

SUMMARY¹

“Due Process of Law and the Legal Profession”

Speakers

- Marcelo Hallake, Partner, Jones Day (**Chair**).
- Sergio Bermudes, Partner, Sergio Bermudes Advogados (Brazil).
- Pedro Dutra, Partner, Pedro Dutra Advogados (Brazil).
- Mario Engler, Professor, FGV São Paulo School of Law.

Overview

This panel focused on the discussion of the role of the lawyers in strengthening the rule of law. Speakers explained the concept of due process, highlighting the role of the lawyer in upholding due process as a means to avoid arbitrariness. Lastly, panellists also spoke about the different roles of practitioners in the legal profession and the challenges they face in advocating in favour of the rule of law.

Details

1. What is due process of law?

Pedro Dutra began by distinguishing between ‘procedural’ due process and ‘substantive’ due process, noting these notions were first introduced in Brazil by Rui Barbosa and Santiago Dantas in 1895 and 1948 respectively. Sergio Bermudes added that due process is not only the observance of principles and norms that govern judicial or administrative procedures, but the proper application of the procedural rule and its correct comprehension from both a literal and systemic point of view.

Speakers agreed that the purpose of the rule of law is to prevent arbitrariness by the state. In this sense ‘Lawyers are the great gatekeepers of due process, and they must ensure that it is strictly applied’, said Dutra.

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.

Moreover he stressed that due process could be used to fight corruption. 'Due process of law is the antidote to corruption because it protects citizens against arbitrariness. Arbitrariness is the biggest form of corruption; it is the source of all other manifestations of corruption because it is the first violation of the Constitution. To defend the application of due process is to defend a democratic state', noted the speaker.

2. Role of lawyers in promoting due process

Mr Bermudes underscored the role of lawyers in the application of procedural norms. As an example, he briefly discussed a leading case in which he acted on behalf of the widow of a deceased political journalist, Vladimir Herzog in the 1970's. He noted that he succeeded in interpreting Brazilian procedural norms in order to obtain what was the first declaratory judgment ever issued by a Brazilian court in favour of his client.

Commenting on the *Lava Jato* case², Mr Dutra stated that there is immense social pressure for immediate results, which inevitably comes at the expense of due process. This is where the role of Lawyers in overseeing due process is vital. But in the process, lawyers have been criticized and often wrongly overlooked as agents of their clients, as if they had participated in illegitimate acts themselves.

Lastly, Mario Engler highlighted the role lawyers play in encouraging private and public actors to apply ethical standards and respect the rule of law. This, he continued, would lead to a shift from the promotion of individual interests to that of the social good. 'In order to achieve this role, a lawyer's independence must be preserved', the speaker stated. For Engler, professional independence has been in decline over the past thirty years due to dramatic changes in the legal profession. He added that in-house counsel roles were particularly vulnerable to conflict of interest issues. He drew a parallel between the recent corporate scandals in the United States and the Petrobras scandal, warning that professional self-regulation would not be enough to correct this situation and avoid future scandals. Instead, regulatory measures and education are needed in order to break paradigms and incorporate ethical values that are not currently clearly perceived.

Questions & Answers

One of the questions touched on the techniques used by Judge Moro (who oversees *Lava Jato* investigations), namely his recent decision to release tapped phone calls between former President Lula da Silva and President Rousseff. A member of the audience questioned whether these techniques were a violation of due process, or

² 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.

whether the speakers considered they were warranted by the nature of the investigation.

Mr Bermudes expressed that procedures in Brazil are governed by the principle of publicity; confidentiality is the exception to the rule. In this line of thought, Bermudes believes that Judge Moro was acting on behalf of the public interest when he released the wiretaps to the public. With regards to situations of prolonged imprisonment (*prisão preventiva*, which translates as preventive or pre-trial detention), Bermudes said that they were inevitable due to the length of proceedings. 'If these people were capable of shamelessly robbing the country, they are capable of interfering with investigations and paying off or threatening witnesses in the case. In this sense, these measures are necessary to preserve the integrity of the investigations and uphold the rule of law', the speaker concluded.