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'Constitutional Justice and Social Integration'

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SESSION IV: THE ROLE OF CONSTITUTIONAL JUSTICE IN SOCIAL INTEGRATION
KEY-NOTE SPEECH
BY MR RICARDO LEWANDOWSKI
JUDGE AND PRESIDENT OF THE FEDERAL SUPREME COURT
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Mr Park Han-Chui, President of the Constitutional Court of South Korea

Mr Gianni Buquicchio, President of the Venice Commission

Presidents of the Constitutional Courts and Conferences of Constitutional Jurisdictions here present,

Mr Il-won Kong, Judge of the Constitutional Court of South Korea

Sheikha Munira bint Abdullah bin Mohammed Al Khalifa,

Assistant Secretary General of the Constitutional Court of Bahrain

Ladies and Gentlemen members of the international legal community,

I am delighted to be here as keynote speaker at the 4th Session of this major World Conference, whose most recent Congress, organised jointly by the Federal Supreme Court of Brazil and the Venice Commission, took place in Rio de Janeiro from 16 to 18 January 2011, to the great benefit of the international legal community.

Besides the fruitful relationships that have been cultivated since that valuable opportunity to share experiences, these forums for excellence show that contacts between judges from different national jurisdictions, ensured by what is now known as “legal diplomacy”, are essential to dialogue between peoples. They also show that there are more common aspects which bring them together than areas of disagreement that keep them apart.

Periodic meetings and exchanges of ideas between members of the Constitutional Courts of various countries heighten our understanding of the multidimensional nature of our tasks as interpreters of the Constitution in an increasingly more interconnected world, as we seek solutions for common problems in areas such as the environment, health, culture, science, human development, etc. These issues raise many challenges in applying the law more fairly, maintaining legal security, ensuring peaceful social relationships and consolidating fundamental rights.

I believe my topic today, “The role of constitutional justice in social integration”, is central to the work of the Constitutional Courts. In this area the Brazilian Supreme Court – the *Supremo Tribunal Federal*, which I have the honour to chair – has a substantial body of well-established case-law, the main precedents of which I will now briefly outline.

I will begin this short presentation by referring to the thinking of John Rawls, for whom “*the concept of justice is defined* (...) *by the role of its principles in assigning rights and duties and in defining the appropriate division of social advantages*”.[1] I firmly believe that the judiciary in democratic nations is increasingly involved in pursuing such objectives, aware as it is of its responsibility in promoting justice, which is now understood as the promotion of equality of opportunity for people, irrespective of natural or acquired inequalities.

This meeting, organised under the auspices of the distinguished Constitutional Court of South Korea and the Venice Commission,

[1] Rawls, John. *A Theory of Justice*, revised edition, Belknap Press, Cambridge,1999.

provides a forum for mutual reflection on issues that currently drive constitutional justice in areas that allow it to contribute towards ensuring the integration of all groups that make up society, without discrimination.

It seems clear to me that the deepening of international co-operation at the most varied levels, besides simply boosting economic activity, has shown just how far the challenges we face in the day-to-day exercise of our function of judging are surprisingly similar.

To give just a few examples, I would like to mention the defence of minorities and vulnerable groups, the consolidation of women's rights, the achievement of republican equality, guaranteed public liberties, the enforceability of social rights, transparent judicial action, the opening of decision-making procedures to public debate, the dissemination of fundamental guarantees on private relations, the appropriate protection of workers, etc., among so many other major issues.

I believe that the important role of constitutional justice in social integration now more than ever involves applying the generally recognised principle of equality before the law with due consideration. If it is interpreted on a linear basis, bearing only its formal aspect in mind, i.e. merely guaranteeing equality for all before the law, it may give rise to enormous injustices, particularly when legal decisions disregard the appreciable differences that exist between the various groups and individuals that make up society.

One of the key objectives of democratic states based on the rule of law in this 21st century is the eradication of social inequalities by ensuring that citizens are completely equal before the law. In that context, the relevance of the judiciaries of the various nations is growing exponentially, particularly their Constitutional Courts as agents for realising the commitments to and desire for material equality set out in the respective political charters, and moreover provided for in countless international covenants and treaties.

According to more progressive schools of legal thought, a desirable level of social integration cannot be achieved without incorporating the idea of material or substantive equality and going beyond the formal orthodox perspective of the principle of equality before the law bequeathed by 19th-century constitutions.

This is because the very concept of democracy generates the need to ensure that all people have the right to equality, but an equality which tolerates, accepts and includes any differences between the varied groups and individuals that make up society, assuring them that their respective particular features will be preserved. It is therefore essential to go beyond the concept of merely formal equality, particularly when it might represent a factor of discrimination or a means to assert superiority over people who stand out from other members of the community because of certain personal characteristics.

According to this approach, the notion of social integration relevant to us today involves a sense of cohesion, harmony and equilibrium in interpersonal relationships, overcoming the differences intrinsic to human beings which have often crystallised over the centuries. In the light of the understandable slowness of different societies in adapting to the democratic changes introduced in modern times, the judiciary – by means of its Constitutional Courts in particular – must be a vanguard institution in speeding this process up.

Against that background, in the short time available to me I will outline a number of Brazilian Federal Supreme Court decisions which seek to fulfil the constitutional rule of the promotion of social integration, regarded as one of the pillars of republican life.

I must stress that the development of Brazilian Supreme Court case-law in this area has been accompanied, particularly over the last decade, by great advances in cutting-edge public policies that have allowed millions of Brazilians to escape the abject poverty in which they lived and join the labour and consumer market.

I will divide my presentation on the development of Brazilian Supreme Court decisions on the topic at issue into three parts. Firstly, I will outline the body of case-law which has set out the parameters required to recognise the **enforceability of social rights** on the basis of specific cases heard by the Court.

I will go on to address a number of important decisions on the **protection and inclusion of minorities or vulnerable groups** which have had great social consequences and the effects of which are now felt in citizens' daily lives.

Finally, I will comment on the opening of the Court to civil society through **the latter's participation in decision-making processes**, via *amici curiae* and the holding of **public hearings** which allow its judges to benefit from the great plurality of ideas and values characteristic of a multicultural society such as Brazil's.

I believe that the decisions I will outline represent the key milestones in the Brazilian Supreme Court's action to promote social integration.

1) The enforceability of social rights

The idea underlying the concept of the enforceability of social rights provided for in the constitution is that government failure to ensure such rights legitimises judicial intervention to consolidate them. Brazil's Federal Supreme Court has stated in this respect that "*when the public authorities fail to comply totally or in part with their duty to implement public policies defined in the text of the constitution itself, that inadequate performance violates the very identity of the Constitution*".[2]

With such words in this specific case, the Court guaranteed access to crèches or nurseries for children of up to 5 years of age, a duty assigned explicitly to the State by the Brazilian Constitution. In another case the Federal Supreme Court guaranteed the right of

[2] ARE 639.337-AgR

people in need to free medication.[3] In yet another it imposed the establishment of a pool of 'public defenders' to serve the underprivileged who could not afford to take on a lawyer,[4] thus ensuring that they had full access to justice.

Before the consolidation of that opinion, which has been systematically underscored in subsequent judgments, the public authorities, in order to avoid complying with certain constitutionally-established obligations concerning social rights, repeatedly cited the theory, of German origin, of the "limits of the possible", according to which the possibility of demanding positive assistance from the State is conditional not only upon the availability of budgetary resources but also upon the reasonableness of the claim, in view of the needs of society as a whole.

This gradual restriction by the Federal Supreme Court of the possible circumstances in which the State could make use of this theory to avoid complying with constitutional rules on social rights, based on examining specific cases, marked great progress in legal theory. The Court's current understanding on this issue is summarised as follows:

> *"The 'limits of the possible' precept – which the public authorities cannot cite in order to defraud, frustrate and render inviable the implementation of public policies defined in the Constitution itself – is insurmountably limited by the constitutional guarantee of the social minimum, which in the context of our positive legal system represents a phenomenon emanating directly out of the presumption of essential human dignity".*[5]

The Supreme Court's recognition that people must be allowed to benefit from the **social minimum**, together with the understanding that the principle of **human dignity** is a fundamental pillar of the Constitution, imposed ever greater restrictions on the possibility open to the public authorities to cite the theory of the "limits of the possible",

[3] STA 175-AgR
[4] AI 598.212-ED
[5] RE 581.352-AgR

making it feasible for citizens to demand the realisation of social rights via legal means.

Similarly, Brazil's Federal Supreme Court began to identify situations involving inertia or indeed government negligence in complying with its constitutionally-established responsibilities, consolidating the "**unenforceability of the State's discretion in rendering social rights effective**".[6]

Having made these initial remarks, I will now examine some more significant judgments that have contributed to the better integration of minorities or vulnerable groups in their respective communities.

2) Integration of minorities or vulnerable groups

2.1) Constitutionality of ethnic/racial quotas

In presenting the leading case[7] on recognition of the constitutional legitimacy of affirmative-action programmes establishing a system of reserved places, based on ethnic/racial criteria, for access to Brazilian university education, I would first like to say that the decision in question – taken unanimously by the Supreme Court – brought about a real revolution in the country in terms of the integration of populations that had previously been excluded from higher education.

As judge-rapporteur in that important case, my opinion laid stress on the difference between the formal and material aspects of equality before the law, stating that in order to achieve material equality between people, the State can make use both of policies of a universalistic nature, encompassing an indeterminate number of individuals through structural measures, and affirmative actions, which affect particular social groups in specific cases, awarding them certain

[6] ADPF 45
[7] ADPF 186

advantages for a limited time to allow them to overcome inequalities deriving from particular historical situations.

Under the principle of equality before the law, which according to the ancient Greek philosophers means treating the unequal unequally according to their inequality, I recognised, as did my Court colleagues, that the different selection method for public universities can indeed take ethnic/racial or socio-economic criteria into consideration to ensure that the academic community and society itself may benefit from a plurality of ideas, a cornerstone of the Brazilian State, as provided for in Article 1(V) of the current Constitution.

The Supreme Court's validation of the different rules that established racial and socio-economic quotas in higher education led to an exponential increase in the inclusion of students of African descent in Brazilian university life, simultaneously promoting an extraordinary increase in the self-esteem of people belonging to that ethno-cultural group, which moreover forms the broad majority in Brazil in demographic terms.

2.2) Same-sex unions

The Federal Supreme Court has also confirmed that stable unions between same-sex couples are lawful under the Constitution.[8] The recognition that such relationships have the status of a family entity enabled the rights conferred by law to unions of people of different sexes to be extended to them. The Court's decision was based essentially on constitutional grounds of the prohibition of discrimination on the basis of gender or sexual orientation, fundamental human dignity, the right to seek happiness and the State's duty to ensure special protection for families.

It is not difficult to understand the impact and scope of this decision on the social integration of certain socially marginalised people and groups whose fundamental rights had previously been restricted in certain respects, and who had been prevented from fully

[8] ADI 4.277 and ADPF 132.

exercising their freedom and realising their potential. Brazil was a pioneer in this area, together with a small group of countries.

2.3) Protection of women

With respect to the protection of women against domestic violence, the Brazilian Supreme Court reaffirmed the constitutionality of the "Maria da Penha Law",[9] a legal instrument that increased the severity of punishment for aggression against women. This law was named after a woman who became paraplegic after repeated ill-treatment and two attempted murders by her then domestic partner.

By amending the criminal code in this area, the Maria da Penha law allowed perpetrators of violence against women in a domestic or family setting to be arrested and remanded in custody, avoiding the possibility of the usual punishment of mild or alternative penalties. It also became possible to bring criminal proceedings against offenders, usually without the need for the victims – who are normally inhibited by fear of reprisals – to be formally represented.

In debating the constitutionality of affirmative action in favour of women, the Supreme Court ruled that it is the State's duty to prevent domestic and family violence, whether physical or psychological. The Court confirmed that, by creating specific mechanisms to restrict and prevent physical or psychological abuse in the private domain and by introducing special measures of protection, assistance and punishment to prevent gender-based violence of that kind, the legislature used the appropriate and necessary means to achieve the ends enshrined in the Constitution.

This judgment had enormous symbolic value, in particular because it drew attention to an important social issue that had previously had a very low profile. What is more, it opened up the possibility of giving a voice to helpless, weakened and vulnerable people, increasing their belief in justice and impacting on society as a whole.

[9] ADC 19 and ADI 4.424

2.4) Demarcation of indigenous land

To continue this appraisal of decisions that have had a marked impact on the social integration of marginalised people, I would like to cite the Federal Supreme Court judgment which recognised the right of indigenous communities to continuous demarcation of their land,[10] without its division into separate territories. The Court took the view that it had to take that stance to ensure, amongst other things, that Brazil's various indigenous populations have sufficient land to guarantee decent livelihoods, not only in economic terms but also from a linguistic and even physical perspective, so as to preserve their rich heritage of ancestral wisdom, which contributes to the diversity and originality of the Brazilian cultural mosaic.

In the "Raposa Serra do Sol Indigenous Reservation" judgment, the Supreme Court confirmed the demarcation of a two million hectare protection area for the native population, with a perimeter of some 1 000 km, and also ordered the expulsion of thousands of farmers, miners or simple squatters who were unlawfully occupying it for speculative reasons.

In so doing the Federal Supreme Court merely enforced the constitutional rules incumbent upon the State to protect social groups which contributed and continue to contribute to the formation of our society's ethnic, cultural and historic identity.

By asserting the need to fully integrate minority segments of the social body into society, the Court helped to preserve our acknowledged multiculturalism, which, together with the country's extremely rich environmental diversity, constitutes an inalienable heritage that present generations have the duty to bequeath to future generations.

2.5) Right of parliamentary minorities to object

[10] PET 3.388

To bring this summary of relevant precedents of Federal Supreme Court case-law on the protection of minorities to a close, I would like to mention the decision guaranteeing the right of parliamentary minorities to object, as an expression of the right to demonstrate in a democratic society, allowing them to establish committees of inquiry.

In the case in which the issue was considered, the Supreme Court declared that "*the legislative majority cannot frustrate the exercise, by minority groups which participate in the National Congress, of the subjective public right that* (...) *gives them the power to see the effective establishment of the parliamentary inquiry, for a certain period, into a particular event*" .[11]

Thus by preserving the right of parliamentary minorities to establish committees of inquiry without undue interference from majority political groups, the Court enhanced democratic debate, allowing diverging (albeit minority) opinions to be given free expression.

I would like to conclude my short presentation with a brief outline of the Brazilian experience of *amici curiae* in cases of abstract monitoring of constitutionality and the opening of the Court to society in debating controversial issues prior to opening the decision-making procedure.

3) Participation of *amicus curiae* and public hearings

By accepting the participation and extending the procedural powers of *amici curiae* in proceedings on the constitutionality of laws, the Brazilian Supreme Court not only provides assurance that its decisions are more effective and legitimate but also enhances the pluralism ensured by the Constitution. This procedural device enables the Court to guarantee the formal participation of bodies and institutions that represent the general interests of the community rather

[11] MS 26.441

than the disputing parties, thus allowing the particular values of certain social groups, classes or categories to come to the fore and assisting the Court in the difficult task of handing down decisions as impartially as possible.

In our court practice the *amicus curiae* is more than a merely potential or optional collaborator in proceedings on constitutionality: it is now a special part of the the procedural relationship in its own right. In this capacity the “friend of the court” can present written submissions and orally argue the standpoint of the social segment represented in the proceedings.

The other side of the same coin – society’s participation in trials – is represented by ***public hearings***. These are convened by the Court prior to hearing so-called hard cases, when it hears the testimony of people with experience and authority in a particular area in order to ensure public discussion of questions of fact or law with a general impact and of significant public interest as a way of supporting the judges.

These meetings generally make it possible to clarify the issues in dispute in cases being heard by the Court, which can now rely on different views of the factual, technical-scientific, political, economic and legal elements of the cases it is required to hear. Over the last five years a number of public hearings have been held in which specialists and interested parties have provided information on matters of the utmost importance, such as: (i) the possibility of the use of embryo stem cells in scientific research for therapeutic purposes; (ii) the system of funding election campaigns; (iii) affirmative action policies in access to higher education; (iv) the possibility of producing biographies not authorised by the person concerned; (v) controversial aspects of the Brazilian prison system; (vi) implementation of the right to health, based on public authority provision of free medication and treatment; (vii) prohibition of the sale of alcoholic drinks close to highways; and (vii) the interruption of pregnancy in the event of anencephalic foetuses.

With this increasingly common practice, the Federal Supreme Court has clearly shown that in exercising its constitutional jurisdiction in a democratic State based on the rule of law, it must constantly strive to promote respect for the diversity of lifestyles and world views existing in the plural society in which we live in this 21st-century world.

Ladies and Gentlemen,

I have no doubt that the experience we will share during this Congress will strengthen our commitment, as judges and legal practitioners, to an increased focus on the integration of marginalised or more vulnerable persons and groups into society through constitutional justice.

I do hope we can maintain that momentum, since as a renowned Brazilian legal scholar, Professor Dalmo de Abreu Dallari, has rightly observed, "*the extension of the powers of the Judiciary, with acknowledgement of its political role, has been recognised since the end of the 20th century.* (...) *It is essential now more than ever for judges to participate actively in discussions on their social role and to seek, with composure and fortitude, to show how they can be more useful in achieving justice*".[12]

This overview of the case-law of the Brazilian Supreme Court in consolidating social rights – which until very recently were seen as merely procedural rules – and the possibility of society's participation in interpreting a nation's constitution shows how much progress can be made in this field which lies between the Law and Politics.

Thank you very much for your attention.

[12] DALLARI, Dalmo de Abreu. **O Poder dos Juízes**. 3ª. ed. São Paulo: Saraiva, 2007. p. 166.