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Constitutionalism in Brazil

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I want to consider initially that .on an international plane, we are arriving in this new century, finding a world that is globalized, but also marked by profound inequality, both social, economic, and political. Domestically, the situation does not appear to be very different. New and complex requirements of the mass societies have significantly impacted the environment through consumerism, and these economic relations have a reflection in juridical relationships. It is seen that there is a break in paradigm, a profound revision of the functions of the state and its sovereignty.

We live in a so-called era of postmodernism, a generalized label which signifies a new social, economic, and political moment experienced by humankind. Following modernity as it does, postmodernism is an attempt to describe the aestheticism, the profound rationalism, the theoretical vacuum, and the insecurity that is observed in society and in a state model in the forms of the economy, in science, and in the principles and values of our peoples in present day. The European thinkers are calling this moment "the breaking moment," the end of an era and the beginning of something totally new and not totally identified. This context brings a new dynamism to the economic and social realities and the political reality and, above all, the juridical reality. Today's society challenges the thinkers to think up a new economic order, including not only economics, but also the juridical sciences and the new values for the mass society. This new reality requires a new posture of law and its operators. Among these we can pinpoint the role of the judge which in the postmodern law cannot act just as an spectator, an invitee to the process, an insensible man or woman, or a mere observer on the operation of law.

Jurisdiction, on the other hand, has to be seen as a dynamic form, concluding on its social, political, economic, and juridical scopes. As Italian professor Mauro Cappelletti says, we cannot consider jurisdiction and law only from the point of view of its producers and of their final product — in other words, the general norms and special norms. Cappelletti suggests a new model, and proposes that in this new vision, jurisdiction shall also been seen as within the ambit of the judge, who is

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the consumer of the law. This activism will necessarily cause the judge to have a stronger role in the application and efficacy of the law. From that basis, let me analyze the access to justice in light of juridical law. In Brazil after 1988 we approved a new constitution and a new phase was inaugurated in the history of our law. This constitutionalism, and especially the process of law in Brazil, incorporate as fundamental a right and a guarantee to access, not only to justice, but to a just and fair judicial order. This protects not only the guarantee to access from the point of view of the insufficiently provided for, poorer populations which require free access to law, but it allows an adaptation of the judicial system to the social, political, and economic reality of the country. The implementation of this new vision of access to justice is based on giving more power to the judges, which rejects a dogmatic and positivist vision of the law. This new vision has made its mark during the last few decades and sees processes in a more effective, agile, and fairer type of law. This type of vision is very difficult to implement in Brazil in view of the judicial system adopted, which is the European civil law system, a heritage left by our Portuguese colonizers.

Contrary to the system of common law, where the freedom of the judge is much higher, the Brazilian judge is too tied to the law, or as Montesquieu said, the judge is "the mouth of the law." We also need to pinpoint the advances that the positive law in Brazil has made with respect to the tutelage of law and the new categories of law. These represent a great transformation in our substantive and procedural plan. One area which has seen advances is group rights protection. Another area is protection of the environment, which in 1988 entered the category of fundamental law with the advent of the new constitution. We have instituted new measures like environmental permits, permit evaluations, environmental evaluations, control of the water, underground, and the air, the protection of the historical tradition of the country, and especially the recognition of the good of environmentally lawful acts. This started with the constitution when it established that everybody has the right to an environment that is balanced as well as the common access to a good quality of life. This measure has given the government and the society the power to preserve the environment for future generations, and to further this goal Brazil created a risk law. Up until that moment, we permitted recovery only in cases of actual damage. A new legitimacy, procedural legitimacy, was created with collective legitimation, and an intergenerational law was created — the expectation of law by generations that are not born yet, which underlies the debate today in Brazil on the legalization of transgenic products and their use.

The constitutional law is also considered as a fundamental law. This is particularly clear with respect to the development of group rights protecting the consumer, which is considered a fragile party in mass contracts and group rights contracts, especially contracts of adhesion where the consumer has no possibility of discussing clauses and conditions of the contract. The protection of the consumer itself is a very important innovation. This protection of rights was developed in Brazil through an action which reminds us a lot of the class action in the United States. This new cause of action makes access to justice easier since simultaneously various collective parties can start suits of this kind, like the federal union, the provinces or states, the municipalities or counties, and the public administration agencies, even if they do not have a corporate figure. For example, the secretary of the environment or minister of the environment can start an action for indemnification by a company independently, regardless of whether it is an executive agency. It is not necessary that the president of the republic or the governor or the mayor starts the suit. The executive director of such an organization can start that suit. This public suit is very encompassing because it protects the rights and interests of the environment, of the consumer, of the economic order, of the protection of the country's legacy, of children and adolescents, and something that is very different from these types of rights that can be characterized as being diffused or collective. We consider as diffused rights as those that belong to an undetermined number of holders and which are connected to the circumstance by fact. Collective rights are those belonging to a number of people connected among themselves by a common judicial relationship. Individual but homogeneous rights are those that have origin on a common fact. These three types of rights – diffused, collective, and individual homogeneous – may be protected by a group rights protection suit that can be started by the union, by the prosecutor's office, by agencies and by NGOs that have the protection of that right among their needs or finalities.

A factor that is very interesting in Brazil at the moment is the role of the prosecutor's office; on a constitutional level, he is the protector of the fundamental rights of the Brazilian system and of our democratic institutions. The Department of Justice has the ability to discuss any actions regarding the public interest. We had, particularly in the case of administrative morality, a profound transformation in the reality of the country because the Department of Justice began to investigate crimes, offenses perpetrated by companies, by authorities; problems related to corruption; and issues regarding public or private contracts and agreements. After that, many suits were started in the country. Today there is much more care and attention paid because the process has been analyzed in terms of hypocrisy and fraud. This is now seen in the practical

reality of public defenders, especially young attorneys, that are involved in this. We had reform of the social security system in Brazil. The great majority of judges and public defenders have retired and the members of a new generation with a new idea, with a new reality, are now taking over positions in and under the light of the Department of Justice. So this role of the Department of Justice is a lot more relevant now for the implementation of these new rights and in making the law more effective in Brazil.

Also, magistrates in Brazil have constitutional guarantees, they have guaranteed independence. We may not have the best salaries in the world for justices and judges; we certainly don't. We may not have the best material conditions for our magistrates; we certainly don't. But we have a miracle happening in Brazil at the moment which is the existence of an independent judiciary branch of dedicated judges which are something for the Brazilian people to be proud of. I think this can only be explained as a miracle, that this can happen in Brazil, with the salaries that our judiciary has, with the conditions under which they work. But this is the result of a rigorous selection which is done for those that want to become judges.

To conclude, in our postmodernist and globalized society, we are seeing a true revolution in law, not only in Brazil but across the world. Aestheticism is being abandoned. Form, rigorous application of the law, all this has yielded to allow a more flexible application of the law and a fairer application of the law in Brazil. The installation of judges with new powers resulting from this process has allowed judges to have advanced decisions going against unjust norms that conflict with public interest. There is no law, there is no legal norm or statute that justifies fraud to the public interest. The Department of Justice has become and is now the vanguard in the application of the law and the efficacy of the law in Brazil and the same occurring with diffuse rights. What we have heard today is the scope of the gap between the production of law and rights and the application of the law and of those rights. Laws are created by those that understand or specialize in certain matters, but they do not disclose enough. The people are not educated enough or guided enough on the application of such laws, especially in some cases. As we have seen here today — everything that's been said about laws related to anti-money laundering or anti-drug trafficking, as well as the protection of environmental rights, rights of engineers, of biologists, administrators, architects, display the full scope of postmodern law. But the most important phase of environmental law is exactly the administrative part of the law, which is not usually operated by jurists. People do not receive the right knowledge and education to understand extremely complex environmental impact permit legislation.

Another negative aspect of postmodernity is the globalization and the inequality that it may have generated which makes nations adopt a bigoted position by charging customs duties on other parts of the world that have a different practice or a different culture. These customs barriers make poorer countries become even poorer, and make companies to go bankrupt. People continue to receive very low salaries because the protectionism of certain countries impedes the elimination of such inequalities. These are global interests; today, there are enough greenhouse gases to affect the entirety of humanity, but the problem is not treated by certain governments. We see certain scientific studies today showing us that if the levels of carbon generation in the atmosphere continue today, Europe, in fifty years, may have increased seventeen degrees in temperature. We see the disgust with which the conventions and treaties are treated, like the convention on climate that was signed in Rio in 1992, and what has been happening to the Kyoto Protocol, which would force all countries signing it to adopt measures to reduce the emission of carbon into the atmosphere.

For all of that, I should say that initiatives like this today allow us to have better hopes, allow us to have the belief that we may still generate these transformations in society. Through the rule of law and not through force, we may eventually eliminate inequalities and overcome distances. Through initiatives like this one, that promote the cooperation among peoples, we will be able to overcome social differences, as well as economic and political differences, promoting a better world, a brotherhood and a just society.