SALUTACIÓN

Ceremonia inaugural

Este es el XII Congreso de nuestra Asociación Internacional de Derecho Procesal. El primero se celebró en Florenzia en 1950. El primer congreso mundial, el sexto en la serie de congresos de la Asociación, se celebró en Gante en 1977, donde aludí al hecho de que Carlos V nació en Gante en 1500. Fue él quien logró establecer un imperio mundial. Algunos años más tarde, en 1522, Pedro de Gante, un hijo de Gante —corrían rumores de que era el hermano natural de Carlos V— abandonó su lugar natal para ir a México, a fin de predicar allí el Evangelio a los aztecas. Introdujo el arte de imprimir en el Nuevo Mundo, lo que creó la posibilidad de impartir enseñanza en todo México. Una placa de bronce en la pared del Palacio de Justicia de Gante conmemora esa partida y se me ha dicho que, en 1975, una estatua de Pedro de Gante fue erigida en su honor en la calle de Gante, en México. La paradoja es que Carlos V no tenía buena opinión de los juristas, pero que, en cambio, apreciaba en mucho la importancia del derecho. En cuanto a su menosprecio de los juristas, me permito recordar la historia de Bernal Díaz del Castillo acerca del descubrimiento de México: "Una comisión pidió a Carlos V no enviar a juristas, porque, con su erudición, éstos sólo provocarían juicios, crearían litigios y hundirían al país entero en un caos. El 15 de mayo de 1523, Carlos V ratificó las propuestas de esa comisión. Añadió que, durante algunos años, ningún jurista obtendría la autorización de establecerse en Nueva España, a fin de evitar las tensiones, los juicios y las intrigas" (*Wahrhafte Geschichte der Entdeckung und Eroberung von Mexiko*, 1568 A. D., pp. 541 y 599).

Hoy, estoy convencido de que nuestro buen colega, el doctor Cipriano Gómez Lara, organizador de este XII Congreso Mundial, sabrá suminis-

trar la prueba de que los juristas, especialmente los procesalistas, saben poner paz y orden en lugar de caos y tensión.

Con nuestra Asociación, hoy, nos alegramos todos de poder estar aquí, en este país y en esta ciudad, donde se celebró el V congreso de nuestra asociación en marzo de 1972, que era dirigido por el profesor Niceto Alcalá-Zamora y Castillo. Aquí, el entonces presidente había podido encontrar su segunda patria. Por consiguiente, nos alegramos particularmente de poder rendir un homenaje apropiado a quien, desde el principio, fue activo dentro de nuestra asociación internacional y que fue uno de los fundadores y presidentes de la Asociación Mundial de Derecho Procesal.

Añado que el profesor Enrique Vescovi ha muerto hace algunos meses. Él fue uno de los pilares iberoamericanos de nuestra Asociación.

Durante il colloquio del duemila sul potere discrezionale del Giudice che, in concomitanza con il cinquantenario dell'Associazione, venne organizzato a Gand, il nostro ottimo segretario generale Federico Carpi ha sintetizzato la storia dell'Associazione e ci ha ricordato che nella riunione innaugurale a Firenze nel millenovecentocinquanta il grande processualista italiano Enrico Redenti dichiaro' quanto segue:

> Noi riaffermiamo qui, dinnanzi al mondo intero, la nostra volontà di vivere e di rialzarci, cosi' come il nostro bisogno di legare dei rapporti più ampi con tutti coloro che coltivano le nostre discipline.
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> Queste ultime, nelle loro applicazioni pratiche, sono essenzialmente tecniche. Ma la tecnica puo', anch'essa trarre vantaggio da esperienze diverse e apparentemente lontane, cosi' come dagli studi condotti nelle condizioni ambientali più diverse.

La fondazione della nostra Associazione in Italia, come una sorta di internazionalizzazione della già istituita nel millenovecentoquarantotto Associazione Italiana della procedura civile, mi porta a dichiarare che, nel diritto processuale, dobbiamo molto se non tutto, alla scienza del diritto processuale italiano.Questa constatazione mi ha, durante una conferenza, quest'anno a Bologna, autorizzato a supporre che, nel campo del diritto processuale, siamo tutti italiani. Parafrasando quanto, a suo tempo, scrisse T. S. Elliot: Siamo tutti greci.

L'una e l'altra cosa mi porta evidentemente al mio particolarmente onorato predecessore Mauro Cappelletti che nel millenovecentotrentatré in concomitanza col congresso di Würzbürg riprese le redini della nostra Associazione insieme con Vittorio Denti, che era già stato eletto segretario in Messico. Vittorio Denti ci lascio' l'anno scorso. Egli fu una straordinaria figura che ha molto meditato sui fondamenti e sul significato del diritto processuale. Egli fu anche il pilastro di tutto cio' che poteva rappresentare l'organizzazione internazionale dell'Associazione per il diritto processuale.

Alla fine di quest'anno, in concomitanza con il suo settantacinquesimo compleanno, sarà reso omaggio, nella sede della sua Alma Mater in Firenze, al mio onorato predecessore, nostro attuale presidente onorario, Mauro Cappelletti. Nessuno puo' disconoscere che il primo vero studioso del diritto processuale comparato su scala mondiale fu il mio predecessore Mauro Cappelletti. Lo ricordo quanto già scrisse Sir Jack Jacob, che Mauro Cappelletti era diventato uno dei massimi se non il massimo rappresentante scientifico nel campo del processo giuridico in generale e del diritto processuale comparato in particolare. Lui fu per di più colui che ha portato il dilagare del movimento Acces to Justice, il quale poté essere costruito grazie al progetto Florence Acces to Justice che parti' nel millenovecentosettantatré e che in sei volumi porto' con se una serie di onde che portarono allo sviluppo internazionale del diritto processuale. Fra l'altro tutti conoscono queste quattro onde che vennero ad espressione in questo Opus Magnum:

- L'accesso al diritto era stato prima concesso alla luce del diritto dei poveri: il diritto d'Assistenza giuridica nel suo significato originario.
- La seconda onda é quella della salvaguardia degli interessi diffusi: gli interessi dell'ambiente e dei consumatori.
- La terza onda chiederebbe di nuovo la piena attenzione per la regolamentazione stessa dei conflitti, sia per la magistratura che per altre istituzioni.
- Nella quarta onda, infine si andrebbe verso l'accesso al diritto e al moderno stato di benessere.

E' evidente che, con queste quattro dimensioni la vera vocazione sociale del diritto processuale viene per la prima volta esaminata scientifica-

mente: attraverso un sistema di diritto processuale giusto e funzionante, bandire dal mondo l'ingiustizia. Ma c'é di più.

En effet, le procès fait partie de la culture. C'est par exemple grâce à l'analyse détaillée par l'historien français Emmanuel Leroy-Ladurie des dossiers judiciaires dans les procès contre les Cathares qu'on a pu reconstruire la société au XIIIème et XIVème siècle (Montaillou, village occitan).

Le procès est un enfant de la culture. Dans la plupart des pays il est toujours l'expression d'une violence civilisée, mais en même temps nous percevons une forte tendance à bannir la violence en cherchant des solutions alternatives pour résoudre les conflits.

D'autre part le procès contribue à un comportement qui peut établir une culture juridique et judiciaire. Il va de soi que la structure dialectique du procès (thèse-antithèse-synthèse) fait de la Justice un pouvoir bien plus démocratique que le pouvoir législatif ou le pouvoir executif.

N'oublions d'ailleurs pas que le pouvoir judiciaire doit être considéré comme la meilleure garantie d'un Etat de droit.

Un débat fondamental nous a été légué par le droit Romain. Celsus: *jus est ars boni et aequi*; Ulpianus: *justi atque injusti scientia*. Le droit est une science ou un art. Personnellement j'ai toujours cru que le droit est plus art que science. Il ne constate pas ce qui est (Sein), mais il dicte ce qui devrait être (Sollen).

François Gény nous a indiqué qu'en droit il y a les donnés et le construit. Cela signifie en fait qu'il y a une sorte de droit naturel d'une part qui cède d'autre part sa place à l'idée d'un construit culturel. Et culture signifie fondamentalement la construction par l'homme. La culture droit être considérée comme l'ensemble des idées, normes, valeurs, règles de comportement et attentes, qui permet de modifier l'environnement naturel. Culture est essentiellement transformation de la nature de la société.

Il est évident que les procès ont changé la face du monde et ont ainsi apporté ce construit culturel. En droit international je vous rappelle les grands arrêts de la jurisprudence européenne: l'arrêt Van Gend et Loos de la Cour de Justice de Luxembourg qui a introduit l' effet direct des normes internationales, tandis que la Cour de Strasbourg a mis fin à certaines discriminations comme celles des enfants naturels (arrêt Marckx). Puis-je vous

rappeler l'arrêt Brown de la Cour Suprême des Etats-Unis qui a mis fin, au moins théoriquement, à la ségrégation des races.

La jurisprudence étant le fruit des procès, a préparé notre société a entrer au troisième millenaire.

Auf unserem Kongress in Wien 1999 haben wir uns den Prozessrecht an der Schwelle eines neuen Jahrtausends gewidmet. Voriges Jahr erschien der Aktenband des Wiener Kongresses: "Procedural Law on the Threshold of a new millennium". Ich möchte dem damaligen Kongressvorsitzenden Walter Rechberger für diese Prachtausgabe in der Reihe unserer Tagungsbände herzlich danken. In den Jahren 2000 und 2001 war es mir vergönnt, in Gent beziehungsweise Brüssel für unseren Verein ein Kolloquium zu organisieren, das der freien Enscheidungsbefugnis des Richters und der Vereinheitlung des Prozessrechtes in Europa gewidmet war. Die beiden Tagungsbände sind soeben veröffentlicht worden und werden hier auch im Stand der mexikanischen Buchhandlung angepriesen. Voriges Jahr wurde ein in Coimbra beschränktes Kolloquium zum Thema der Verfahrenskosten organisiert. Manches weist darauf hin, dass unser Internationaler Verein besonders aktiv gewesen ist; dies haben wir denjenigen zu verdanken, welche die Kongresse und Kolloquien haben veranstalten wollen, sowie den Vorstandsmitgliedern, die so vorausschauend sind, dass sie unseren Verein über die Schwelle der dritten Jahrtausendwende heben und ihn in alle Welt hinaustragen können.

In der Entwicklung unserer Vereine sollten wir allerdings einen ganz besonderen Platz denjenigen Ländern einräumen, die bisher ungenügend zum Zuge kommen konnten. Ich erwähne Mittel- und Osteuropa, Asien und Afrika. Dort sind Gesellschaften und Kulturen in Bewegung, in denen das Prozessrecht einen wohltuenden Einfluss ausüben könnte, weil wirksame Verfahren für unabhängige Richter zum Zustandekommen der wirtschaftlichen Stabilität und des gesellschaftlichen Wohlergehens beitragen könnten.

In diesem Zusammenhang möchte ich eigens betonen, dass uns in den schwierigsten Nachkriegsjahren die Kollegen-Prozessrechtler vieler mittel- und osteuropäischen Staaten einen bleibenden wissenschaftlichen Beitrag von hoher Qualität versichert haben, den wir immer sehr zu schätzen

wussten. Dazu brauchte es damals nicht nur der Sachkenntnis, sondern vor allem vielen Mutes. Nach der Wende ist es unsere Pflicht, möglichst viele gute junge Kollegen aus diesen Ländern Mittel- und Osteuropas anzuziehen und sie zu aktiven Mitgliedern unseres Internationalen Vereines zu machen.

Besonders bemerkenswert ist die Tatsache, dass in vielen Ländern, in denen der erneute Aufbruch in die Demokratie erfolgt ist, sehr oft eminente Kollegen-Prozessrechtler gebeten worden sind, politische und konstitutionelle Aufgaben zu übernehmen. Es sind Kollegen-Prozessrechtler, die die Leitung ihres Landes in Argentinien und Kap Verde übernommen haben; es sind Kollegen-Prozessrechtler, die den Vorsitz der neuen in Bulgarien, Polen und Ungarn aufgerichteten konstitutionellen Gerichtshöfe übernommmen haben. Ich wollte dies heute besonders betonen, weil es die wichtige gesellschaftliche Rolle des Prozessrechts unter Beweis stellt.

Zwei Jahre nach den tragischen Ereignissen des 11. September gebührt es außerdem, zu erinneren an das Motto, das über dem Eigangstor des Hohen Rates der Niederlande gemeißelt stand: Ubi iudicia deficiunt, incipit bellum.

It is my conviction that the life of our Association —now in its 53rd. year— has coincided with an unbelievable evolution of more than half a century of procedural law in the world.

If we survey the fifty years of our Association and examine what has happened in procedural law throughout the world, we note that there have undoubtedly been fundamental changes and movements, in short, fundamental developments. I shall confine myself to the most important of them.

1. Accessibility to the legal process has, as I have already pointed out, surged strongly ahead, mainly under the influence of the study by Mauro Cappelletti entitled *Access to Justice*. This still does not mean that accessibility is at an optimum level today, but even so it is noteworthy that citizens and legal entities are going to court more than ever before in quest of justice.

2. *Internationalization*. At the same time it has become clear that the death knell of a procedural law geared too much to a national system was sounded by the relentless prosecution of comparative law research in pro-

cedural law, but also by the coming into effect of important international treaties such as the European Convention for the Protection of Human Rights and the Brussels Convention (1950 and 1968). Moreover, attempts are being made here and there to bring about a harmonization of procedural law in large continental areas. I would call to mind the Codigo Tipo Ibero Americano and also the steps I undertook with the working group which I chaired to obtain an approximation of procedural law in the European Union.

3. *Deformalization*. In the same period, deformalization of procedural law has stood high on the list of priorities. History shows us that the need for judicial formalities decreases in proportion as the degree of awareness of the law and the sense of justice in a society increase. Many people have drawn their inspiration from the golden rule of the Brazilian procedural code, which provides that if the goal envisaged by the rule is attained notwithstanding its nullity, the latter shall have no effect.

4. The judiciary is gaining more and more of a central place in the distribution of power in every state based on the rule of law. Not only is its necessary independence being increasingly underlined, which should put an end to what are styled "political appointments"; in addition, efforts are being made in different quarters to formulate an answer to Juvenal's question: "*quis custodiet et ipsos custodes?*" In Italy the legislator has done that. In my country, the Supreme Court has decided that the State is responsible for mistakes committed by the judiciary which have given rise to damage.

5. The concept of time has considerable significance in procedural law. I would instance the celebrated pronouncement by an eminent member of our presidium, the late Sir Jack Jacob, who spoke of the three-headed hydra: costs, delays and vexation.

Quoting Sir Jack Jacob I must remind you that he died two years ago. He was also a giant in our Assocation as an outstanding representative of the common law world. The struggle to cope with the backlog of cases, the needless prolongation of proceedings, the overburdening of the courts is being waged everywhere. On the eve of the third millennium, a present was offered by the Strasbourg Court in the case of Kudla v. Poland (26 October 2000), which stated that a citizen can make a claim against his own State in an actual suit before a National Court on the grounds that the obligation to hear any case within a reasonable term has been infringed.

Options must also be taken for the future and in my opinion such options concern the model for society that we should strive to attain, the performance of actors in the courts, the simplification of judicial structures and certain new rules of procedure.

I shall explain more fully. By the model for society I mean that if we want the courts to function properly, care must be taken to ensure that many disputes in our society are avoided so that they do not need to be brought before the courts.

It is clear that in procedural law progress has too often gone no further than determining rules of law for litigation instead of devoting attention to the actors in the courts. And these actors are numerous but in addition they are the ones who determine the pace of the proceedings. It is therefore high time to replace education in law in our law faculties throughout the world with the education of jurists whose task will be to lend the maximum support to the new model for society and to act accordingly.

As regards the judiciary system, I would point out that Jeremy Bentham in his time was already calling for all cases to be brought before one and the same court and then be distributed over various specialized divisions by means of a dispatching system. And where rules of procedure are concerned, it is evident that everywhere in the world the case is being argued for placing the conduct of the action in the hands of the judge; only the dispute is a matter for settlement by the parties. This basic rule is today no longer questioned but urgently needs to be converted into rules of procedural law throughout the world.

Winston Churchill once said: "The independence of the judiciary from the control of the executive is one of the cardinal principles of the constitution". If I may paraphrase this eminent statesman, I conclude this opening address at the Mexico Congress with the assertion that the only guarantee of the rule of law is a properly functioning Court with prompt dispensation of justice.

And let us keep in mind during the proceedings of this congress the creative idea of the Irish Nobelpricewinner Seamus Heaney: "*Turn hope into history*".

Marcel STORME