**Proposed speech for the Worldwide Conference on Constitutional Justice, South Africa, January 2009.**

**Introduction**

On behalf of the Ibero-American Conference of Constitutional Justice and the Supreme Court of Justice of Mexico, I thank the South African Constitutional Court and the Commission of Venice for having invited us to take part in this Worldwide Conference on Constitutional Justice.

As a preamble, I would like to begin by making a brief analytical reflection about the daily affairs of the judicial bodies to which we pertain: the administration of constitutional justice as the means of safeguarding the essential values of our fundamental laws.

The exercise of constitutional jurisdiction is the result of three great political-legal syntheses: the democratic State, the liberal State and the social State. By means of the first one, the criteria of access to power, as well as the legitimization of governments and the status of the citizens were transformed, all of them directed towards the formation of a model of relationship between society in general and those who govern in their name. Thanks to the second, a distinction was made between public power and society, thereby providing the possibility of constructing a space reserved for individuals with respect to state action. Fundamental rights leading to the construction of personal freedom come up from that act and, for the same reason, the modern sense of a division of powers and the principle of legality. Lastly, under the formula of a social State, a set of guarantees was introduced consisting of material benefits in favor of the least favored. The rationale behind this was a possibility that minimum or vital rights would be obtained for large sectors of the population, through the so-called social rights.

To affirm the existence of this general constitutional structure is simply the first step in constitutional acceptance, since very serious problems arise immediately. Principally, the problem as to how the components of three moments which, as

such, have different origins and purposes, can be harmonized at a time of growing political pluralism. This means that the social and democratic State of law is only an initial structure with respect to which solutions must be provided to make it fully effective. What is the solution? Fundamentally, it must be acknowledged that in the field of human rights we have an array of guarantees vis-á-vis State action and a series of elements that guarantee a better quality of life.

In consideration of the foregoing, the Ibero-American Conference of Constitutional Justice--a body made up of courts, tribunals and chambers that dispense constitutional justice in Spanish- and Portuguese-speaking countries—has from time to time held meetings of constitutional judges so that they might share experiences and contribute to jurisdictional efforts through the exchange of ideas, always searching for the reaffirmation of the basic principles and values of the rule of law, the correct institutional functioning of the branches of government and greater efficacy and guarantee of the rights and liberties of the individual.

To form a database of cases and experiences in Ibero-America regarding which we will work at the respective roundtable during this conference, the questions previously made known have been distributed and inserted in sections A and B, and we will refer to them below.

It is important to distinguish between the internal and, the external approach to the cases on which we will work in the coming days. By internal approach, we should understand cases that were resolved nationally, while by the external approach, we understand the arguments and criteria arisen from sentences and opinions of international bodies engaged in the protection of human rights. We must be cautious in differentiating the former from the latter. We will now proceed to analyze sections A and B.

**A. Influence of constitutional justice on society**

In a first phase of the conference, the discussion will be focused on the influence of constitutional justice on society. Strict constitutional jurisdiction has been defined as the privileged instrument for solving principal conflicts confronted by the components of society and the ultimate body in which the various political positions that conform contemporary democracies are debated, thus it is logical that the latter's influence on society is an extraordinarily interesting topic.

Obviously, the issue is complex; the influence of constitutional justice on society may be considered at numerous levels, each with independent elements of analysis and evaluation: social, economic, legal and of course political.

However, I think that the point of analysis intended to be addressed at this conference demands a general understanding of the manner in which constitutional justice has been able to interact with society, as a means for evaluating it as a space that rationalizes social and political conflicts in a particular community. Generally speaking, the relevance of focusing on this issue, we insist, is more notorious when referring to Latin America than to Ibero-America.

Despite the obvious internal heterogeneity of Latin America, the historical and cultural experience of this region has confronted the various countries with a first challenge: the introduction of a model of constitutional justice into their own and consolidated historical realities to which the region must adapt. This contrasts with the situation in Europe where constitutional tribunals frequently were part of the respective founding process after the Second World War and their adaptation processes ran parallel to the consolidation of a new common political reality.

The sub-issues chosen to present this first item of discussion, in the indicated context, have three ideas: 1. In the first place, a collective perception of various aspects: a) the very existence and magnitude of the social impact of constitutional

justice, b) the existence and magnitude of the social reaction (in mass media, political spheres and civil society), and c) the role of constitutional justice in the social scheme; 2. In the second place, the manner in which said perception translates into the instrumentation of internal elements in the system to channel such social impact, namely: a) the manner in which constitutional courts take into account the consequences of their resolutions when pronouncing them, b) the form of limiting them in the face of any possible harm they may cause, and c) the obstacles said tribunals could encounter. 3. In the third place, the manner in which the forgoing translates into constitutional elements: a) the verification of whether social and economic rights are constitutionalized, and b) if they are subject to judicial oversight.

1. Within the first item--which we could refer to as the collective perception of the social impact of constitutional justice and the reaction to it--the situation in the region is in general terms as follows. In the first place and primarily, the impact of constitutional justice in Ibero-America is perceived centrally, I believe, as a necessary lever for the consolidation of the institutional life of the countries in the region. It is true that there are constitutional tribunals that have developed human rights rich jurisprudence in content, as we will observe in the next section, but the basic social impact to which they are associated, I believe, is the maintenance and preservation of the normal functioning of democratic and republican institutions. For example, there are courts that are mainly recognized for resolutions pronounced on this issue: in Chile court are related to the consolidation of the democratic transition that took place from 1985 to 1987; in Venezuela the resolutions its tribunal has had to pronounce to confirm the autonomy and independence of the judicial branch vis-á-vis the other branches are acknowledged; there are paradigmatic cases such as that of Guatemala where the court had to declare the unconstitutionality of the dissolution of the Court itself, attempted by the President, as well as the unconstitutionality of the concentration of legislative powers in the President, resolutions which were finally backed by the army of Guatemala and which translated into the strengthening of its constitutional

State. Lastly, we can also mention a case in Mexico where the Supreme Court has practically recreated all the components of our federal system and has also restated the conditions under which it guards the division between the three powers.

I think that the reaction of society to constitutional justice is perceived through this same code. Latin American societies submit social conflicts to their constitutional courts for the purpose of preserving public authority within basic constitutional parameters. For example, noteworthy in Panama and Argentina are the declarations of unconstitutionality of amnesty laws issued by political forces in the government in order to unjustifiably create immunity in favor of certain groups, which led to a generalized negative reaction on the part of society, forcing constitutional justice to intervene in the case. Cases related to freedom of speech analyzed by the courts in the region also stand out. Emphasis has been placed on the relation of this right, particularly in the press, with the preservation and development of incipient or transitional emerging democracies, the courts of Colombia, Uruguay and Chile, being good examples.

From another angle, the social reaction is perceived in a double aspect. On the one hand, it is observed that mass media influence, with their own logic, the still incipient social debate on decisions of constitutional courts and a need is observed to construct specialized space to allow civil society to debate these issues. Against this trend, however, is the case of Mexico where a public television channel has been created, the principal task of which is to disseminate the work of the judicial branch. On the other hand, we still observe a degree of political hostility to the imminent expansion of constitutional jurisdiction to certain spaces that were previously exclusively reserved to politics which, however, has not been translated into generalized and systematic action that may jeopardize the operation function of said courts, with certain exceptions.

2. This collective perception has become inherent in the functioning of constitutional justice. Ibero-American systems are more widely perceived as having constitutional courts that are true social architects. The foregoing is important; in many countries, this variant of social impact is taken into account by the courts when deciding their cases, even to the point of their being a technical translation of their decisions. Thus, for instance, in Colombia, Costa Rica and Spain there is a growing jurisprudence relative to the characteristics of sentences insofar as their effects on the various spheres of application are concerned, particularly in cases that may end with *erga omnes* sentences, which receive the greatest attention in this regard. However, the best example of this phenomenon is the appearance of "interpretative" sentences. This is an exploration that has been effected individually by constitutional courts aimed at avoiding that unconstitutionality pronouncements apply to the validity or invalidity of a rule and the appropriate manipulation of their content so that, without being expelled, may be applied according to the supreme law. This development of jurisdiction by the courts of the region clearly denotes a conscience assumed in their role of social architects; there is broader concern to conciliate the practical results of the sentences with constitutional content.

On the part of society, the influence on constitutional justice refers in most cases to the pressure society has exercised for the acknowledgment of historical singularities of the region and its pluralism. This can be observed mainly in constitutional jurisprudence on the issue of indigenous communities in countries such as Bolivia, Chile and Mexico, in which conciliation of the needs of these communities has been required, many times on a jurisdictional level, publicized through broad social movements, with institutional life contemplated by constitutional states.

3. Lastly, as regards the above perception becoming intrinsic in constitutional content, we can mention that in Ibero-America constitutional courts have the regular task of overseeing previously constitutionalized economic and social rights,

which require them to play an important role in achieving social goals in their countries. This is mainly reflected of the foregoing in the doctrine of progressiveness that many courts have adopted when interpreting the scope of cited rights as an example of the development of jurisdictional protection in the social sphere. It is also important to mention, however, that except for a few cases, social rights have not been assigned the same regulatory force as the one recognized to freedom rights.

**B. The development of global jurisprudence on human rights**

In order to analyze the second issue, we can point out that Constitutional Justice is undoubtedly driving the development and creation of a global jurisprudence on human rights. As it has been acknowledged almost uniformly by several of the Ibero-American countries, in the case of fundamental rights, the coincidences in the interpretation, content and scope given of such rights, as seen by their courts are increasing. Principally, to the extent that international law has been incorporated as an element that has rendered uniform the law applied in all regions.

This is so even though Ibero-American constitutional courts do not uniformly use in their sentences international or regional human rights instruments in their sentences, among other reasons because they are not considered binding in their constitutions, and their place or hierarchy has not been established in the same fundamental or national rule, and also because no interpretation has been made recognizing them a specific practical usefulness for the guarantee and respect of fundamental rights. At the other end, we find the constitutional courts that constantly and increasingly use and apply use international human rights instruments, as they have an express provision in their Constitutions regarding their status among other legal precepts or because legally or jurisprudentially they have been placed among those included in the so-called “constitutionality block”.

As a result of the foregoing, there is no uniformity either in Ibero-American courts as to the form in which reference of jurisprudence pronounced by international human rights organizations should be made and cited, although there is a greater development in jurisprudential reference for the interpretation of specific fundamental rights such as the application and direct interpretation of international treaties. However, there is a greater development jurisprudential reference interpretation of specific fundamental rights than to directly apply and interpret international treaties. Nevertheless, there is a disparity between courts that constantly quote international jurisprudence and those that do so only exceptionally.

To cite some examples of the use of international jurisprudence, the Supreme Court of Justice of Uruguay, in a sentence related to the change of sex of a person, cited international jurisprudence, both from the Inter-American Court of Human Rights and the European Tribunal of Human Rights. In cases of freedom of speech, due process of law and rights of vulnerable groups, the Constitutional Courts of Guatemala and Colombia have made reference, among others, to jurisprudence of international organizations, although clearly giving priority to jurisprudence issued by the Inter-American Court of Human Rights. In Mexico also, when analyzing the limits between the right to health and the right to work in medical practice, we use jurisprudence issued by the afore mentioned international courts, as well as by the United Nations Committee of Human Rights and its Committee of Economic, Social and Cultural Rights.

Derived from those two forms of incorporation of the international law into national legal systems by supreme and constitutional courts, there is no express acknowledgment of the existence of a global or regional jurisprudence on human rights derived from the various international human right instruments, to which the Ibero-American States are a party. However, some Latin-American countries acknowledge as such the jurisprudence issued by the Inter-American Court of Human Rights, although strictly speaking their decisions are not legally binding on

all the American States, except when the country is a party to a litigation from which they derive; but acknowledgement is made as a clear reference to interpreting and learning the scope of the rights and liberties contained in inter-American human rights treaties and with respect to others that have been pronounced by said regional tribunal.

This situation poses a new challenge; in the case Almonacid Arellano versus Chile, the Inter-American Court of Human Rights invited the States through their jurisdictional bodies to exercise “conventionality control” which implies, on the one hand, the possibility of directly interpreting the content of the American Convention on Human Rights, but also, to observe their own jurisprudence so that the protection of fundamental rights may advance. On the other hand, the invitation also implies the need to continue constructing jurisprudence, at least regionally, with regard to fundamental rights, inasmuch as there is more than one authorized interpreter of American human rights treaties.

But the jurisprudence of international bodies is not the only reference for constructing global jurisdiction on human rights; that of foreign tribunals also exists. On this point, among Ibero-American countries there is a greater willingness to adopt and accept the decisions of other supreme or constitutional tribunals, although not always expressly or with full acceptance; rather, it depends on the specific case and from this, in turn, depends that a research on the foregoing jurisprudence is made. For example, the Constitutionality Court of Guatemala has referred to what was established by the Supreme Court of Argentina, the Colombian Constitutional Court, the Constitutional Court of Bolivia and the Constitutional Court of Spain when deciding a case related to freedom of conscience. In Mexico, to resolve upon the issue of abortion, we studied the analysis of the decisions pronounced by the Constitutional Court of Germany, the Constitutional Court of Colombia, the Supreme Court of Argentina, the Constitutional Court of Spain, among others, to learn the treatment given to this issue and to the right to life in these specific cases.

Thus, we observe that “jurisprudential dialogue” is more fluid at the present time among supreme courts or constitutional tribunals and is still somewhat reduced among the latter and international courts.

The development of global jurisdiction on human rights necessarily implies the need to create an open “jurisprudential dialogue” among national courts, as well as between international tribunals and national tribunals. It also implies not only that national tribunals in their resolutions not only refer to what international tribunals have previously decided, but also that the latter analyze what each country is doing, when interpreting the Constitution and other rules of national origin, in order to construct global jurisdiction on human rights.

The challenges on this issue are significant. Fortunately, the first steps have been taken and we are on the road to building, perhaps not a uniform jurisprudence but a global jurisprudence that will set the guidelines for better and greater protection of human rights and a greater institutionalization of social life by constitutional courts.