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Remarks for the Opening of Duquesne University’s Seminar on Judicial Review

Dr. Jean-Frédéric Salès*

I thank you, Professor Barker, for this very friendly and generous presentation. I know that perception is often much larger than reality, and I am afraid that today, you have described me through the prism of your friendship. This seems particularly the case when my wife asked me with a strange look on her face: who are you going to speak to and on what subject? From where I stand now, she certainly was right to be incredulous.

I am not a constitutional scholar, but I do practice law in a very difficult country. When I find myself in the presence of practically the Who’s Who in constitutional law and judicial review in particular, I have to admit that my wife was probably right to question my sanity. Thank you all the same, Robert!

Today and tomorrow, we are going to have the opportunity to listen to some of the best constitutional law scholars and practitioners bring us up to date on the status of the process of “Judicial Review in the Americas . . . and Beyond.” As a lay person, I will limit my remarks to the challenges that judges, investigating magistrates, district attorneys and lawyers confront in a more or less open way nearly everywhere in the world today.

Too often we are complacent about the situation around us, either because we do not pay attention or because it is hard to believe.

We know the principle: since L’Esprit des Lois of Montesquieu, we are informed that the Judiciary occupies the third branch of government and possesses a powerful tool to check abuses of office by both the Executive and Legislative Branches, the authority to declare acts of Congress and the Executive Branch unconstitutional. Whatever the origin of this authority — a decision by the Supreme Court in the United States, or a disposition imbedded in the Constitution such as in Canada or Haiti — “Judicial review is the power of a court to review a law or an official act of a government employee or agent for constitutionality or for the violation of

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basic principles of justice." In many jurisdictions, particularly in common law countries, the court has the power to strike down that law, to overturn the executive act, or order a public official to act in a certain manner if it believes the law or act to be unconstitutional or to be contrary to law in a free and democratic society.

All of this sounds great. However, we must realize that this power is exercised by people, women and men, and that it is often not as easy to do as it looks on paper. Indeed, in cases that are unpopular or bring back bad memories or are interpreted as being politically oriented or motivated, the other side always throws roadblocks to counter that exercise.

Last Monday, I was asked by the former President of the Colegio de Abogados de Córdoba, Argentina, if in the countries of the Americas it was possible to exercise the various aspects of the legal profession without interference, subtle intimidation or open threats. He was referring to the pressure under which judges, investigating magistrates, district attorneys and lawyers have to operate in Argentina. The wounds left by the military dictatorship from 1976 – 1983 were reopened when, after judicial review, the Argentinean Supreme Court found unconstitutional laws enacted by previous governments to grant amnesty in favor of people responsible for gross violations of human rights.

Imagine yourself subjected to death threats (that are sometimes carried out) for doing your job, or because the decisions that you are making are not considered to be politically correct! The pressures can be more subtle in countries with a long tradition of democracy, but they exist nonetheless. You can be subjected to smear campaigns that will affect your life and that of your family, you may be ostracized by friends who do not understand the process, or be on the receiving end of hate mail from the general public.

In other words, ladies and gentlemen, it is not always easy to exercise the power of judicial review; it can be downright unpleasant and sometimes dangerous in certain places and circumstances. It is a fundamental right that we all have, but that cannot be taken for granted and must be constantly defended against encroachment by the other branches of government.

Our meeting today is not the forum to present an inventory of such places and circumstances. I am confident that anyone in this room has in mind an example of the situations I am referring to.

The point I do want to make is that at the end of the day, it is the independence of the legal professions that can guarantee that judicial review remains the last line of defense when our funda-
mental rights are threatened. This independence has to be institutional, but also ingrained in each of the players on the judicial scene: judges, district attorneys, lawyers. Indeed, in order for the Judiciary to be truly independent, we need something that we must look for in the judge or lawyer himself. A judge must be independent from himself. A magistrate is a human being, which is a package of passions and prejudices, sympathies and antipathies, affection and resentment, hatred and contempt, and fear and temerity. To be good and exercise his power of judicial review, a judge must be able to hold back and control all those conflicting feelings, and this is possible only through education, training, continuous practice and the culture of a sense of humility and responsibility. These control mechanisms, if I may call them that, cannot be bought at a market, nor injected in the human system by written statutes or case law. If these qualities exist, even if the protective measures provided by constitutions or statutes disappear, the independence of the Judiciary will not be affected. On the other hand, even if all these protective measures are part of the legal structure, the judge may not be independent. In difficult times, only the strength of character of the judges can save the judicial system and therefore the process of judicial review.

I know that in this country, there is not a special school for the Judiciary, and judges are appointed by taking into consideration, among other things, their standing as lawyers. It is therefore particularly fitting that the debate that will begin shortly is organized by and takes place at the Duquesne University School of Law. It will most certainly contribute to the establishment of trends and boundaries of judicial review today, and will also instill in a new generation of lawyers a particular interest and, why not, a passion, for a process that is so important for the protection of the basic rights of the citizens of the world.