

SUMMARY¹

KEYNOTE ADDRESS

“Judicial Independence in Brazil – a case study analysis of the National Council of Justice”

Minister Gilmar Mendes, Justice of Brazil’s Supremo Tribunal Federal

Overview

In his keynote address, Justice Mendes expanded on the creation of the National Council of Justice (*Conselho Nacional de Justiça* or CNJ) and discussed its contribution to due process in Brazil. The National Council of Justice is an organ of Brazil’s Judiciary, composed by 15 members and presided by the President of Brazil’s *Supremo Tribunal Federal* (Supreme Federal Court or STF).

Judicial independence has been a tradition in Brazilian history, only interrupted during military rule. Institutional Act number 5 of 1968 suspended judicial guarantees. These were subsequently re-established in the transition from authoritarianism to democracy and enshrined in the 1988 Constitution. Hence, it was no surprise that proposals for the creation of an autonomous organ which would exert external control over the Judiciary, were initially perceived as a threat to judicial independence.

The creation of the CNJ, ‘is a significant step towards a more efficient Justice system; one which can provide answers to a variety of problems within a socially acceptable time’, according to Mendes.

Details

1. Creation the National Council of Justice

Justice Mendes contended that the CNJ’s creation was not driven by the need or purpose for greater judicial independence. To the contrary, the CNJ came about in order to

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.

rationalize administrative activity and achieve greater integration of what had become a segmented Judiciary.

Before the establishment of the CNJ, the Judiciary benefitted from unlimited independence and autonomy. Citing former STF Justice Nelson Jobim, Mendes expressed that before the CNJ was created, courts and tribunals were isolated islands, without much connection to an overall system. They lacked accountability, acted autonomously, and decided on their administration and finances by themselves.

The announcement of an agency that would exert control over the Judiciary in the early 1990s was received with much scepticism and resistance and did not prosper until 2004. Upon its creation through a constitutional amendment, attempts were made to declare it unconstitutional on the grounds that it was an interference with the doctrine of separation of powers. Even when these attempts failed, judges continued to find ways to bypass the CNJ's control.

As an example, Mr Mendes mentioned that one of the CNJ's first measures was to prohibit nepotism. Injunctions were filed to overturn this measure and family members continued to take office. Judges then began a practice known as "surrogacy", whereby one judge would employ the family member of another, and vice-versa. This, in turn, led to corruption and traffic of influence by the appointed family member.

Another role adopted by the newly established CNJ relates to disciplining judicial misconduct. Before the CNJ, judges regulated and disciplined themselves, which was extremely ineffective since members of the same tribunal were reluctant to investigate and punish their own colleagues. 'Scandals multiplied and judges were not held accountable for their misconduct', noted Justice Mendes.

2. The CNJ as a mechanism for due process

Justice Mendes voiced concerns over Brazil's overburdened and mismanaged justice system. 'What he have today is a massive judicial structure composed of eighteen thousand judges and an immense array of public servants. Government expenditure in the justice system represents 1.2% of GDP, purportedly one of the highest rates in the world. Still, we lack an effective Judiciary and have a mountain of dockets. As we speak, 100 million cases are currently pending a decision'.

In this line of thought, the CNJ plays an important role when it comes to rationalizing judicial activity. For example, the CNJ examines a number of administrative issues such as federal bills aimed at increasing the number of judges and public servants.

The CNJ has been acting strongly in line with previously approved strategic plans and pre-established yearly goals. Justice Mendes explained that one target for the end of 2010 was

to decide all pending cases filed from 2005-2006 onwards. A joint effort was made by the CNJ, in coordination with courts and tribunals nationwide, to clear the dockets. This, in turn, served to identify distortions in the system, and establish a plan of action in order to address the distortions.

With regard to Brazil's criminal justice, Mr Mendes noted that the current system is being questioned due to the possibility of lodging endless appeals and challenges to judicial decisions as well as the overcrowded state of prisons. The speaker contended that Brazil's prisons have a capacity for 360,000 prisoners, but in practice, numbers have reached 700,000 inmates. 'These numbers alone give an account of the chaos in our criminal justice system'.

To address this problem, the CNJ set up a task-force entrusted with conducting a national survey on the current situation of Brazil's prisons. The speaker noted that at the end of his term in 2010, 22 million prisoners who were wrongly arrested were set free as a result of this review. In addition to this, in line with the American Convention of Human rights, the CNJ is implementing 'custody hearings' and ensuring that prisoners are brought before a judge within 24 hours.

Questions & Answers

Among other things, questions related to the STF's exclusive jurisdiction to try ministers and elected government officials, and on the alleged 'judicialization' of the impeachment procedure against President Rousseff.

On the first, the speaker remarked that a serious constitutional reform will have to be undertaken. At present, 90 congressmen are under investigation, the speaker claimed. This has a direct impact on the Supreme Federal Tribunal's *ethos* as it must dedicate an excessive amount of resources to cases such as the *Mensalão*² or the *Lava Jato*.³ Moreover, this diverts the STF's attention from judging the constitutionality of laws passed by the National Congress which may have an impact on millions of Brazilians. What was initially envisioned as an exceptional situation (the judgment by the STF of ministers and elected officials), has now become common practice.

On the second, Mr Mendes noted that both during former President Collor de Mello's and Dilma Rousseff's impeachment processes, there was a strong intervention from the STF. Jurisprudence of the STF ensures the right of due process, the right to be heard, and to a full defence, however the STF cannot make judgments on the merits of the case.

² Mensalão was a criminal investigation initiated in 2005 for diversion of public funds from state-owned enterprises used to pay off lawmakers in exchange for political support in Congress. The case was concluded in 2012 with the judgment of Criminal Action number 470 by the Supremo Tribunal Federal.

³ Lava Jato (translated as car wash) is an ongoing criminal investigation initiated by Brazil's Federal Police in 2009. Operation Lava Jato is allegedly the largest corruption and money laundering investigation in Brazilian history.