

Speech of Justice Cezar Peluso

2nd Congress of the World Conference on Constitutional Justice

The Supreme Court is honored to promote, in partnership with the Venice Commission, the 2nd Congress of the World Conference on Constitutional Justice. On behalf of both and of the Brazilian people, I thank you all for having, in a surprising scale, accepted our invitation, as well as the substantial opportunity for a fruitful exchange of experiences. Welcome.

The uncontrollable forces of destiny wanted that the Congress begins in Rio de Janeiro at the time that the state suffers from the brutal tragedy of floods. I am sure that I speak for all in expressing our solidarity with the victims' families and the tireless work of rescue and reconstruction on the part of authorities and private initiatives. The hospitality with which we are being received, even in circumstances so dire, demonstrates that the locals are endowed with unusual strength to overcome the adversities of the present.

Ladies and Gentlemen,

The deepening of exchanges between legal systems is a reality of our time. Formerly restricted to the limits of the territory of sovereign states, the operations of the world of law are becoming increasingly transnational. Apart from the obvious political, cultural, social and economic implications, the growing interdependence among nations represents now a double challenge to national judiciaries. On one hand, frequent interaction with the regulatory systems of other nations. On the other, the need for building bridges between autonomous legal systems, with the aim of strengthening and spreading the cult of the universal rule of

law and legal certainty as basic conditions of the civilized world and the continuous refinement of the human spirit.

These bridges are materialized in many forms: references to foreign judgments in decisions of national scope, cooperation between courts and among judges, exchange of professors and legal professionals, interaction in international courts and numerous other communication mechanisms.

The dialogue between national legal systems has a name: judicial diplomacy. Of course I am not referring to the foreign policy defined and implemented by the executive branches. I understand the judicial diplomacy as a set of relationships and interactions between domestic and foreign courts, aimed at improving the court's performance before the new realities produced by the growing interdependence of nations.

It is, actually, to that exercise that we dedicate this Congress, in the light of the proposed agenda. Peter Häberle has summarized the latest conceptual meaning of the Constitution as "a vehicle for self-representation of an entire people, a mirror of its cultural legacy and the foundation of their hopes and desires " ("Teoría de la Constitución como Ciencia de la Cultura", 2000).

Given this core idea, the knowledge of fundamental legal and political structures, as well as the principles and purposes of other states, became a natural element of the routine set of constitutional courts.

As recently pointed out the Spanish magistrate Jorge Carrera Doménech, "dialogue and international relations of the operators of Justice comprise not only indisputable reality, but are evidently needed to strengthen systems of justice and, therefore, the democratic rule of law."

The Venice Commission has completed 20 years in 2010. Not coincidentally, their two decades coincided with the spread and stability of democracy throughout the world. Under the timeline suggested by Giuseppe de Vergottini

("Diritto Costituzionale Comparato", 2004), some experts have even described the process of spreading democracy after the end of the Cold War as the "fourth wave" of modern constitutionalism.

The first of these cycles would have been the existence of liberal constitutions at the turn of the 18th century to the 19th, under the influence of the ideals and the Bills inspired by the North American independence and the French Revolution. The second phase would have been built by the constitutions that recognized the so-called economic and social rights and introduced the "Welfare State" in the mid-20th century. Finally, the constitutions of the countries which attained independence in the decolonization process of the second postwar period.

Confirming the potential wealth of the exercise that began today, these four constitutional cycles are represented in this room. Adapted to the conditions of each country, the democratic rule of law seems to consolidate itself as the dominant model of organization of power on a global scale. In this particular form of fundamental arrangement of the State, democracy and the Constitution legitimize each other, defining, in the words of Norberto Bobbio, one set of rules of procedure (the so-called "rules of the game") for the formation of collective decisions.

In contrast with a not too distant past, democracy and constitutionalism means today the "cornerstones" of most of our political systems, ensuring the legitimacy of both the decision making process and the outcomes ('output legitimacy' in Anglo-Saxon technical jargon) of experience of the political game .

After the economic and financial turmoil of 2008, the contemporary scenario is marked by the sign of uncertainty. There are still doubts about the depth of the impact and effectiveness of measures adopted to contain the worst crisis in 70 years. However, certain features of the new

world we will live can ever be found, some with profound repercussions on the Rights and Constitutionalism.

Firstly, the crisis seems to have revitalized the role of states and national legal institutions. Thinkers such as Nobel Prize Amartya Sen have been taught for years that legal institutions are instruments of development, not results or consequences of this process. A strong legal system ensures legal certainty and the quick settlement of disputes. Democracy based on the rule of law ensures the transparency of government decisions, the "accountability" of the authorities and the efficient allocation of public resources and social investments. Therefore, legal institutions function as an arena of productive investments, generating income and improving socioeconomic conditions.

This lesson is even more important during economic crisis of great magnitude. Severe economic stabilization programs are - or should be - highly political processes. It is necessary to identify the problems to be tackled as a priority, assess the potential losses that depend on the good success or failure of the measures adopted and conclude a social agreement for the distribution of losses when setting the amount to be socialized by the national budget and the amount to be absorbed by private agents.

For their ability to generate political consensus despite economic, cultural, partisan, religious dissent, the rule of law emerges as the best way to engineer the most efficient alternatives in the face of financial turmoil. No crisis will be defeated without the grant by the State of political legitimacy that is exercised within a normative device with strong constitutional foundations. Experience indicates that countries with strong democratic and constitutional structures can encapsulate the political dimension of economic conflicts in the right place (the political representation, with temporary consensus and permanent discussions) and find legitimate and efficient solutions to their problems.

As in Mark Twain's famous quip when reading news about his own death, seem premature the predictions of some theorists who saw the waning of the traditional role of constitutions on historical phenomena such as globalization, the loss of decision-making autonomy of governments, the growing unification of markets into a single economic system of global scope (the "world economy" mentioned by Braudel) and the advent of new normative orders beside that customarily governed by positive law. Rather, the contemporary crisis seems to give new emphasis to the concept, developed by Professor José Gomes Canotilho Portuguese, of "leading Constitution".

It refers that particular kind of constitutional text that, besides the organizational structure of the state, also defines what, how and when legislators and rulers must do to achieve program guidelines and constitutional principles.

In addition, the democratic state reappears as the main instrument for guaranteeing the fundamental rights of citizens. Bobbio has pointed out the obvious nexus between democracy and human rights domestically, and between democracy and peace in international relations. Without fundamental rights recognized, protected and experienced, there is no democracy, without democracy, there are no minimum conditions for the peaceful settlement of conflicts, no room for ethical living.

Directly or indirectly, this Congress will examine the two main remedies to curb the abuse of power of states or any other decision-making centers, guaranteeing the fundamental rights of citizens. One, the Constitutional Justice, namely the unconditional subordination of all state power to the law. The other, the principle of separation of powers.

It is unnecessary to reconstruct the historical evolution of the concept of separation of powers, from Aristotle to Locke and Rousseau. As a source of inspiration for the discussions that follow, please allow me to recall the

famous passage from Book XI of the "Spirit of Laws", which Montesquieu flawlessly summarizes all the problems that occupy us in this Congress: "When in the same person, or in the same body of magistrates, the legislative branch joins the executive, the freedom disappears; it can be feared that the monarch or senate enact tyrannical laws, to enforce them tyrannically. There is no freedom if the judiciary is not separated from the legislative and the executive. If there were such a union with the legislative, power over life and liberty would be arbitrary, since the judge would be at the same time legislator. If the judiciary joins with the executive, the judge could have the force of an oppressor. And everything would be lost if the same person, or the same body of noble, notable, or common people, pursue the three powers: that of making laws, of ordering the execution of public resolutions and to judge the crimes and conflicts of citizens.

Ladies and Gentlemen,

Let me talk a little about my country. Brazil is experiencing today a broad and intense process of transformation, with positive impacts on internal social reality and about its international insertion profile. Many factors have contributed to these changes. One, however, has not attracted the attention of analysts. I refer to the inseparable link between the consolidation of the democratic rule of law and the strengthening of the judiciary, under the aegis of the 1988 Constitution.

Beyond ensuring fundamental rights and principles, the Charter of 1988 has allowed the formulation of demands for public policies by the majority population and the adoption of effective measures to safeguards the interests of that majority. The combination of those ingredients is the social base of our democratic Constitution (or of our constitutional democracy), which never had such a high degree of legitimacy and wide duration.

The changes in the constitutional context of Brazil can be attested in several dimensions. First, no relevant political, social or economic actor harasses or achieves its goals by means which result in the establishment of an undemocratic political system. In addition, the vast majority of people evaluate democracy in a highly positive. Finally, both governing bodies and opposition sectors undergo the Constitution and seek to satisfy claims and resolve conflicts within the constitutional requirements. The Supreme Court and the Judiciary have contributed decisively to the consolidation of Brazilian democracy. With firmly and independently, the judiciary, and especially the Supreme Court, has been tireless guardian of the constitutional text. Therefore, the judiciary is without doubt the guarantor of democracy in Brazil.

Our Constitution proclaims through expressed text the independence among the Powers. And in the same way, also prescribes the harmonious coexistence between them. Independence does not mean systematic comparison. In Brazil, without compromising the constitutional independence, or neglecting to comply with its statutory mandate, the three branches have been working together to find solutions to common problems. The Constitutional Amendment 45, which in 2004 introduced significant reforms in the Brazilian judicial system, it is important fruit of cooperation between the three Powers.

Similarly, we expect to renew this year, the so-called Republican Agreements, in particular the third one, in which the heads of the three Powers undertake the effort of improving the legal system and the modernization of justice.

Some themes are already in early stages of discussion, as, e.g., the changing nature of extraordinary appeals to higher courts for the purpose of accelerating the proceeding of the lawsuits. With strict adherence to all constitutional guarantees, as the two levels of jurisdiction, the right of defense, the *res judicata* and the other principles inherent in the due process clause (due process of law), the proposal

sets out to eliminate, among other inconveniences , procedural maneuvers to delay the enforcement of sentences and prevent the exercise of one of the most fundamental rights of citizens, in fact object now of ostensible constitutional rule: access to quick and efficient justice.

We also study the creation in our country, possibly with support from international organizations, of a university which has as objective the public security and social development. Our goal is to generate mass of academic reflection to open new prospects for action in fighting crime and poverty, with resources from different areas of expertise. In the same idea of cooperation, the Brazilian Judiciary signed last December in this same place, an agreement with the state government of Rio de Janeiro and the Ministry of Justice to ensure the presence of judges and services judiciary, along with prosecutors and public defenders, the so-called Pacification Police Units (UPP). This is something new and powerful in the sense that it tries to lead the state and full citizenship to the slums of Rio de Janeiro and could even be a possible model of response to demands from the suburbs of big cities.

Ladies and Gentlemen,

We have an ambitious agenda. We will deal here with complex concepts: democracy, justice, constitutional separation of powers. If I had to summarize them in a single word, the choice could not be different: freedom. As once said the poet Paul Valéry, "Freedom is one of those terrible words that have more value than sense." This Congress can be described as a celebration of that value. Thank you.