

## SUMMARY<sup>1</sup>

### “Judicial Independence and Accountability”

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#### Speakers

#### Judicial Independence in Latin America: The Implications of Tenure and Appointment Processes

- Dr Jan van Zyl Smit: Associate Senior Research Fellow, Bingham Centre for the Rule of Law, UK (**Presenter**),
- Dr Julio Antonio Rios Figueroa: Associate Professor of Political Science at the Division of Political Studies at the *Centro de Investigación y Docencia Económicas* (CIDE), Mexico (**Commentator**).

#### A Double-Edged Sword: Judicial Independence and Accountability in Latin America

- Jessica Walsh: Consultant, International Bar Association’s Human Rights Institute; Associate Lecturer, University of Surrey, UK (**Presenter**),
- Luciana de Oliveira Ramos: Researcher, FGV São Paulo School of Law (**Commentator**).

*Papers from the two presenters (Mr van Zyl Smit and Ms Walsh) are available for download from the [Conference page](#). This summary therefore captures comments and points of discussions only.*

#### Overview

In this session, speakers presented working papers on Judicial Independence in Latin America. While Dr Jan van Zyl Smit focused on tenure of judges and the appointment process of higher and lower court judges, Jessica Walsh spoke about judicial accountability and ways in which judges are disciplined and removed from their post.

Commentators argued that the key issue when discussing appointment procedures and tenure involves identifying why models vary across the region. It is also important

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<sup>1</sup> 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. The purpose of this note is to summarise Portuguese and Spanish content included in the relevant audio recording, and does not therefore include a full summary of the session as a whole.

to understand the causes of variations in appointment procedures and in tenure in order to determine if there is an optimum model that produces best results in the different Latin American countries.

Furthermore, commentators highlighted the relationship between judicial independence and trust in the judiciary, and the extent to which this relationship affects the rule of law. The challenge, therefore, is how to protect judicial independence while strengthening mechanisms for judicial accountability.

### ***Details: comments and discussion***

#### ***1. Tenure and Appointment Processes: one model fits all?***

Dr Rios Figueroa questioned whether there is an ideal model in terms of institutional design of the appointment and tenure of judges: 'it is very clear what the wrong model is, but we still do not know what the *right* one is, let alone whether such a model exists'.

Rather, the more relevant question is whether variations in appointment mechanisms and differences in tenure have an effect on the decision-making process of judges. 'What we want are judges who decide independently. Do these variations make a difference or not? It's a difficult question to answer', noted Figueroa.

Regarding the appointment of judges, the commentator stressed that the appointment process should not be in the hands of a sole organ or agency without a counterbalancing institution or agency. An important issue for all types of appointments is transparency in the selection of candidates and public participation in the selection process. Moreover, adequate justification should be given by the appointing authority as to why a candidate was elected.

When addressing tenure of judges, the speaker noted that while the international community seems to lean in favour of permanent appointments, it is not clear why they are the best solution to ensure judicial independence. 'There are arguments that suggest the contrary', said Figueroa. 'If judicial salaries are high and judges hold office for long periods of time and in addition they can be easily removed from their post, then there is a higher chance judges will be deferential to political power because they fear losing something that is very valuable to them'. As examples the speaker mentioned Singapore and Mexico.

In the questions and answers session, the panellists were asked to comment about the appointment process of Supreme Court judges in the United States and in Brazil by the head of the executive branch. 'The model seems to work in the United States, however, if you consider that this model is not the optimal one to ensure judicial

independence, what would that model be?', asked a member of the audience. Ms de Oliveira Ramos agreed on the contention that there is no such thing as an optimal model for judicial appointments. Judicial independence in Brazil was tested as a result of the *Mensalão* trial<sup>2</sup>, the speaker noted. Although Justices of Brazil's Supremo Tribunal Federal are appointed by the head of the executive branch, as a consequence of the *Mensalão* trial, elected government officials were punished and sentenced to prison.

## **2. Indicators of performance of the judicial system, transparency and accountability in Brazil's judiciary: are we moving in the right direction?**

In her comments, Ms de Oliveira Ramos spoke about the crisis in Brazil's judiciary during the 1980's and how this led to a process of reform in the Judiciary. She highlighted that the creation of the National Council of Justice in 2004 (*Conselho Nacional de Justiça*) resulted in the possibility of measuring performance of the Judiciary through data analysis. However, this data did not enable an objective and important relationship to be measured: the one between citizens and the rule of law.

In order to address this gap, the FGV School of Law devised two indicators, the first aimed at measuring the level of trust in the judicial system and the second at measuring social perceptions towards the rule of law. These indicators show that 70% of Brazilians have little or no confidence in the judiciary. Numbers are significant and beg the question of what is failing in the Brazilian judicial system and what can be done to address the problem.

Ms de Oliveira also commented on judicial councils, stressing that recent studies show that Brazil's National Council of Justice has acted timidly in regards to judicial misconduct and disciplinary proceedings. 'This is an extremely important issue that should be on our agendas and further discussed in Brazil', remarked the speaker.

Lastly, Ms de Oliveira suggested that public access to judicial decisions and televised sessions in Brazil have not had a clear impact on judicial accountability, but on the contrary have been counterproductive. In this regard, she expressed the need to define what is meant by 'greater transparency' as well as the need to continue elaborating measures that would work in favour of greater judicial accountability in Brazil.

In response to a question on the impact of broadcasting judicial sessions on the accountability of judges, Jessica Walsh made a distinction between transparency and making the courts and the law more accessible to citizens. 'If you have court

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<sup>2</sup> *Mensalão* was a criminal investigation initiated in Brazil 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*, Brazil's Constitutional Court.

proceedings being televised, it is more useful to bring citizens to the court; transparency is a separate matter- it's a matter of providing separate justifications for decisions of judges'. Dr Rios Figueroa, in turn, expressed that in his view, the deliberation process of judges should not be televised, although the trial could be transmitted as this is done in Mexico and Brazil.