

SUMMARY¹

KEYNOTE ADDRESS

“Fundamentals of the Rule of Law and Crisis of Representation in Latin America”

Mr Tarso Genro, former Minister of Justice and Education of Brazil, former Governor of Rio Grande do Sul

Overview

In his presentation, Mr Genro purports to answer two central questions which refer to the title of his presentation: (1) what are the fundamentals of a constitution, and (2) what is causing the current crisis in democratic representation in Latin America? The answers to these two questions are, in turn, interrelated.

Relying on contemporary philosophers of law, political scientists and historians such as Hans Kelsen, Norberto Bobbio, Robert Alexy, and Luigi Ferrajoli, Mr Genro suggests that the crisis of the Rule of Law in representative democracies is caused by the lack of legitimacy of the nation-state. This crisis affects countries in Latin America and beyond, and need a collective solution.

At the very heart of his argument, Genro asserts that capitalism is suppressing individual and collective rights, and that current debt levels are hindering progress in Brazil. He further argues that a new economic order built on cooperation and interdependency between societies and nation-states would enable constitutional principles to be realized and carried out in a manner consistent with a ‘basic norm’, a term coined by Hans Kelsen and also found in Norberto Bobbio’s work².

The questions and answers section touched on the possibility of drafting a new constitution for Brazil, as well as a change in Brazil’s government system.

¹ This Summary was prepared for the Bingham Centre by Patricia Regules and does not reflect the views of the Bingham Centre for the Rule of Law.

² ‘Basic norm’ refers to the transformation of power into law, or the rules and belief systems that underlie a legal system. See Zimmerling, R, 2005, *Influence and Power, Variations on a Messy Theme*, Springer: The Netherlands, p 257

Details

1. Societies face a number of challenges, but democracy is the answer

Genro first outlines a number of challenges many societies face:

- There is a conflict between written constitutions that carry normative weight, and the normative force of globalized financial capital, which has turned citizens into consumers.
- Societies are currently experiencing a crisis of representation, which is due to a 'reduction of the normative force of modern constitutions', predominantly caused by 'the lack of efficacy of the basic norm'. The emergence of social democracy, combined with the rise of mass consumption, the deficit financing of the welfare state, and the increasing dilapidation of natural resources are fuelling this crisis. The situation has led to undermining the role and legitimacy of political parties, who are failing to represent the populace and to meet its social expectations and demands.
- Political parties in Brazil are undermined by a complete lack of trust, legitimacy and strength and are therefore not able to carry out their mandate(s) as normal. Part of this results from the subjugation of power of political parties by 'superior normative forces'. For example, financial capital and public debt are 'normative forces' that carry much more significance than the normative force of the Constitution. In practice, this has led to weakening fundamental rights such as the right to equality before the law. 'It seems to me that our situation limits progress. 40% of our public funds are destined to repaying our debts, and this is far too much for a country like ours', the speaker emphasized.

Mr. Genro further asserts that these problems could best be addressed 'with more, not less democracy'. This is to say that segregated sectors of society must be included in the political debate. Furthermore, in Genro's view, a comprehensive, reasoned, technical and legal debate together with the establishment of a new Constituent Assembly would help Brazil exit the crisis and support the country's transition to a new legal and economic order.

2. The impeachment procedure against Rousseff is flawed and questionable

During parts of his speech and the questions and answers session, the former minister criticised the impeachment process of President Rousseff by the Lower House of Representatives. He argued that Rousseff's criminal liability was not established, and hardly if not discussed in Parliament. It is likely that economic considerations, particularly a general dissatisfaction with the state of the economy, preceded any legal considerations and due process in the impeachment vote. 'This constitutes a misuse of conduct on behalf of the Lower House', Genro said. 'What we witnessed [during the vote] was not a trial for a crime committed, but rather an indirect election of a President', he emphasized.

3. A new system of government is needed in Brazil

When questioned by the audience if Brazil would benefit from a parliamentary system of government, Mr. Genro expressed that in his view, the country would be better off with what he called a presidential parliamentary system (*parlamentarismo presidencialista*), which is led by a head of government (typically, a Prime Minister or a political figure who is not the head of State), much like in Spain and Portugal. In practice, this would depart from the current political system in Brazil which is based on a federal presidential system, characterized by the speaker as being excessively monarchical, and hinged on attaining regional support through political patronage.

In his view, a new system of government would allow greater flexibility to solve crises. A presidential parliamentary system has many similarities with a presidential system (whereby the President is head of state and of government), but it would bestow upon the President greater flexibility to operate in a time of crisis.

'This is an important issue and a profound change for Brazil's political system. In practice, it would probably call for a constituent assembly, adjacent to the functioning of Congress, which could solve the following two issues: the one with our political system and the one with our political regime. If this could be achieved, it would be a great breakthrough', noted Genro.

Whichever the solution, he concluded, Brazilians must not conform to the current gridlock in the legal order. If unaddressed, it could lead to growing scepticism of the electorate, or even in certain circumstances, to outbreaks of violence.