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THE STATE FINANCE CONTROL FUNCTION AND THE COURT OF ACCOUNTS

*Speech by The Honorable Lincoln Magalhães Da Rocha**

March 1, 2003

*Introduction by John B. Attanasio, Dean and William Hawley Atwell
Professor of Constitutional Law*

I am very honored to present today's speaker, Judge Lincoln Magalhães Da Rocha. Judge Da Rocha has served on the Supreme Court of Accounts for Brazil since September of 1978, when he was appointed by President Joao Figueiredo. This twelve judge court reviews and passes judgment on all expenditures of the federal government of Brazil. He may serve in this position until he reaches seventy years of age.

Born in 1936 in Belo Horizonte, Brazil, he comes from a family of ten brothers, including engineers, doctors, pharmacologist, sociologist, lawyers, and teachers. After graduating in law in 1960 at the University of Minas Gerais in Belo Horizonte and briefly serving as a district attorney, named by President Joao Figueiredo, Judge Da Rocha came to Dallas and enrolled in the SMU School of Law in 1962. He received his Masters of Laws Degree in Comparative International Law from SMU in 1963 and returned to Brazil to take a position as a district attorney for the federal

* The Honorable Lincoln Magalhães Da Rocha currently sits on the Federal Court of Accounts of Brazil and is a professor at the University of Brasília Law School. Judge Da Rocha obtained a Master of Comparative Law from Southern Methodist University School of Law in 1963. On March 1, 2003, Judge Da Rocha received the Southern Methodist University Dedman School of Law Distinguished Global Alumni Award.

He published several books on American Law in Portuguese: "The American Constitution: 2 centuries of Comparative Law;" "The Rule of Stare Decisis at the Brazilian Supreme Court;" *Legal Writings*, 1992; "Courts' decisions as a Model of Legal Experience;" "Federalism and Judicial Activism;" "Blood Baptism: The Epic of Brazilian Revolution of 1889."

In 1992 Judge Da Rocha received the Diploma of Enseignant des Droits de l'homme in Strassbourg. In 1982 he attended a course on Roman Law at the Istituto di Diritto Romano de la Università di Roma in Rome. In addition, Judge Da Rocha has traveled through the United States and Canada as a visiting Professor of Human Rights with a stage at Geneve, at the Red Cross.

In 2006 Professor Da Rocha will retire from public service and intends to lecture through the world and seeks an editor for his books written in Portuguese.

district of Brasília Law School, where he has been teaching for forty years. He is the faculty's leading teacher of Jurisprudence, Criminal, and Administrative Law.

Judge Da Rocha has lectured in all of the major cities in Brazil and in 1981 he received his Juris Doctor Degree from the University of Minas Gerais. He has published several books on comparative law, focusing on American and Brazilian Law. He is a member of the Rotary Club, Ecumenical Christian Leadership Conference, and the Academy of Writers.

This past Saturday, Judge Da Rocha was awarded the Distinguished Global Alumni Award for the Dedman School of Law at SMU. Please join me and the Dedman School of Law's Hispanic Law Students Association and International Law Society Organizations in welcoming Judge Da Rocha as he speaks to us today on the topic of "The State Finance Control and the Court of Accounts."

I. INTRODUCTION

AFTER being invited to speak to such an audience, I have been wondering about choosing a theme. What kind of subject would you like to hear? The Holy Bible says, *os loquitur ex abundantia cordis* – "Out of the abundance of the heart, the mouth speaketh."¹ Shall I speak about Brazil? The elections? The new President of the Republic? The economic situation of my country? Globalization? Law? Ethics and corruption? Because I serve on the Supreme Court of Accounts of Brazil, I have decided to speak about the constitutional principles of our administration and to discuss the administrative and auditing role of the Court of Accounts, which functions as the supreme audit institution.

II. INFLUENCES OF THE AMERICAN LEGAL SYSTEM ON BRAZILIAN LAW

First, I would like to note some influences of the American legal system upon Brazilian Law:

1. Federalism as a form of state and the Republic as a form of government;
2. three branches of government: the executive, the legislative and the judiciary as independent powers;
3. the supremacy of the Constitution over the infra-constitutional legal order; and
4. the rule of law as the inspiration of what the French writers call *l'état de droit* and what the Spanish-speaking call *estado de derecho*.

I would like to discuss the influence of Federalism first. Federalism in Brazil is comprised of the central power, known in Portuguese as *União*, the regional power, represented by the twenty-six States; and the local power which includes 5,400 municipalities. Our branches of government

1. *Matthew 12: 34-35*

are similar also to those of the United States: the president of the republic is the chief of the executive power, the governors are the heads of the states, and the mayors are the heads of the cities or municipalities. The administrative capital is the Federal District of Brasília, which one of the visiting astronauts called "the space age capital." All three components of our federalism have the three powers of executive, legislative, and judicial, except the municipalities (cities), which have no judicial power. A system of checks and balances among the three powers acts both to integrate them and to keep them in equilibrium.

The Brazilian constitution, promulgated in 1988, is very advanced, and I have no doubt that, it is the most advanced constitution in the entire world! Much of its virtue is due to the influence that the American Constitution and American legal writers have had over the Brazilian constitutionalists from our first Republican Constitution in 1891 until the present day.

The decisions of the U.S. Supreme Court are a permanent source of inspiration for the Brazilian judges. The supremacy of the Constitution over all the infra-constitutional law and statutes is inspired by the opinion of Chief Justice Marshall in 1803 when he decided the famous case of *Marbury vs. Madison*.² This case has had a very strong effect over our constitutionalism and has established the doctrine of judicial control over all acts of the executive, legislative, and judicial branches.

Brazilian courts have strong judicial power. No one can withdraw from the judgment of the courts any limitation the courts have placed on the defense of the rights and interests of the citizens.

III. PRINCIPLES OF ADMINISTRATIVE LAW AND THEIR CONTROL BY THE COURTS OF ACCOUNTS

I would now like to discuss the state function that we call control of finances and budget, which is conducted through the public administration. This function operates within all three powers of the government, for each one conducts administrative actions. The control function is very important to administrative and constitutional law. The phases of administrative activity are: planning, organization, command, coordination, and last but not least, control. The word "control" etymologically comes from the French word *contrôle* (contre + rôle) and means the act of checking a list to certify that nothing is lacking. This is an appropriate meaning for a function that involves oversight of income, expenditures, credits, warranties, and the use of public properties. In Brazil, modern constitutionalism grants this power of the purse to the legislature.

Historically under Brazilian law, Congress, controls public finance with the aid of the Court of Accounts. The Court of Accounts makes the legal and technical decisions of the acts of the three powers and controls the use of public resources. The Court of Accounts has two main functions:

2. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

(1) to manage a fiscal system and (2) to make judgments. The Court's two main instruments are the inspection and the audit. The Court may apply several kinds of sanctions: (1) recommendations, (2) fines, (3) orders to stop the act (injunctions), (4) communication to the Congress to interrupt contracts, and (5) imputation of debts for damages to the *aerarium*.

The main task of the Court of Accounts is to foster the following principles of administrative law:

1. legality in the rule of law;
2. impersonality, for example, public interest, rather than private, as the motive of administrative action;
3. morality and ethics in public service;
4. publicity – access to the actions of the administrators;
5. efficiency, reflecting the modern concept that what has to be done ought to be done economically and to achieve the best results. Efficacy is not sufficient; rather, it is efficiency that means quality.

The Court of Accounts analyzes the action of the *gestors* of the richness of the nation, checking to see if they have been fulfilling their duties. According to the teachings of the jurists, the administrator has four main duties:

1. to act, this means to be an executive, to do and to make things happen, accomplish plans, and make true the promises of the campaign; to be creative;
2. to be honest (in Latin, *probus*) and to act as the father of the household (in Latin, *bonus pater familias*);
3. to seek efficiency and efficacy, to have results, and to solve problems; and
4. to be accountable, meaning to fulfill the order of the land, *redde rationem villications tuae*. That is to say, to show the results of your administration; to openly show the use of the public money.

Other principles of administrative law applied by the Court of Accounts are:

1. priority of the public interest;
2. unavailability of the public property and facilities for private profit;
3. proportionality and reasonableness, this means coherence in administrative business—it should be the right decision for the right place;
4. permanence of the administration, showing that shows the administrative work will not stop but will continue (this principle is carried out through a system of substitute vice- and deputy authorities);
5. the presumption of the legality and veracity of the administrative action;
6. self-execution of the acts of the administration;
7. self-reviewing power that assures the administration the right to revoke its own acts within certain parameters; and

8. the principle of due process with regard to its affairs and decisions. Due process includes the plain right to defense, the calling to the procedure, the right to produce evidence, and such.

IV. ADMINISTRATION AND GOVERNMENT

The concepts of *government* and *administration* present both similarities and distinctions. The administration is seen as the action of the executive power while government encompasses policy and guidelines. Government implies the power of decision-making with long-term aims. Administration implies the everyday working of the state. Government implies politics, while administration implies action. Economic policy and international policy are matters of government. As we can see, distinguishing the limits of each is not easy. All three branches of government have an administrative power such as the power of everyday work. So we can say that there is no government that is purely political and no administration is entirely bureaucratic. Presently, the staff of the administration is entitled to get into the issues of law-making and rule-making, as well as to prepare the legislative process.

V. ADMINISTRATION, LEGISLATION, AND JURISDICTION

The separation of powers doctrine in its original version establishes the executive branch to act as administrator, the legislative branch to make rules, and the judiciary branch to decide cases and interpret laws. This is the stereotyped feature of the Illuminist creation.⁴ Currently, this separation is not as strict as the original thought of Montesquieu. For example, the executive power has some normative powers, as in the case where it is entitled to edict decrees and *Medidas Provisórias* (Temporary Provisions). The executive in Brazil, especially with President Fernando Henrique Cardoso, has ordered many *Medidas Provisórias*, which have the strength of statutes.

The judiciary exerts administrative action, for instance, when it fills positions of officials, and it exerts legislative actions when deciding the competence of legislation. In the judiciary, there is enforcement of the law and there is a substitution of the parties when a conflict is installed. The legislative body can act as the judiciary when deciding the impeachment of the President or other high authorities.

Comment And Case Notes

