order.

More than "pronouncing the law" in particular cases, the role of the investigating judge is to check compliance with the law, especially regarding the criminal police authorities. They examine cases, gather evidence, take provisional measures and monitor compliance deadlines, among other functions. As a member of the Judiciary the investigating judge is subject, like ordinary judges, to the principles of independence, irremovability, unaccountability and impartiality.

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19 (: Statute of the Administrative and Fiscal Courts). and Articles 114 ff of Law No. 60/98, August 27 (: Statute of the Public Prosecutor's Office).

[14] Cf. Articles 202/4 and 209/2 of the Constitution. See also, Law No. 78/2001, July 13 (: Legal Status of the Justices of the Peace), and Judgment of the Constitutional Court No. 250/2009, at: www.tribunalconstitucional.pt.

[15] Cf. Article 218 of the Constitution.

[16] Cf. Article 217/2 of the Constitution.

[17] Cf. Article 220/2 of the Constitution.

3. In the world of the courts of law, in addition to lawyers, who belong to a professional association, which takes the form of a "public association" [18], with its own ethics, and whose members take an oath before being issued with their professional license, we find other agents, e. g., experts, perhaps one of the institutions that has been developing most recently.

Furthermore, we have the so-called "friends of the court" (*amici curiae*), an institution of citizen's participation in the administration of justice that has been developing recently at the domestic, international and supranational levels.

At the moment, the institution of the "friends of the court" plays a very small and ineffective role in Portugal. It has only been to some extent accept at the Constitutional Court, in major cases that most directly involve public life, and therefore have earned wider reception by the media and public opinion.

But the same can be said in relation to other courts, particularly the Supreme Court of Justice or the Supreme Administrative Court, since both deals with problems and issues not only relevant to the public life but also of interest to society. Hence, other forms of participation in the administration of justice should be developed which can incorporate advising the court on various matters before it pronounces its judgment.

From this point of view, and contrary to what happens at the international and supranational levels, participation of civil society has so far been scarce and of little impact on the decisions of any of the courts, except for the Constitutional Court.

III. THE CONSTITUTIONAL JUDGE

1. The development of different legal systems has end up by granting judges a "new" role. The constitutional principle of the separation of powers, in particular the separation between the Constitution and the law, does not signify the "immunity" of statutes or other acts of public nature.

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[18] Cf Articles 20/2 and 267/4 of the Constitution. and the Statute of the Bar. aproved by Law No. 15/2005, January 26.

Thus, in addition to defending democratic legality, the courts have powers to examine the constitutionality of laws and other acts of public nature [19].

This reviewing function can be undertaken in two ways:

- in a decentralized manner, case by case, which is the solution adopted in the United States;
- in a centralized or concentrated manner, the solution adopted in Europe.

In Portugal the system of judicial review is neither centralized nor decentralized. It incorporates elements taken from both systems. It is, in short, a *mixed system*.

In the tradition of the Republican Constitution of 1911, Portugal has now a decentralized review of legislation, comprising a right of access of all judges and courts to the Constitution and the principles contained therein [20], and a concentrated review of legislation in a special court, constituted solely for this purpose, the Constitutional Court [21].

In the first case, in a matter subject to trial, both the litigants and "de officio" the Judge and the Public Prosecutor's Office can question the constitutionality of a rule or principle. Acting in this competence, the judge is also a *constitutional judge*, performing a constitutional function, and has then the duty not to apply the rule to the case brought to trial [22]. In the second case, prior to the enactment of the law or after its enactment, at the request of certain previously determined authorities, the Constitutional Court can consider and declare the unconstitutionality of legislative rules or principles with general binding force (*erga omnes*).

In the case of preventive review, that is, before the law's enactment, this will just involve the rules or principles embedded in certain instruments expressly individualized in the Constitution [23]. In the case of successive review, this will cover "any" rules or principles, in accordance with the provisions of Article 281/1/*a* of the Constitution.

The Constitutional Court also assesses and declares the illegality, but only on a successive application, of certain rules, generally contained in

[19] Cf. Article 220/2 of the Constitution.
[20] Cf. Articles 202 and 204 of the Constitution.
[21] Cf. Articles 221 ff of the Constitution.
[22] Cf. Article 204 of the Constitution.
[23] Cf. Article 278 of the Constitution.

laws of a superior force ("leis de valor reforçado") or in the relational domain between the central and regional authorities [24].

Finally, the Constitutional Court "checks" and "informs" the legis--lature of the non-compliance of the Constitution for "omission of the necessary legislative measures" [25]. In this function, the Constitutional Court does not replace the legislature. It only exercises a "negative" function, and is therefore not entitled to set "time limits" or " make recommendations", as occurs in other legal systems, such as Germany and Italy.

2. "In matters brought to trial the courts cannot apply rules that contravene the Constitution or the principles contained therein" [26]. Any court may decide the issue of constitutionality, regardless of a later appeal of the incident to the Constitutional Court [27].

So, the "judgment of doubt" or "reasonable grounds" does not occur in Portugal, as it does in Germany, Italy, and more recently, in France, with the institutionalization of the "priority issue of constitutionality". In this, the trial court does not decide the question of constitutionality, instead it refers to the Constitutional Court for a subsequent ruling, and, in the specific case of France, to the higher courts of common order (*Cour de Cassation*) and administrative order (*Conseil d'Etat*), that will later send (or not) the issue to the Constitutional Council.

And we say any courts, because, from the outset, military and any other forms of settlement of disputes, on which the law confers jurisdictional form, including arbitration courts, are not excluded [28].

Hence, it can be stated that the judge is an arbiter not only of legality but also of the constitutionality, in short, a *constitutional judge*. For this reason the literature has come to distinguish between a "constitutional jurisdiction in the broad sense", assigned to all courts of justice, and a "constitutional jurisdiction in the strict sense", within the competence of the Constitutional Court [29].

[24] Cf. Article 281/1/*b*, *c* and *d* of the Constitution.
[25] Cf. Article 283 of the Constitution.
[26] Cf. Article 204 of the Constitution.
[27] Cf. Article 280 of the Constitution.
[28] Cf. Article 209/2 of the Constitution.
[29] Cf. Charles Eisenmann and Léon Halmond. *La Jurisdiction Constitutionnelle en droit français (1875-1961)*, General Introduction. in: Hermann Mosler (ed.). *Verfassungsgerichtsbarkeit in der Gegenwart. Länderberichte und Rechtsvergleichung*, Max Plank Institut für ausländisches öffentiches Recht und Völkerrecht, Cologne, 1962. pp. 233 ff.

IV. THE PROCESS OF JUDICIAL SELECTION

1. The Supreme Judicial Council is responsible for the appointment, placement, transfer and promotion of judges, as well as the exercise of disciplinary function [(30)]. In the case of the administrative and fiscal courts, these powers lie with the Supreme Council of Administrative and Fiscal Courts [(31)]. The law establishes the rules and determines the competence for the appointment, placement, transfer, promotion and the exercise of discipline in relation to the judges of the remaining courts [(32)].

The appointment, placement, transfer and promotion of public prosecutors, as well as the exercise of disciplinary function, is the responsibility of the Attorney-General's Office [(33)].

Both judges and public prosecutors are appointed through a public recruitment process, excluding any kind of influence from the political system. But this independence and autonomy, in particular with respect to the executive power, is offset by the introduction of internal controls, in--cluding the integration into a competitive career in a lifelong appointment, managed with a wide margin of discretion.

In any case, in neither the Judiciary nor the Public Prosecutor's Office, is there any direct intervention from Parliament or the Government, which cannot individually affect the career of the magistrates.

Note, however, that by law the Parliament can only intervene indirectly in the appointment, placement, transfer and promotion of judges, when appointing seven members of the Supreme Judicial Council, four members of the Supreme Council of the Administrative and Fiscal Courts and five members of the Supreme Council of the Public Prosecutor's Office. In this last case, and contrary to what happens with the Supreme Judicial Council and the Supreme Council of the Administrative and Fiscal Courts, the Minister of Justice may appoint two persons of recognized merit [(34)].

According to the Constitution, both the statute of Judges, common or specialized, and the statute of the Public Prosecutor's Office, are part of

[(30)] Cf. Article 217/1 of the Constitution.
[(31)] Cf. Article 217/2 of the Constitution.
[(32)] Cf. Article 217/3 of the Constitution.
[(33)] Cf. Article 219/5 of the Constitution.
[(34)] Cf. Article 15 of the Law No. 60/98, August 27 (: Statute of the Public Prosecutor's Office).

the "relative", *i.e.*, not "absolute", reservation of powers of Parliament, which signifies that the Government is allowed to legislate in these domains, if provided with the appropriate parliamentary credential [(35)].

Moreover, when it comes to the budget, whose bill is a Government legislative initiative, the courts rely on political power, in particular on the Assembly of the Republic [(36)]. The two relevant exceptions are the Constitutional Court [(37)] and the Court of Auditors [(38)], which have budgetary autonomy, *i.e.*, the power to draw up their management and operating budgets.

2. The Judiciary is an autonomous, independent and professionalized body, composed of judges appointed for life, managed and administered by the relevant Supreme Councils. It is, in short, a system of *public appointment*, and, as a rule, through a *public recruitment process*.

The Supreme Judicial Council and the Supreme Council of the Administrative and Fiscal Courts are of mixed composition. These bodies are composed of judges and representatives elected by the Assembly of the Republic and others appointed by the President of the Republic. They are chaired by the President of the Supreme Court of Justice, in the case of the Supreme Judicial Council [(39)], and the President of the Supreme Administrative Court, in the case of the Supreme Council of Administrative and Fiscal Courts [(40)].

The distribution of seats on the Supreme Judicial Council is currently as follows: 2 appointed by the President of the Republic, 7 elected by Parliament and 7 judges elected by their peers, in accordance with the principle of proportional representation [(41)]. Regarding the Supreme Cou-

[(35)] Cf. Article 165/1/*p* of the Constitution. With the sole exception of the organizational and procedural Law of the Constitutional Court, which is part of the "absolute" reservation of powers of the Assembly of the Republic (Article 164/*c* of the Constitution).
[(36)] Cf. Article 161/*g* of the Constitution, which is part of the "absolute" reservation of powers of the Assembly of the Republic.
[(37)] Cf. Article 5 of the Law No. 28/82, November 15 (: Organic Law on the Organization, Functioning and Procedure of the Constitutional Court).
[(38)] Cf., Article 31 of the Law No. 98/97, August 26 (: Law on the Organization and Procedure of the Court of Auditors).
[(39)] Cf. Article 218/1 of the Constitution.
[(40)] Cf. 75/1 of Law No. 13/2002, February 19 (: Statute of the Administrative and Fiscal Courts).
[(41)] Cf. Article 218/1 of the Constitution.

ncil of Administrative and Fiscal Courts: 2 appointed by the President of the Republic, 4 elected by the Assembly of the Republic and 4 judges elected by their peers, in accordance with the principle of proportional representation [42].

The law may provide for the participation in these councils of judicial officials, elected by their peers, with intervention limited to the discussion of and voting on matters relating to the assessment of professional merit and the exercise of disciplinary function [43].

3. These Supreme Councils are not "self-government" bodies of the Judiciary. Instead, they are "organs of guarantee", which administer the life of the judiciaries in the name of the law and without political interference.

The fact that the political power is represented on these bodies does not impair the above statement. One thing is the independence of their function, the other is the management of their careers. The representatives of the political power have also a word to say on this matter to the extent that justice is administered "on behalf of the people".

These Supreme Councils are intended to limit, or even exclude, the intervention of the executive power in the management and administration of the Judiciary, including its remuneration system, enshrined in a special statute, and thereby separating it from the political system.

Reasons connected with the previous authoritarian regime, especially the need to reconcile the requirements of a political nature with those relating to the technical-legal competence of the candidates, led the constitutional fathers of 1976 to favor this particular system.

In the higher courts, in particular the Supreme Court of Justice and the Supreme Administrative Court, the competitive submission of curricula is open to jurists of recognized merit, apart from judges and prosecutors, which means that lawyers and academics can apply [44].

(42) Cf. 75/1 of Law No. 13/2002, February 19 (: Statute of the Administrative and Fiscal Courts).

(43) Cf., Article 218/3 of the Constitution.

(44) Cf. Articles 50, 51 and 52 of Law No. 21/85, July 30 (: Statute of the Judges), and Articles 65, 66 and 67 of Law No. 13/2002, February 19 (: Statute of the Administrative and Fiscal Courts).

4. Judges are members of bodies that are unique although not unified, according to the principle of the "plurality" of jurisdictions. And these judges are subject to a special statute.

This statute must include not only how they are recruited, appointed and access to their bodies, but also the guarantees of the exercise of their duties, including the remuneration system. Of these structural principles, independence, irremovability, impartiality and unaccountability, are of particular importance.

The principle of judicial independence states that courts are subject only to the law. The law refers here to the legal system, and the supreme law is the Constitution [45].

The principle of judicial independence means also that judges are not dependent upon instructions and policy directives. They are strictly separated from other organs of the state. The literature has come to distinguish between "external" independence (relating to the Judiciary as a corporate body, and, reflectively, to the single judge) and "internal" inde-pendence (relating to judges considered individually).

By external independence we must, then, understand that judges are not subject to orders or instructions from external authorities, including the organs of political power. The judge is not a "political judge", nor is the justice that he administers a "political justice", subservient to political or private interests. The Judiciary is independent, manifesting itself, primarily, as a separate power within the internal division of state powers.

By internal independence we must understand the authority of judges considered individually in relation to acts performed within their functions. Judges are subject to the law and the Constitution. This is a principle of functional independence and not of institutional independence. The appeal system provided as a guarantee of citizens' rights, mostly in the procedural codes, does not impair this functional independence.

5. The irremovability of the judges is usually seen as a guarantee of the institutional independence of the Judiciary. But it has not always been so. Article 216 paragraph 1 of the Constitution, however, provides the generic guarantee of irremovability of the judges. They cannot be transferred, suspended, retired or dismissed, except as provided by the law.

(45) Cf. Article 203 of the Constitution.

But the irremovability can also be interpreted, from another perspective, as a guarantee of the internal institutional independence. This task is now assigned to the respective Supreme Councils, "organs of guarantee" of the respective judiciaries, the Supreme Judicial Council and the Supreme Council of Administrative and Fiscal Courts [46].

6. Judges cannot be part of the cases brought to trial. The judge must decide the case as a non-participant "third party", i.e., equidistant from the interests at stake in the process, only subject to the law. This requirement of impartiality or "*terceriedade*" justifies the judge's obligation to declare himself prevented from judging if there is a personal relationship or self-interest in the case, and it may still give rise to the incident of suspicion driven by the litigants.

Due to the impartiality and adherence to the law, judges may not simultaneously exercise any other function or role in which they have to deal with the same subject matter with subjection to given instructions. Judges cannot be subject to instructions and no judge can be bound by orders for the fulfillment of their functions. Ensuring fairness and compliance with the law reinforces the guarantee of the institutional and functional independence of judges and the Judiciary [47].

Impartiality, however, can be seen from another point of view, as a rule of professional conduct directed at the behavior of judges for pro-tection of the reputation of the Judiciary. The judge in his private life is a citizen like any other, but he should conduct his private affairs with certain discretion. Whoever is called to administer justice "on behalf of the people" cannot exhibit dysfunctional behavior that causes public scandal. This discretion, which is essential for judges, is required to prevent the internal forum, the conscience of the judge, from vitiating the correct interpretation and application of the law.

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[46] Cf. Articles 217 and 218 of the Constitution.

[47] It is this guarantee of independence and impartiality, reflected in being bound solely by the law, that justifies the establishment in their statutes of prior permission from the Supreme Councils for the exercise of other functions, and the ban on party political activities of a public nature, and also the holding of public offices, with the ex-ception of the President of the Republic, member of the Government or the Council of State. Cf. Article 11 of Law No. 21/85, July 30 (: Statute of the Judges), Article 3 of Law No. 13/2002, February 19 (: Statute of the Administrative and Fiscal Courts), which refers, subsidiarily, in matters of incompatibility, to the Statute of the Judges, and Articles 82 and 139/1 of Law No. 60/98, August 27 (: Statute of the Public Prosecutor's Office).

7. Judges are masters of their "pre-judgments", a concept that encompasses both their professional knowledge and their knowledge as private citizens, but this pre-judgment, although it can be seen as a "hypothesis of judgment", should not dominate the outcome of the case. It must instead be taken as one of several integral elements of the "hermeneutic circle" of the judicial decision.

This concept of "independence" is confronted with the concept of "accountability". This, in particular, for the judge considered individually. Within certain limits, judges are considered "unaccountable", in the sense that they have no obligation to external authorities, including the agencies of the political system. Thus, in Portugal, judges have no political accountability before the political-representative bodies which could eventually lead to dismissal or transfer of functions.

But, contrary to common law judges, they do not individually perform the function of administrator of justice. They are integrated into a "public office career". They have therefore been incorrectly deemed to be part of the civil service. This is why the provisions of Article 22 of the Constitution, relating to extra-contractual liability of the state and other public entities, should not apply to them.

This, however, does not mean that judges, individually considered, cannot be directly accountable under the criminal, civil and administrative laws for acts performed in the exercise of their functions, which result in contravention of the law or the rights, freedoms and guarantees of the citizens or injury to others [48].

In the case of criminal liability, if it is found that a judge has committed a crime there is nothing to preclude the obligation to answer to the law. But not quite so with regard to the civil liability and disciplinary procedure rules.

As the courts are a "sovereign body" [49], the judge cannot answer in civil and disciplinary proceedings in the same way as the other state organs and agents or the ordinary citizen. Here, more accurate and precise limits must be established.

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[48] Cf. Article 5 of Law No. 21/85, July 30 (: Statute of the Judges), Article 3/2 of Law No. 13/2002, February 19 (: Statute of the Administrative and Fiscal Courts), and Article 77 of Law No. 60/98, August 27 (: Statute of the Public Prosecutor's Office).

[49] Cf. Article 202/1 of the Constitution.

But if there is a place for disciplinary liability, it will be exercised by the Supreme Councils [50]. The competent body to exercise disciplinary function, as regards the Judiciary, is the Supreme Judicial Council [51]. Regarding the judges of the administrative and fiscal courts, it is the Supreme Council of the Administrative and Fiscal Courts [52]. With regard to the public prosecutors, it is the Attorney-General's Office [53].

8. The Constitution refers to the issue of judge's accountability. In accordance with the provisions of paragraph 1 of Article 216: "[t]he judges cannot be held accountable for their judgments, saving the exceptions provided for by law".

Law No. 67/2007, December 31, introduced a new discipline in the legal system of extra-contractual civil liability of the state and other public entities, which includes "liability for damages arising from the exercise of the judicial function".

In these circumstances, without prejudice to the criminal liability they might incur, judges cannot be directly liable for damage arising from their exercise of the judicial function. However, if a judge acts with "willful misconduct" or "gross negligence" the state has a right of return against them. The decision to pursue the right of return in relation to judges lies with the competent disciplinary body, acting on its own initiative or on the initiative of the Minister of Justice [54].

This type of accountability that the state imposes on judges, by way the right of return, consisting of compensation for damage caused to the exchequer in the exercise of judicial duties, does not seem to be the best and most appropriate.

First, because the function of judging is an independent rather than a subordinated activity. Second, its exercise may not correspond to the fulfillment of a "service obligation".

(50) Cf. Article 217 of the Constitution.

(51) Cf. Article 217/1 of the Constitution, and Article 149/*a* of Law No. 21/85, July 30 (: Statute of the Judges).

(52) Cf. Article 219/2 of the Constitution, and Article 74/2/*a* of Law No. 13/2002, February 19 (: Statute of the Administrative and Fiscal Courts).

(53) Cf. Article 219/5 of the Constitution, and Article 15/1 of Law No. 60/98, August 27 (: Statute of the Public Prosecutor's Office).

(54) Cf. Article 14 of Law No. 67/2007, December 31.

The statute of the Judges now includes this accountability, while safeguarding provisions in the Constitution and other special statutes [55]. Nevertheless, in the light of the actual status of the Judiciary, this provision should be deemed constitutionally groundless and politically wrong, since judges and other judicial officers, including the public prosecutors, cannot be considered public officials in the sense of belonging to the civil service.

Judges are holders of a "public office", performing a function — the judicial function — characterized by its independence, irremovability, unaccountability and special guarantees of impartiality.

Hence, the constitutional qualification of judges and other magistrates as holders of a "public office", without prejudice to the legal extension of certain aspects of the civil service system, is one thing, but their status as civil servants is quite another.

The judges and judicial officers have their own particular statutes. So the proper solution would have been to leave them out the scope of application of the new law on extra-contractual civil liability of the state and other public entities.

V. THE PARTICIPATION OF "NON-PROFESSIONALS" IN JUDICIAL DECISIONS

1. The courts are "sovereign bodies" responsible for administering justice "on behalf of the people"[56].

In carrying out this function, the courts are entitled to the assistance of other authorities [57], and the law may provide for alternative forms of settling disputes [58].

First, we must distinguish between the forms of "voluntary" and "involuntary" jurisdiction. In the latter case, with the exception of experts and other persons who may be called to testify in court, it is hard to say that we have instituted forms of "non-professional" participation in the decisions of justice.

(55) Cfr., Article 5/2 and 3 of Law No. 21/85, July 30 (: Statute of the Judges), Articles 3/2 and 3 and 24/1/*f* of Law No. 13/2002, February 19 (: Statute of the Administrative and Fiscal Courts), and Article 77 of Law No. 60/98, August 27 (: Statute of the Public Prosecutor's Office).

(56) Cf. Article 202/1 of the Constitution.

(57) Cf. Article 202/3 of the Constitution.

(58) Cf. Article 202/4 of the Constitution.

In the "voluntary" jurisdiction processes, i.e., non-adversarial, the answer will be different. In family law, in contract law, and in social protection law, not only are forms of assistance of other authorities contemplated, but courts can even act in "dialogue", not just with the various parties involved, but also with any public or private associations that may represent or support them.

Justices of the Peace have recently been introduced as a mode of "non-jurisdictional" settlement of disputes. But, in fact, this is yet another alternative form of settling disputes, and so also a way of "unclogging" the work of the courts, both to achieve greater proximity and speed in obtaining a fair judgment, and for reasons of financial and economic rationality, with a facultative appeal of the final decision to the courts (59).

These forms of "extra-jurisdictional" settlement of disputes, and even of "mediation", are tending to spread in the domains of both the civil and criminal law. Strictly speaking, there is no involvement or participation of "non-professionals" in the decisions of justice, since this is not an exercise of a jurisdictional function.

2. Another issue is related to legal advice. But here too we cannot strictly speak about the involvement or participation of "non-professionals" in the decisions of justice. Besides that, the system of legal counsel operates solely with regard to the Constitutional Court (60), the Court of Auditors (61), the Supreme Court of Justice (62), and the Supreme Administrative Court (63).

In such cases, the court system, in addition to incorporating a smaller number of judges, usually offers legal counsel. In general, the consultants and auditors come from universities in the intermediate levels of their ca--reers, but they can also be judges or other judicial officers. In the case of the Constitutional Court, legal advisors are generally recruited out from

(59) Cf. Article 61 of Law No. 78/2001, July 13 (: Legal Status of the Justices of Peace). See also, Judgment of the Constitutional Court No. 250/2009, at: www.tribunal-constitucional.pt.

(60) Cf. Articles 18 ff of Decreto-Lei No. 545/1999, December 14.

(61) Cf. Article 30 of Law No. 98/97, August 26 (: Law on the Organization and Procedure of the Court of Auditors).

(62) Cf. Article 3/2/e and 3 and Article 13 of Decreto-Lei No. 74/2002, March 26.

(63) Cf. Decreto-Lei No. 354/1997, December 16.

the civil service (64). In the case of the Court of Auditors, the office of auditor and consultant, which is not personally attached to any of the judges, is, as a rule, trough public tender (65).

At the level of the higher courts, the Supreme Court of Justice or the Supreme Administrative Court, the judges have legal advisory and te--chnical support to carry out their functions (66). And the Administrative and Fiscal Courts also have a system of audit and consultancy (67).

The presidents of the higher courts have a technical support office. This includes jurists and judges cooperating with, rather than participating, in judicial decisions (68).

Finally, the Public Prosecutor's Office is assisted by judicial officers, the criminal police authorities, with the corresponding advisory and consulting services, as well as legal auditors, who may be judges (69). In addition, the office of the Attorney-General has its own technical support service (70).

VI. JUDGES AS MAKERS OF LAW

1. In Portugal, as in other countries, judges complete the activity of the legislature. Judges make law, not on a general and abstract way, like the legislature, but in individual cases. In civil law, contract law, in the review of administrative action, especially in constitutional matters, judges make law, and not just in the "interstices" of the law.

However, contrary to the "common law", of Anglo-American extrac--tion, Portuguese judges belong to a continental system which is based on

(64) Cf. Article 20 of Decreto-Lei No. 545/1999, December 14.

(65) Cf. Article 30 of Law No. 98/97, August 26 (: Law on the Organization and Procedure of the Court of Auditors), and Decreto-Lei No. 440/1999, November 2.

(66) Cf. Articles 3/3 and 13 of Decreto-Lei No. 74/2002, March 26, and Decreto-Lei No. 354/1997, December 16.

(67) Cf. Articles 56/4 and 56/A of Law No. 13/2002, February 19 (: Statute of the Administrative and Fiscal Courts).

(68) Cf. Articles 18 ff of Decreto-Lei No. 545/1999, December 14, Articles 3/2/e and 3, and 13 of Decreto-Lei No. 74/2002, March 26, Decreto-Lei No. 354/1997, December 16, and Article 30 of Law No. 98/97, August 26 (: Law on the Organization and Procedure of the Court of Auditors).

(69) Cf. Articles 3/3, 9/2, 44, 45, 49 and 50 of Law No. 60/98, August 27 (: Statute of the Public Prosecutor's Office).

(70) Cf. Article 12/4 of Law No. 60/98, August 27 (: Statute of the Public Prosecutor's Office).

a Roman law. The system is not juriscentric but legiscentric. The law is the expression of the "general will", the sovereign decision of a representative parliamentary body, not the "common law" formed on the basis of classical Roman law, but on a centralized system of law, which is the one received on the Continent.

The law is centered on rules and statutes. It is a "Jupiter's law", enshrined in the codes, not primarily realized, as the Anglo-American law is, through the ordering of legal proceedings (*writs*). And in addition, on the processes, which based on the principle that if their rules were properly observed and respected, this will necessarily lead to a fair and equitable procedure (*due process of law*).

2. In Portugal, the procedural law is not structured by the ordering of legal proceedings (*writs*). Consequently, the principle of the binding force of precedent is not recognized.

The origin of precedent, literally the prior decision lasts, results from the assertion of a universal principle of justice — equal (or similar) cases shall be decided in the same (or a similar) way. In principle, for judges to draw up rules of law it is enough for them to decide on "questions of law".

Questions of law can be decided in two ways: with or without justification. But in both cases the judge produces "jurisprudence". A judgment or decision that is confined only to the explicit content of the law, without further justification, will determine the law applicable to the case, and, as such, it also conveys a rule.

Precedents, however, have the advantage of facilitating the "prediction" of the judgments, the so-called "theories of anticipation", i.e., what has been "said" or "spoken" by the judges, whence we can infer what he will "say", and it is the combination of these two elements which constitute a precedent.

Other jurisdictions have chosen another structure, not making the precedent binding on the future.

As a reaction against the "general provisions" pronounced by the parliaments (courts) of the *Ancien Régime* in France, and in Portugal, too, when the constitutional fathers were engaged in the preparatory work of the Constituent Assembly of 1820-1822, in the early stage of the constitutional regime, they decided to prohibit judges from "pronouncing" on matters brought before them through "general provisions" (71).

(71) Especially in the face of distrust from the judges of the then judiciary that represented an aristocratic and stratified form of justice. Cf. ANTONIO M. HESPANHA *Guiando a Mão Invisível. Direitos, Estado e Lei no Liberalismo Monárquico Português* ("Guiding the Invisible Hand. Rights, State and Law in Portuguese Monarchical Liberalism"), Coimbra. 2004, pp. 91. 111 ff.

However, given a precedent contrary to the law and reason, judges have the socially recognized power (*auctoritas*) to argue that new facts, certain key elements, are different from those previously governed by the same act.

Even in the systems of legislative enactment, where the judge is not bound by precedent, we find this system of *distinguo*.

Only Continental judges do not have to give them relevance. In such cases, the reasons for the judgment may be limited to creating a principle of "correction", without the need to demonstrate that this same principle is justified by factual circumstances peculiar to the case.

3. It happens that the higher courts, the Supreme Court, in the common order, or the Supreme Administrative Court, in the administrative order, do not in general decide "questions of fact" but "questions of law".

In addition, the "uniformity" of jurisprudence is not brought about through rulings endowed with the same general binding force of the law. Consequently, in Portugal, the decisions of the higher courts cannot directly bind the lower courts, which thus remain free to resist the decisions of the higher courts, and so produce "dissident" jurisprudence.

This decision is due not to the legislature but to the intervention of the Constitutional Court, which in 1993 declared unconstitutional, with general binding force, Article 2 of the Civil Code, for breach of the principle contained in Article 115/2 of the Constitution (now Article 112/5), which established the prohibition of "general provisions" with force comparable or identical to the law (72).

The only exceptions constitutionally provided for refer to the judgments of the Constitutional Court, in accordance with paragraph 1 of Article 282 of the Constitution, when declaring the unconstitutionality or illegality of rules in a successive abstract review, and the Supreme Administrative Court, when declaring the illegality of regulations submitted to it for assessment (73).

(72) Cf. Judgment of the Constitutional Court No. 810/93. at: www.tribunalconstitucional.pt.

(73) Cf. Article 268/5 of the Constitution, and Articles 72 ff of the Procedural Code of the Administrative and Fiscal Courts.

But we can always say that the judge, in the Kelsenian tradition, acts not as a "positive legislator", but as a "negative legislator", enjoying the power of "refusal" and not a "prolative" power.

4. Judges, from whom binding judgments are expected, should be required to set out the reasons, the rational grounds for their decisions. The obligation to justify decisions weighs on the judges and the judicial power [(74)].

It is now the task of the modern theory of interpretation to determine the rational grounds for the judicial decisions so that the sentence can be controlled. This principle requires from the judge a linkage to "reasonableness". The responsibility of the judge is becoming more and more a responsibility for the rationality of their decisions.

In this sense, we can say that the rational grounds are a "necessary support" of the judicial decision. Irrationality or insufficiency of the reasons will determine the injustice and irrationality of the decision. Hence, the lack or insufficiency of reasons constitute a suitable cause for the nullity of the ruling in which it was handed down.

The rational grounds for the judicial decision, however, do not amount to a set of rules, but to a bundle or set of reasons for these rules, which are offered in support of the judgments. Therefore, it is this "value-based" or "non-deductive" mode of justification, more extensive than the merely "deductive" one, in reference to the codes, that forms the model of the "syllogism of justice", which is now advocated as a central element of the "democratization" of the system of justice and of the "correct" application of the law by the courts.

This model of the court's reasoning is essentially "value-based" and appeals to "non-deductive" arguments. This "law of the judges" (*Richterrecht*) derives its authority and independence from the scientific method of justification [(75)].

Thus, the "forms of communication" gains new relevance and with them the evaluative and complex dimension of the law as an alternative model of consistency and/or integrity between the "textual linguistic utterances" and the "reasons" underlying their rulings, i.e., the arguments used.

(74) Cf. Article 205/1 of the Constitution.

(75) Cf. Cristina Queiroz, *Interpretação Constitucional e Poder Judicial. Sobre a epistemologia da construção constitucional* ("Constitutional Interpretation and Judicial Power. On the Epistemology of Constitutional Construction"), Coimbra, 2000, pp. 161 ff.

Integrity is now controlled by the use of a "strict" justification that "objectively" is contained on the specific mode of rational argumentation.

And it is through this "act" of speech (*iuris dicere*) that not only the vocabulary but also the entire judicial life have been developed. The administration of justice in a democratic and constitutional system is the product of a confrontation of values. And it has to do not with the "internal justification", but with the "external justification", that is, with the "rational acceptability" of the premises of the "internal justification" [(76)].

With this, judges try to compensate for their lack of democratic representativeness, basically the fact of not being elected. Which is to say that the courts now seek to justify their decisions to benefit from a consensus: of the litigants, of the higher courts, and ultimately of the inter-pretive community itself.

In short, the idea is that judicial decisions should not only be obeyed, but also recognized, since, as seems more appropriate, they are best seen as more widely accepted by society [(77)].

5. In Portugal we can disagree as much with the court's decision as with its reasoning [(78)]. But recognizing the existence of dissenting opinions is also accepting, based on the same grounds, a "personalization" of justice whose rationale amounts to a plurality or free expression of opinions.

This practice can convey some confusion in the rational grounds of judicial decisions, but it provides alternatives. The requirement to publish minority dissident opinions allows a better public discussion of the decision, strengthens the awareness of judges' accountability, and as such contributes decisively to further the rationalization of the system of justice.

Knowing the extent to which this "revelation" of reasons does not by itself lead to other conflicts within the system, and which classes of disad--vantages could steam from it, is itself another problem which is related to the expectations of participation and democratization of the system of justice as a whole.

(76) Ibid., p. 163.

(77) Chaïm Perelmann, *Ethique et Droit* (brasilian translation. "Ética e Direito"). São Paulo: Martins Fontes, 1996, pp. 552 ff.

(78) Cf. Article 42/4 of Law No. 28/82, November 15 (: Organic Law on the Organization, Functioning and Procedure of the Constitutional Court). Article 663/1 of the Civil Procedure Code, and Articles 372 and 425 of the Criminal Procedure Code.

Be that as it may, and in the case of the higher courts, the publication of the dissenting individual opinions, together with the reasoned grounds for the judicial decisions, should be construed as a means of strengthening the guarantee of neutrality and impartiality of the courts and, through them, the entire process of (inter-)mediation between the state and society.

And it decisively marks the passage of an authoritarian to a democratic based system of law, which implies "discussion" and "dialogue", not only between the courts and other organs of the political system, but also between the courts and public opinion.

VII. THE QUESTION OF LEGITIMACY

1. In the late eighteenth century, James MADISON wrote in "The Federalist" No. 51 that the courts, as organs of the political system, should be viewed as "sentinels" of public opinion.

In fact, at the level of the supreme courts, and in particular the courts of Constitutional Justice, the literature tends to divide jurisprudence into two blocks: one related to the "legal matters" and the other to the "political matters" [79] .

Today, as we should expect, the discussion about the "legitimacy" of the courts and the Judiciary is guided by other paths.

The problem is not one of knowing whether the courts can take — and do take — "political" decisions, breaking with the traditional legal criteria — the *Methodenstreit* of the Weimar era — but of determining the extent to which courts in general, and Constitutional Courts in particular, operate in a "continuum" between a typically political function and a typically legal function.

For that reason, the differentiation between the "legal system" and the "political system" consists not only of strengthening the position of judges, and the appeal to a higher decision-making autonomy, but also of a better theoretical and methodological development of legal arguments in comparison with strictly logical or sociological determinations [80].

[79] Cf. ROBERT H. JACKSON, *The Supreme Court in the American System of Government*, Cambridge, Mass.: Harvard University Press. 1955, pp. 53 ff.

[80] Cf. NIKLAS LUHMANN, *Funktionen der Rechtsprechung im politischen System*, in: NIKLAS LUHMANN, "Politische Planung. Aufsätze zur Soziologie von Politik und Verwaltung", Cologne, Opladen, 1971, pp. 47 ff.

In fact, the model of judicial adjudication does not result in the replacement of a "rule interpretive model" with a "judicial power model", a model in which the judge (and the Judiciary) would constitutively be an interventer, an autonomous creator of the solutions required by societal aspirations.

Nevertheless, the courts and the Judiciary can "correct" and "supplement" the legislative prognosis, distinguishing, in the event, the "legal (provisional) qualification of the facts", operated by the legislature, from the individualization of the "norm of decision". An issue, after all, of "(self-)delimitation" of their own jurisdiction and of the "extent" of their reviewing function.

Not forgetting that legal procedures are not only used for the "production" of the decision, but also for the "absorption of protests" [81]. Under the current system, the responsibility for the "consequences" or the "results" of judicial decisions is not ultimately the competence of the judges, but fundamentally that of the politically conforming bodies.

In these circumstances, the judicial decision becomes a "creative act" and not just from an exclusive conventional point of view — the problem of the *Selbsbegrifflichkeit* — the ability of the judges (and the law in general) to create "autonomous concepts" [82].

To this should be added the radical distinction between the position in which we find the legislature, or normative producer, and the judge, although in the case of the latter it can be asserted that there now coexists, alongside a social activity of arbitration, a specific form of control of the activity of public authorities.

The function of judging is something that is beyond the essential core activity of the state in its projection on the whole of society. It represents, in the institutional division of power, the function which has least approached the evolution towards the social state. Constitutional Justice alone maintains a more appropriate relationship with the global functioning of the political system [83].

[81] Ibid.

[82] Cf. WALTER LEISNER, *Von der verfassungsmäßigkeit der Gesetze zur Gesetzmäßigkeit der Verfassung. Betrachtungen zur möglichen selbständigen Begrifflichkeit im Verfassungsrecht*, Tübingen, 1964, pp. 16 ff.

[83] Cf. CRISTINA QUEIROZ, *Interpretação Constitucional e Poder Judicial*, cit., pp. 307-308.

2. Judges do not have an originally power, but a derived one. The appeal to popular sovereignty — "We, the People" — in the exordium of judicial decisions, as the source of all legal powers, sets up the Judiciary as a representative body. But this is not a representation by delegation (or majority), but rather of a "figurative" or "symbolic" representation, i.e., a representation of an institution or legal person, which implies a distinction between the "office" (*officio*) and its "holder" (84).

"Ubi non est actio, ibi non est jurisdictio" or "wo ist kein Kläger, das ist kein Richter", the principle that the law does not arise from the creation of an action but precedes it. In other words, the ultimate "professionalization" of judges and the Judiciary represents a logical "prius" for important changes in the relations between the courts and the political system.

Given these considerations, the independence of the judges and the apolitical and impartial nature of the Judiciary are not solely a consequence of the principle that judges are bound by the law, even though historically they are understood as self-binding requirements. This is because the legislature also acts in subjection to a higher law, never having intended to be taken as independent or apolitical, since, in fact, it reflects the personal and objective independence of judges and the Judiciary, the principle that they should act independently of political groups, so that their judgments can be presented as free, fair and impartial (85).

Within the process of law creation, judges are essentially adjudicators, who are predominantly not bound, and therefore highly independent, while they institutionally and internally depend for various reasons on their surroundings and on themselves (86).

Two aspects of the judicial function give the judge this special resonance: one is its obligation to engage in a *dialogue*, the other is its *independence* (87).

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(84) Cf. Ernst Kantorowicz, *The King's Two Bodies. A Study in Medieval Political Theology* (french translation. "Les Deux Corps du Roi. Essai sur la théologie politique au Moyen Âge"), Paris, 1996, pp. 156 ff., especially the concepts of "corpus fictum" and "corpus repraesentatum".

(85) Cf. Cristina Queiroz, *Interpretação Constitucional e Poder Judicial*, cit., p. 309.

(86) Cf. Dieter Simon, *Die Unabhängigkeit des Richters* (castlian translation, "La Independencia del Juez"), Barcelona, 1985, p. 171.

(87) Cf. Owen Fiss, *The Supreme Court, 1978 Term. Foreword: The Forms of Justice*, in: 93 "Harvard Law Review" (1979), pp. 1 ff., 13.

But the judges are people — "human, all too human". Their ability to make a special contribution to political and social life is not derived from a function of personal knowledge, but from the definition of the function they perform and through which they exercise their power (88).

Even in the period of the liberal state, the institutional separation of powers never fully coincided with the legal separation of functions. The development of the democratic system has accentuated these differences. In times of economic and social crisis, it is not the legal control that prevails but the political control.

In the end, the legal and constitutional principle of the separation of powers ensures the "reflexive structure" of legitimacy by presenting itself as a limit to the "juridification" process, thus preventing a legitimizing "self-referentiality" of the judges and the Judiciary (89).

And to the extent that "procedural legitimacy" (90) has succeeded, the political system legitimizes itself while legitimizing the law it produces. This presumes a functional model of structural delimitation of power by the judge. It is the judges that now draws the line of separation between the law and the political system, which is to say between the law and the system of justice (91).

3. The "remedial" role of the courts and the Judiciary embraces the basic concept of "representation" and, consequently, the concept of "sovereignty" in its legal and political framework.

The fact that the prophecy of Alexis de Tocqueville (92) had been fulfilled in the meantime, according to which "political issues" tend to be

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(88) Ibid., p. 12.

(89) Cf. Jürgen Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaat*, Frankfurt am Main, 1992, pp. 229, 317 ff.

(90) Cf. Niklas Luhmann, *Legitimation durch Verfahren*, 6th edition, Frankfurt am Main, 2001.

(91) Cf. Cristina Queiroz, *Interpretação Constitucional e Poder Judicial*, cit., p. 3, and *Justiça Constitucional e Interpretação da Constituição. A procura de um novo paradigma* ("Constitutional Justice and Constitutional Interpretation. The search for a new paradigm"), in: "Nos 25 Anos da Constituição da República Portuguesa de 1976. Evolução Constitucional e Perspectivas Futuras" ("In the 25 Years of the Portuguese Constitution of 1976. Constitutional Developments and Future Prospects"), Lisbon: AAFDL, 2001, p. 598.

(92) Cf. Alexis de Tocqueville, *De la Démocratie en Amérique*, Paris: Robert Laffont, 1986, Book I, chap. 6.

turned into "legal issues" to be decided by the courts, can be seen as a breaking point:

- on the one hand, given the traditional view of the Judiciary, es--sentially as a "moderate" and "self-contained" authority, "*en quelque façon nul*l"; and,
- on the other, given the "functionalized" view of the judge, basically a "Jupiter's judge" interpreting a law already "given" and never "constructed", and in rare cases even as a "*longa manus*" of the Parliament, strategically placed at the pinnacle of the state power [93].

In the final analysis, it is this relational structure of the Judiciary that enforces the prevalence of the "dialogical" and "participatory" dimension of justice, to the extent that the courts may continue to be seen by as "defenders" and not as "dominators" of the Constitution. A process that is more "dialogical" than "monological", a process that makes public more than it conceals the assumptions on which it was based [94].

Ultimately, it is the function of the courts and the Judiciary to build their own "paideia" as to defend the "forte" of the Empire of Law. In this regard, the jurisprudence of the courts, in particular the jurisprudence of the Constitutional Courts, has reformulated the Empire of Law [95].

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(93) Cf. Cristina Queiroz, *Constituição e Poder Judicial* ("The Constitution and Judicial Power") in: "Nos 20 Anos do Código das Sociedades Comerciais. Homenagem aos Professores Doutores Ferrer Correia, Orlando de Carvalho e Vasco Lobo Xavier" ("In the 20 Years of the Commercial Companies Code. Tribute to Professors Ferrer Correia, Orlando Carvalho and Vasco Lobo Xavier"), II, Faculty of Law of the University of Coimbra, 2007, pp. 523 ff., 533.

(94) Cf. Cristina Queiroz, *Interpretação Constitucional e Poder Judicial*, cit., p. 22.

(95) Ibid.