

Political Reform and the Crisis of Representativity

GILMAR MENDES (INTERVIEW)

THE CONGRESS CRISIS was the theme of an exclusive interview granted to *ESTUDOS AVANÇADOS* by the Chief Justice of the Federal Supreme Court (FSC), Gilmar Mendes.

The Chief Justice attributed the Congressional crisis to the prevailing institutional model, denied that what we were seeing was a “judicialization of politics” and defended the FSC “in its role as guardian of the Constitution”.

In January 2000, Gilmar Mendes was appointed Attorney-General for the Union. Two years later he was nominated to the Federal Supreme Court. During his tenure as an Associate Justice he also assumed the post of vice-president of the FSC under Chief Justice Ellen Gracie. On April 23 2008 he was sworn into office as Chief Justice of the FSC for the biennial 2008-2010.

A legal scholar – holder of a degree, two master’s degrees and a doctorate, earned during the period 1973 and 1990 in Brazil and Germany – he is a professor of law at the University of Brasília (UnB), where he lectures on Constitutional Law at graduate and post-graduate level. He is the author of books and articles published in academic journals.

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ESTUDOS AVANÇADOS – Mr. Chief Justice, some analysts say there is a crisis in the Congress because it has failed in its mission to draft the laws the nation demands, while on a daily basis fresh scandals break concerning cronyism, nepotism and abuse of privilege among parliamentarians. In your opinion, is the Congress in crisis? And if so, what are the causes?

Gilmar Mendes – The present difficulty encountered in drafting and voting on bills of law at the Congress does not stem from a momentary crisis alone, but from an institutional model that does not allow the Congress to set its own agenda. Extremely important bills spend years being discussed without getting passed, while the agenda is taken up by the need to deliberate on provisory measures.

However, there have been successful motions that show that with a little political will and cooperation it is possible to make real change happen. One example is the so-called “Republican Pact”, an initiative by the Executive, Legislature and Judiciary to pass laws of vital importance to fine-tuning the Brazilian judicial system, yielding real benefits for the Brazilian population.

In Defense of the Constitution

ESTUDOS AVANÇADOS – Some analysts claim that in the last few years we have seen a judicialization of politics through interference by the Federal Supreme Court in areas that ought to be under the jurisdiction of the Congress. What is your view on this issue?

Gilmar Mendes – Beyond being a legal document, the Constitution of 1988 represents the achievements obtained after a twenty-year struggle for re-democratization. In this context, in response to the concerns of the people, the Constitution set a social agenda that far transcends purely formal aspects and which is expressed early on in the text. The aim of this social agenda posited by the Constitution is to lay the groundwork for a fully-fledged democracy. Only sustained economic development and the construction of an environment in which economic prosperity is accompanied by widespread social integration will it be possible to generate a stable democratic regime.

As such, the Federal Supreme Court, as guardian of the Constitution, finds itself faced with the daily and immense political and economic challenge of interpreting and applying a Constitution that is replete with fundamental rights and assurances of an individual and collective order. However, the Supreme Court, in delivering on these complex tasks, has no remit to interfere in the activities of the democratic legislature. So there is no “judicialization of politics”- at least not in the pejorative sense of the term - when political issues are configured as veritable matters of rights. This has been the orientation followed by the Court, which is fully aware that it is not its role to substitute the legislator, much less curtail or restrict political activity, of essential importance to the Constitutional State.

The Republican Powers are equipped and mature enough to conduct intelligent and supra-partisan political dialogue. In contemporary constitutional States, the democratic legislature and constitutional jurisdiction have equally relevant roles. The immanent and apparent dialectical tension between democracy and the Constitution, between fundamental rights and popular sovereignty, between constitutional jurisdiction and the democratic legislature is what nourishes and aggrandizes the State of Law, making development possible within a society that is both open and plural, grounded upon fundamental principles and values.

We have to realize that we find ourselves before a reality in which the facts and figures paint a grim picture, which shows just how difficult a task the Constitution has set for us in this social agenda. However, it has to be underscored that the Federal Supreme Court has been delivering on its part of this constitutional mission in exemplary fashion.

ESTUDOS AVANÇADOS – Mr. Chief Justice, in one of your interviews, you mentioned the present wave of scandals at the Senate. Are these scandals not prejudicial to the democratization and development of Brazil?

Gilmar Mendes – There is no doubt that we need to rethink the current institutional model, not only of the Senate, but of the entire electoral system. There is a pressing need for a political reform that can iron out certain problems in the way our political system functions, especially in relation to the so-called “crisis of representativity”.

That said, it is also important to highlight that, despite the occasional isolated problem, the present constitutional model, introduced with the promulgation of the Constitution of 1988, has proved very successful. The Constitution was completed at a symbolic moment, when inflation had hit galloping rates. We rode out serious economic crises at that time, faced a presidential impeachment and a crisis in the budget commission, there was lots of upheaval, but it was always kept within the strict bounds of normality. In this sense, we have to recognize the strength our political institutions showed in dealing with these crises, and draw assurance from that that the present crisis will also be overcome.

The Constitution of 1988 attempted to supersede the merely formal model of democracy to which we had been accustomed in the past. In the years since 1988, we have seen how the Constitution’s ample proclamation of rights has served as a stimulus for civil society institutions to rally behind the concretization of those constitutional promises. There is no doubt that, from 1988 on, Brazilian civil society has been strengthened.

Lack of Representativity

ESTUDOS AVANÇADOS – *Is the legitimacy of Congress not further undermined by the presence of supplants at the Senate, people who were not voted for by the electorate, but result from the same mechanisms of campaign funding?*

Gilmar Mendes – As mentioned earlier, the whole system has to be reformed if the Senate is to fulfill its extremely important brief as set forth in the Constitution. The current supplant system should also be rethought, because, regardless of the merits of those who have exercised the functions of absent senators, there is no doubt that this present model has put further distance between the electorate and the political class, aggravating the current sense of a lack of representativity felt by the population. Just to emphasize once again that the Federal Supreme Court has made a significant contribution to this process, drawing directives from the Constitution to guide the functioning of the system.

Along these lines, special mention should be made of the Federal Supreme Court’s decision to uphold party fidelity as a guarantee of respect for the voters’ will, seen as the party-switching by elected officials that goes on in the current political reality is a clear violation of the will of the electorate that conferred those mandates and makes a mockery of the model of democratic representation via a party-based political system. The Supreme Court’s ruling was a watershed in our republican history insofar as it consolidated democracy

and the fruition of fundamental political rights, and the major beneficiary of this decision was, beyond shadow of doubt, the voter.

Interview given on October 8, 2009. @ - mgilmar@stf.jus.br

Translated by Anthony Doyle. The original in Portuguese is available at http://www.scielo.br/scielo.php?script=sci_issuetoc&pid=0103-401420090002&lng=pt&nrm=iso.