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**The FUSADES strategy for El Salvador:
Priority areas for judicial reform and the problem of corruption**

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Priority Areas for Judicial Reform and the Problem of Judicial Corruption

This chapter considers the strategy of judicial reform in light of the problem of judicial corruption. Among all the legal problems in the Salvadoran justice system today, the problem of judicial corruption is the most serious and fundamental, both for the project of the rule of law and for the program of economic development¹.

The discussion has three main parts. First I discuss the nature and significance of the corruption problem, based on a review of the cross-country studies of institutional performance and on interviews with stakeholders and participants in the Salvadoran judicial system conducted in July of this year. Next I consider some consequences of the corruption problem for the program of economic reform. I argue that the corruption problem represents a key constraint in two different senses: one narrowly economic, the other, political. In the present circumstance of the country, the latter may be more important.

The third part of the discussion considers some institutional aspects of the corruption problem. I begin by examining the recent case of the *Titulos Falsos*, a case involving allegedly widespread judicial corruption. Next, I consider six main areas of institutional concern, suggested by the incident of the *Titulos Falsos*. I conclude the discussion with some proposals for reform of the judiciary and its surrounding constitutional framework.

Three main ideas inform this discussion. The first idea is that the problem of judicial corruption is not a problem of law alone (i.e., the creation and application of legal standards to discipline judicial behavior), or even a problem in the courts

¹ The observations and analysis contained in this chapter were developed largely on the basis of interviews conducted by the author and other members of the research team headed by Dr. Ricardo Hausman during a trip to El Salvador in July, 2003. Factual errors are mine alone. Thanks to members of the research team, and to members of the FUSADES legal department for their assistance in all aspects of the project.

alone. It is a problem in the underlying framework of the rule of law, involving the legal organization of the courts, the relation of the courts to the political parties, and the strength or (weakness) of surrounding social institutions.

The second idea is that under conditions characterizing El Salvador today, traditional approaches to judicial reform, emphasizing “modernization” of the procedural framework or improvement in professional training, are inadequate². The traditional approach is inadequate because it relies on the courts to police themselves, and assumes that nothing in the existing framework of the Salvadoran judiciary is at odds with the commitment to judicial neutrality, impartiality and independence. In contrast to this position, I argue here that structural problems in the organization of the Salvadoran judiciary contribute to the basic mechanisms of corruption. The effort to change these structural features must therefore play a crucial role in the strategy of judicial reform.

The third idea is that the program of judicial reform can be organized around a small number of incremental changes to the existing judicial framework. None of these changes is radical from the standpoint of contemporary constitutional practice. None of these changes requires wholesale redefinition of the current Salvadoran judiciary. The reforms merely shift some of the basic features of the current judicial framework. Collectively, these changes would help bring about a more open and transparent judiciary, freed from the corrupting influence of centralized and unaccountable power, and better able to promote the rule of law and provide a framework for economic development.

² Both the World Bank and USAID have sponsored programs for judicial reform in El Salvador. A review of these programs may be found at USAIDgov/sv/dg/dgrulelaw.htm and www4.worldbank.org/legal/leglr/index.htm.

The problem of judicial integrity, efficiency and corruption: experiences and observations

The problem of judicial corruption in El Salvador has long been recognized as a central and disturbing phenomenon. Writing in the aftermath of the Peace Accords and the constitutional changes of 1993, Margaret Popkin noted in her book, *Justice Delayed*: “The major challenge facing the new Court is to play a leadership role in transforming the administration of justice in El Salvador, confronting both corruption and impunity.”³ The U.N. Truth Commission’s March 1993 Report, “From Madness to Hope,” reached a similar conclusion. According to Popkin, the U.N. report “severely criticized the sitting Supreme Court and the whole judicial system for obstructing investigation of human rights abuses. It called for the resignation of the Supreme Court and a thorough cleaning out of the judicial system.”⁴

Recent cross-country studies of legal and institutional variables suggest that problems diagnosed nearly a decade ago may still be present in the country. Earlier chapters have noted a general improvement across many categories of institutional performance. For example, the discussion in Chapter One noted that El Salvador performed better than the world average in three key areas of institutional development: regulatory quality, voice and accountability, and political stability.⁵ Rodrik made a similar point in discussing possible reasons for El Salvador’s recent slump in investment, noting that many of “the usual litany of disincentives that go under the heading of “poor investment climate” had recently improved.”⁶

However, despite the general improvement in institutional quality indicated by the recent studies, measures of judicial performance continue to lag. For example, the Kaufmann indexes indicate that the variables of rule of law and control over

³ Popkin, 1994.

⁴ Popkin, 1994.

⁵ Hausmann, Chapter 1.

⁶ Rodrik, Chapter 2.

corruption for El Salvador remain below the world average, and have deteriorated in recent years.⁷ Private correspondence between Dani Kaufman, Aart Kraay and members of the research team involved in this Report provide a more precise assessment. As Hausmann notes in Chapter One, “El Salvador performs worst in indicators related to the judicial system: it is below the Latin American average and performs quite poorly in perceptions of corruption and of political independence of the courts.”⁸

Interviews conducted during a recent trip to El Salvador provide further indication that the perception of judicial corruption remains a central concern. Among the people we interviewed, there was a widespread perception that judicial performance remained deficient along a number of dimensions. Five main themes emerged repeatedly in our conversations about the judicial system, including:

- Lack of independence and impartiality among members of the Judiciary;
- The appearance of political interference in judicial decisions and judicial process;
- Perception of frequent irregularities and delays in court proceedings;

⁷ Kaufmann indexes are provided at [www/worldbank.org/wbi/governance](http://www.worldbank.org/wbi/governance).

⁸ Hausmann, chapter 1. It would be unwise to read too much into these measures of institutional quality. For one thing, the categories themselves are crude. For example, measures of corruption are typically defined by reference to the likelihood that “high government officials are likely to demand special payments” (e.g., the explanation of the corruption variable provided by the rating agency, International Country Risk). But corruption may take many forms and occur at many different levels of government activity. The term “judicial efficiency” is no more precise, blending notions of effectiveness (which may be due to organizational strength and resource endowment) with notions of integrity and independence. For another thing, the measures are perception-based, and thus inherently problematic.

Nonetheless, the picture suggested both by these studies of legal and institutional factors, and by the political opinion surveys discussed by Carey in the chapter on political reform, is generally compatible with the view that judicial corruption and lack of integrity continues to be a source of great concern for the people in El Salvador today.

- Perception that many of the irregularities and delays were associated with questionable judicial practices, including acts of judicial corruption;
- Distrust for the judicial system generally, expressed at all levels of Salvadoran society and with respect to all levels of the judicial system.

It is, of course, difficult to confirm empirically the existence and impact of the institutional behavior suggested by these observations. However, when we combine the observations with the earlier discussion of cross-country indicators of institutional strength and with recent surveys of public opinion (referred to in the chapter by Carey), a general picture begins to emerge of a legal and judicial system incapable of fulfilling its basic task in a modern democracy ruled by law. The issue is especially important in the current moment of political and economic uncertainty. No set of institutions is more important to providing the framework of trust, legitimacy, and effectiveness required by El Salvador today in its quest to define and implement the next generation of economic and political reforms.

Economic aspects of the corruption problem

According to the standard economic analysis, corruption is seen primarily as a tax on private economic behavior, undermining the certainty and fairness required to secure private right and provide a basis for individual transactions.

But in the conditions described above, the problem of corruption is not merely a problem for the enforcement of private transactions. It extends instead to the basis of trust and credibility underlying all forms of economic and political cooperation, jeopardizing both the existing structure of economic activity and the project of economic reform which earlier chapters of this Report describe and defend.

If we look only at the current activities and perceptions of major local players (local banks and national businesses), we might reasonably conclude that the immediate consequences of judicial corruption are slight. For a number of reasons, local businesses and banks may be able to defend themselves effectively through informal channels of influence and enforcement. (For similar reasons, they may also be well positioned to participate in the practice of pervasive corruption, and appropriate the rents of this activity. The anecdotes mentioned above and below lend credence to this hypothesis.)

But the situation changes markedly if we consider the position of foreign investors. For three separate reasons, the problem of corruption seems to present a disproportionate risk to foreign commercial interests, especially in the area of complex financial transactions.

The first reason is cultural: although local Salvadoran businesses seem to tolerate the perception of widespread corruption, foreign investors do not. Conversations with representatives of the Chamber of Commerce indicated widespread revulsion and frustration at the arbitrariness and situation of “judicial insecurity” experienced

by them in their dealings with the local courts. (Indeed, other contributors to this Report have already mentioned that the fact or perception of judicial corruption appears to be one of the major constraints on future participation by El Salvador in the CAFTA.)

Two other factors may lead to a disproportionate impact on the activity of foreign investment. First, foreigners are less likely to have recourse to informal mechanisms of influence and self-defense. They thus depend all the more deeply on formal institutions of legal justice and formal (i.e., judicial) mechanisms of legal enforcement.

At the same time, the complexity of the legal and financial arrangements that typically characterize cross-border transactions may increase both the incidence and the detrimental impact of corruption on the activity of foreign investment.

Political aspects of the corruption problem

The discussion so far has focused on one aspect of the economic dimension of the problem of judicial corruption: the corrosive effect of legal and judicial insecurity on economic activities and relationships that are important to the country today and may become even more important with the progress of development and globalization. Yet there is also a second sense in which to consider the corruption problem: from the standpoint of the broader program of economic reform and the perception of its legitimacy among groups across the country.

Consider first some of the central elements of the development program which this Report has identified and defended: increased use of government agencies to promote the conditions of self-discovery; increased channeling of off-shore savings to fund on-shore productive investment; increased emphasis on foreign investment to promote market access, partnership and trade; and an increase, generally, in the coordination of public and private activity in many sectors of social life. These activities may go forward even in the absence of the rule of law. But the greater opportunity the initiatives would provide for private and public acts of illegality would eventually undermine their legitimacy and lead to a backlash against reform.

In the current political situation, a second aspect of the corruption problem may be even more important. Recent studies have emphasized the importance of building a political constituency for reform initiatives. Yet the very structure of the corruption problem described in the preceding paragraphs (and elaborated further in the discussion below concerning the recent incident of the *Titulos Falsos*) suggests the difficulty of forming a domestic constituency in favor of legal and judicial reform. Indeed the very pervasiveness of the corruption phenomenon in El Salvador today may lead to a second-order problem, by weakening the perception of the judicial problem as an impediment to the development project.

Institutional aspects of the Corruption Problem

This discussion is divided into three parts. The first part illustrates some institutional aspects of the corruption problem through reflection on the recent case of the Titulos Falsos. The second part develops a series of institutional criticisms of the Salvadoran judicial system, based both on the analysis of Titulos Falsos and on conversations and interviews held with members of the bar, the judiciary, and political parties during a trip to El Salvador in the third week of July. The third part develops a proposal for judicial reform, based on the institutional analysis.

Preliminary observations: institutional aspects of the corruption problem and the case of the Titulos Falsos

To understand the deeper roots of the problem of judicial corruption, consider the recent incident of the “Titulos Falsos”⁹. By all accounts, the case of the Titulos Falsos represents one of the most ambitious efforts in recent years to directly challenge the corruption problem. But even here, the effort failed. An understanding of both the effort and the reasons for its failure can go a long way to explaining both the nature of the corruption problem and the difficulties of attempting to correct it through traditional methods of legal and judicial reform.

The expression, “Titulos Falsos” already provides an initial sense of the nature and breadth of the problem. The term refers to the allegedly fraudulent or empty degrees held by nearly three hundred members of the bar and the judiciary, including several prominent judges in higher echelons of the judiciary. According to the Report prepared by Lic. Roberto Vidales, Special Advisor to the Fiscalía General de la Republica (and currently head of FUSADES Legal Research Department), the basic facts of the case were not in dispute. Under the Lei Organica de Justicia, judges appointed to the national bench must possess valid legal degrees; the Supreme Court Justices responsible for making these appointments must themselves

⁹ The incident is treated exhaustively in the report prepared by Vidales (2001).

certify the adequacy of the judges' ethical and professional qualifications. Failure or falsity in professional qualification is a crime, subject to prosecution by the Fiscalía General and/or removal from the bench by the Justices responsible for judicial administration.

Under ordinary circumstances, such a scandal in the national judiciary would occasion a collective sense of outrage and swift legal action. But in the case of El Salvador today, few of the ordinary checks and balances work. First, the Supreme Court Justices, constitutionally charged with policing the judicial system, failed to take any action at all until provoked by the Fiscalía General. The Congress, which should serve as a watchdog for both the courts and the constitution, abdicated entirely from both of these functions. Indeed, its role in the scandal was even worse, as described below. Finally, neither the bar association (nor any other organized social group) took notice or chose to file a formal complaint. Although the problem "was an open secret" according to several of the people we interviewed, the official position of the bar was to support the formal prerogatives of the *Titulos Falsos*, both at the start of the legal inquiry and at the end, after one or two token convictions.

In this context of widespread hostility and indifference, two voices stood out: the voice of the Fiscalía General (who attempted to expose and prosecute the acts of corruption, using the prerogatives and independence bestowed on that office by the Constitution of 1993); and some progressive elements of the legal community, which had become outraged by the situation. But under the present institutional set-up, such action was doomed from the outset. First, the judges operate under a legal regime that virtually guarantees them immunity from prosecution and removal. Second, all acts of judicial prosecution must pass through the courts, especially the Supreme Court, which in this case adopted a course of intransigence and obstruction.

The final move in the legal and political chess-game illustrates both the difficulty under present conditions of seeking justice in the courts, and the opposition of many

social and political constituencies to making the attempt. Faced with the choice of going public with the evidence assembled or proceeding quietly through the courts, the Fiscalia General chose the strategy of public disclosure. This undoubtedly heightened the pressure on the Supreme Court Justices, and provided support for legal enforcement. But it also allowed both the courts and their allies to mobilize opposition against enforcement. The result was extraordinary. Lawyers, judges and politicians came forward in support of the false judges. According to people close to the case, the Supreme Court itself was outraged and did everything in its power to destroy the reputation of the Fiscalia Nacional and the legal basis for his action. But the real kick came at the end, as some convictions began to come in. During the week we spent in the country, the Congress proposed a law granting legal amnesty for the Titulos Falsos, an action which had been lobbied for intensively by the official bar and the judiciary. This proposal is still pending.

What are we to make of this striking case? How are we to explain this failure in the rule of law and the participation of so many social and political actors in the events leading to the failure? According to one view, the problem may be seen as the outgrowth of the country's political past and the culture of lawlessness, distrust and polarization that grew up both during the civil war and in the aftermath of the Peace Accords.

But the more closely we look, the more we are able to identify a series of contingent institutional factors, which underlie even the most plausible of cultural accounts.

Consider first the behavior of the members of the Supreme Court. Their intransigence and opposition to the prosecution of judicial fraud cannot be understood merely on the basis of shamelessness and self-preservation. The behavior by the Court must also be linked to a series of legal and institutional arrangements which characterize the Salvadoran judiciary today. These elements include: centralized control of the judicial bureaucracy by members of the SJC; confusion of administrative and judicial functions, which allow high court Justices

tremendous latitude in the allocation of positions and financial resources within the judiciary; near-absolute legal immunity for acts of corruption, incompetence and fraud committed by judges in active service; and the reliance on judicial self-regulation to police even the most egregious forms of judicial misconduct and conflict of interest.

Consider next the operation of the private law faculties that produced the *Titulos Falsos* and operated in close connection with members of the judiciary and SJC. These faculties must themselves be understood as a product of the earlier period of conflict and political reform. During the civil war, the government closed the leading public university and law faculty, which had become a center of political agitation. The private, for-profit law faculties grew up in the vacuum created by the closing of the national university. (The same set of circumstances left the Judiciary and the Congress virtually untouched by the post-conflict constitutional reforms.)

Once established, these law schools could not operate as they did (and fail systematically to provide the most basic legal education) without the tolerance and tacit support of many elements within Salvadoran government and society, including the Ministry of Education (which failed to regulate the schools sufficiently); members of the private bar (which accepted the *Titulos Falsos* within the legal community); and judges in the national judiciary (which hired graduates from the private law faculties, notwithstanding their evident lack of qualification).

Consider, finally, some elements in the surrounding legal and institutional framework, which both contributed to the problems and were reinforced by their operation. Three features deserve special mention: first, the special ties between the Congress and the Judiciary, evident in both the constitution of the SJC and in subsequent acts of congressional restraint and then political intervention in legal case against the *Titulos Falsos*; second, the weakness in the powers of the *Fiscalia General*, constitutionally charged with prosecuting instances of fraud and corruption, yet unable to achieve more than a handful of hard-fought convictions in

the current legal and institutional setting; and third, the widespread tolerance for acts of lawlessness and corruption, on the part of both private and public actors.

In other words, the phenomenon of judicial corruption revealed by the incident of the *Titulos Falsos* is not a fact of “culture” alone. It is a phenomenon rooted in the judicial structure created (or left alone) in the aftermath of the Peace Accords. This structure is characterized by: centralized bureaucratic organization of the judiciary; political control of the Courts by Congress (switched from the executive to the congress); extensive opportunity for patronage and corruption within the judicial bureaucracy; and near-absolute legal immunity for fraud, incompetence, and other forms of illicit judicial behavior.

Recent writing in law and development emphasizes the importance of rule of law, both to the exercise of political authority, and to the exercise of individual rights underlying private initiative in a market economy. The rule of law is associated, in turn, with a constitutional structure based on checks and balances, and including as its core, a judiciary characterized by impartiality, neutrality and independence.

Contrast the Salvadoran structure described above with this idealized world of checks and balances. According to standard view, a formal system of checks of balances should itself be sufficient to provide the basis for the rule of law and respect for democratic legal and political institutions. Yet in the case of El Salvador today, neither the legal nor the judicial framework assures, in practice, the institutional framework for the rule of law or the institutional basis for the judicial impartiality, neutrality and independence. Instead, the Salvadoran judiciary labors under a framework at odds with its basic mission. This framework compromises judicial independence, subverts judicial neutrality, and denies the country the institutions it needs to uphold the system of justice.

Earlier observers of the situation¹⁰ saw in this problem a threat to constitutional order. This chapter has argued that threat today extends beyond the realm of the existing order, to the process of political and economic reform required today to secure the conditions of the future Salvadoran democracy.

Institutional aspects of the judicial problem

Five main features in the existing judicial structure contribute to the problems discussed in the preceding section:

Problem number 1: Political control of the judiciary (through control of appointments to the SJC)

The problem of political interference with the appointments process has already been touched on briefly in the chapter on political reforms. That discussion emphasized the “politicization” of the appointments process via the process of congressional selection of appointments to the Supreme Court. This “politicization” undermines judicial neutrality and independence, both essential to the rule of law. More fundamentally, it establishes an on-going and internal link between the Supreme Court as an institution and the Salvadoran political parties.

Three main aspects of appointments process contributes to this phenomenon. The first aspect is the selection of justices in groups of three, every three years, to coincide with the congressional electoral calendar. A second aspect is the absence of public hearing or debate in relation to the individual candidates. A third aspect is perhaps the most important: justices of the SJC are appointed for renewable terms of nine years, rather than given life-tenure.

This process of judicial selection was adopted in the Constitution of 1993, following the UN report commissioned after the Peace Accords. Ironically, the

¹⁰ See Popkin, 1994.

transfer of the prerogative of appointment from the Executive to the Congressional Branch was intended as a defense against political interference in the constitution and operation of the Supreme Court. The creation of the Judicial Council was intended to provide a discipline to the selection process and a transparency to the Court overall. Through its screening of judicial candidates, a function shared with the local bar, appointments to the Supreme Court (and other ranks of the judiciary) were supposed to be rendered transparent, accountable, and legitimate, in professional and constitutional terms.

But in the actual conditions of the country today, neither the process of judicial screening nor the participation of the Judicial Council provide an effective check on “politicization” of the Court. The Judicial Council, though established as a counterweight to both the Congress and the Courts, has no power of enforcement. There is no practical or legal sanction for failure of the Supreme Court to abide by the lists prepared by the Judicial Council. Thus, partisan political control of the Judiciary remains unchecked, uncontrolled either by an ethic of responsibility widely shared among members of the Court, or by effective constitutional safeguards for judicial neutrality and independence.

Problem number 2: Centralized control of the judicial bureaucracy by the SJC and confusion of administrative and judicial functions

A second main problem with the existing judiciary is its unitary organization, combining administrative and judicial functions in the hands of the SJC. It is a common practice throughout the world for Supreme Court Justices to serve as the final authority in the interpretation and application of legal norms. But the powers of the SJC in El Salvador extend as well into two other areas of judicial practice: the administration of the judicial bureaucracy, and the selection (and promotion) of lower court judges, within a regime of life-tenure.

Under current Salvadoran judicial code, members of the SJC are responsible for all aspects of judicial finance and administration, including management of the courts; allocation of the judicial budget (fixed by the constitution at 6% of the national budget, and not subject to outside scrutiny by congress or the executive branch); and supervision and regulation of lower court judges, including initial appointments and promotions.

Under the conditions of the country today (i.e., limited respect for the rule of law, limited democratic scrutiny and control of the courts, and limited regulation of law school faculties and judicial appointments, as discussed below), this confusion of functions and combination of prerogatives creates an enormous opportunity for patronage and self-dealing within the judicial bureaucracy¹¹.

It is important to emphasize that judicial self-administration need not produce fraud, incompetence, or corruption. Indeed, most judiciaries organize themselves and combine administrative and judicial functions. The difference between the judiciary in El Salvador and other countries is that the confusion of functions here is more pronounced; the mechanisms of openness, transparency and accountability less well-developed, and the safeguards against wrongful conduct and appropriation less adequate. All of these features contribute to the problem of judicial delinquency and corruption.

Recent programs of judicial reform have attempted to rationalize “administrative” structure of the courts, improve the training of court officials, and make the functioning of the judiciary more open and transparent. The problem with all these efforts is that they rely primarily on the courts themselves for implementation and enforcement. They fail to understand the very great conflicts of interest that exist today within the judicial structure, and the inadequacy of measures to improve performance without removing these conflicts of interest.

¹¹ Note that the SJC is currently responsible for supervision and licensing of the legal profession, in addition to its responsibilities for hiring and promotion among judges of the lower court.

Problem number 3: The principle of judicial immunity, based in law and reinforced by the confusion of judicial and administrative functions described above.

The politicization of the SJC and the internal structure of the judicial bureaucracy create the possibility of widespread corruption and conflict of interest within the judiciary. This situation is aggravated by a third main aspect of the situation of Salvadoran courts: the principle of judicial immunity, which operates on a near-absolute basis to shield judges from legal prosecution for acts committed in violation of the law.

The principle of judicial immunity has two main legal foundations. The first is the principle of immunity itself, established in the Lei de la Carrera Judicial, which grants full immunity to judges against legal sanction for acts in connection with the performance of official duties, while serving on the bench. The second basis for the principle is the law granting life-tenure to all judges beneath the level of SJC. Under this law, judges may not be removed from judicial office, even in connection with the most serious cases of illegality or corrupt behavior¹².

Under the Constitution of 1993, the Office of the Fiscalia General was granted formal powers to prosecute all instances of corruption, in the judiciary and beyond. Both the independence of the Fiscalia General (an independent agency of the executive branch), and the legal powers granted to it, were supposed to provide a bulwark against official corruption. However, under conditions of judicial immunity and life-time tenure for judges (beneath the level of the SCJ), the Fiscalia General has an uphill battle, which may be impossible. Certainly, the record to date is inauspicious.¹³

¹² Life-tenure for Salvadoran judges beneath the level of the SJC was established constitutionally in 1993.

¹³ Inadequate funding may also contribute to the limited effectiveness of the Fiscalia General.

The immunity of judges under law is reinforced as a practical matter by the weak self-regulation that occurs within the judiciary, given the combination of administrative and judicial functions discussed above. The SJC is responsible for supervising all administrative aspects of the judiciary, including the compliance of lower court judges with the rules and procedures of the courts. In principle, judges may be disciplined and even removed from the bench for incompetence as well as corruption. However, the record suggests that the SJC rarely enforces these norms of judicial conduct to sanction or discipline judges.

The apparent failure of the SJC to adequately monitor and police the judiciary suggests a central problem in the current set-up, namely, whether judicial self-regulation alone is sufficient to monitor and enforce appropriate judicial behavior. The principle of judicial immunity, together with other problems to be discussed below, further illustrate how many different features in the current organization of the Salvadoran judiciary work together to create a judiciary that is only weakly governed by law or accountable to the Salvadoran people.

Problem number 4: Inadequate regulation of the law school faculties and the production of “licenciados”

Each of the problems discussed above concerns an aspect of the judicial structure, or the legal framework governing judicial behavior. But the problem of judicial legitimacy and performance cannot be understood on the basis of these arrangements alone. Both the conduct and the culture of the judiciary depend as well on the organization of the bar and its structure of professional training.

By all accounts, the system of legal education in El Salvador today is a major contributor both to the problem and the perception of widespread delinquency in the judicial system. It is common knowledge that many lawyers and judges have only minimal legal training. The Lei Organica de Justicia establishes minimum professional qualifications for all members of the bench. But these requirements are

loosely defined and enforced. In practice, the mere possession of a legal diploma (a certificate or “licenciado”), is considered sufficient for entrance to a life-time judicial career.

The roots of this problem are several. On the one hand, the problem stems from the existence of dozens of private, for-profit “law school faculties” opened in the past twenty years (referred to by some as “sham law schools”). Many of these recently created law schools operate as little more than commercial operations, providing degrees in exchange for tuition. (Indeed, according to recent reports, many so-called graduates from these law faculties have only a minimum acquaintance with Salvadoran law. In some cases, they have none.)

Yet the existence of these “sham” law schools can explain only part of the problem. After all, the ability to pay for a law degree would have little or no value if the “licenciado” could do nothing with the degree. Apparently, individuals pay to become licenciados, even (or especially from) the lesser law faculties, because many of them are able to use these degree to obtain jobs in the judiciary.

According to the report prepared in the Titulos Falsos case, the connections running between the judges and the private law faculties were many and significant. In several cases, high-ranking members of the judiciary had a direct financial stake in the for-profit law faculties, either as paid advisors or faculty members, or as owners of the for-profit businesses. Many of these judges were directly implicated in the Titulos case, as providers of employment within the judiciary to “graduates” or affiliated law faculties.

This apparent connection between the functioning of the private law faculties and the allocation of positions within the national judiciary takes us to the heart of the problem of judicial delinquency in the country today. For neither of these two key factors can be understood apart from the broader context in which they operate: a context characterized by weakened respect for the rule of law and a breakdown in

many of the constitutional checks and balances responsible for preserving the legal order.

Problem number 5: Lack of transparency and openness in judicial decisions, proceedings and activities.

The final problem to be discussed here concerns the transparency and openness with which the Salvadoran judicial system conducts its activities and operates in practice, as an integral part of the political system. The Salvadoran courts are supposed to serve as a neutral and impartial arbiter in the administration of the system of justice. To do this – both in fact and in perception – requires that the courts operate openly and transparently, in a manner that can be seen, scrutinized and evaluated by all members of society. The problem in the country today is that the courts conduct themselves and their activities with little or no openness or transparency. Few proceedings are open to the public. Few judicial decisions are made available to the public in a timely or accessible manner. Few people beyond the courts and uninvolved in particular proceedings are given access to the legal or judicial materials required to understand, interpret or evaluate the performance of the courts.

The implications of this lack of transparency are far-reaching. Without openness in judicial proceedings, neither citizens nor political branches are able to monitor or vouch for their work. Without timely publication of judicial decisions, individuals are unable to organize their own activities or predict with any certainty the outcome of judicial decisions or the broader direction of the courts. Instead, the courts become laws unto their own; unfathomable to the surrounding society and incapable of being judged or held accountable in accordance with the rule of law.

Recent efforts to improve transparency in judicial proceedings have emphasized publication of judicial decisions in forms accessible to court systems in other countries. For example, both the World Bank and USAID have recently sponsored

initiatives to link the judiciaries in Latin America, for example, by creating a centralized repository of judicial decisions available to courts throughout the region. These efforts may help judges communicate with each other across jurisdictions. But they do little to provide heightened access to or awareness of the functioning of the Salvadoran courts within the country. These efforts thus fail to address a key priority for judicial reform: the creation of mechanisms of improved openness and visibility of the courts and judicial initiatives within El Salvador itself, for the benefit of the judicial system and its accessibility and integrity before the people it represents.

Priority Areas for Judicial Reform

Six main sets of reforms are implied by the previous discussion. These reforms include: (1) changes in the appointments procedure for judges to SJC; (2) separation of administrative and judicial functions within the Judiciary; (3) creation of a career judiciary beneath the level of the SJC; (4) modification of the principle of judicial immunity in practice and in law; (5) improved regulation of the Salvadoran law faculties; and (6) increased openness and transparency of judicial proceedings.¹⁴

Changes in the appointments procedure for judges to SJC

Appointments to the SJC should be organized to conform to the judicial ideal of individual integrity, impartiality and independence. To achieve this ideal, appointments (a) should be made on an individual basis; (b) for a period of time that does not coincide with the congressional electoral calendar; and (c) through a process that includes public debate of the candidate and his/her qualifications.

If the current fixed term appointment is maintained, the term itself should be lengthened or shortened (e.g., either 10 years or 7 years) so that it does not coincide

¹⁴ The strategy outlined below is similar in breadth and spirit to the Judicial Reform Program developed by the World Bank for Peru. See World Bank, "Peru-Judicial Reform Project," 1997.

with congressional elections. Judicial appointments should be made on an individualized basis, through a process of public scrutiny and debate, and in light of a candidate's professional qualifications, rather than partisan political affiliation. There should be open and disclosed voting by Congress for individual judicial candidates. The selection of judicial appointees one-by-one, rather than in groups of three, should further reduce the tendency to horse-trading among the political parties.

An even simpler approach would involve life-time tenure for SJC appointments. This is the dominant practice in the world today among modern constitutional democracies. The great advantage of life-time tenure is that it creates a structural base for judicial independence. Politics intervenes at the initial stage of the judicial appointments process (subject to the safeguards of individual scrutiny and public debate described above), but the justices and the court are then shielded from subsequent political intervention and control, and allowed to exercise their judicial function without fear of political reprisal.

Under either of these alternatives, judicial appointments to the SJC would be made on an individualized basis, rather than in groups of three. There are two main advantages to a process of individualized judicial appointment: one practical, the other, symbolic. Judicial appointments made one-by-one are less susceptible to a process of political barter and horse-trading; whereas judges selected in groups of three can be more easily traded off against each other according to the logic of rival parties and partisan political calculation.

The symbolic advantage of individualized judicial appointments may be just as important. The selection of judges in groups of three suggests the preeminence of collective (e.g. political party) affiliation over individual integrity and professional merit. This is the antithesis of the judicial ideal and the impartial administration of justice.

Separation of administrative and judicial functions within the Judiciary

Administrative and judicial functions of the Salvadoran judiciary should be clearly and cleanly separated within the Salvadoran judicial organization. A separate administrative department should be established within the Judiciary, operate within clearly articulated rules and procedures, and held publicly accountable for the efficiency, effectiveness and integrity of the judicial system. The administrative department should be required to perform and present an annual review of operations, perhaps in conjunction with the presentation of its annual budget to congress. The budget for the Judiciary is currently fixed by the constitution (6% of the annual operating budget of all government departments and not subject to review.) The judicial administrative body should be required to present an annual review of operations to Congress and the Executive Branch, even if the constitutionally-determined budget provision is maintained.

In theory, either the SJC or the Judicial Council could be entrusted with this administrative function (subject to the design principles described above). However, the better solution is to transfer the administrative function to the Judicial Council and make their decisions binding on the SJC. Such a transfer of power from the SJC to the Judicial Council would have two beneficial effects. First, it would strengthen the Judicial Council, and provide the practical basis for coordinated control of judicial functions. Second, the new mechanism of shared and divided judicial powers would create both the opportunity and the framework for an expanded national debate over the forms and strategies of judicial practice. Both these changes would be welcome in the current situation.

This proposal to expand the functioning of the Judicial Council is not new. It has been a recurrent theme in the Salvadoran debate over reform of the judicial system. The proposal outlined in this Chapter sides with the pro-Judicial Council pole in the debate. It sees the strengthening of the Judicial Council as a crucial step in the

transformation of the Salvadoran judiciary, toward greater openness, accountability and enforcement of the rule of law.

Creation of a career judiciary beneath the level of the SJC

This “professionalization“ of the judicial administrative body should be accompanied by the professionalization of the lower court judges, i.e., the creation of a career judiciary beneath the level of SJC.

The creation of a career judiciary addresses two key problems: first, the problem of illegitimate forms of judicial behavior, connected to the control of judicial appointments and the development of judicial careers; and, second, the problem of inadequate training, integrity and public spirit-ness among judges in the national courts. Career judiciaries are common throughout the world. They are the dominant form of judicial system in Latin America, Europe and Asia. This dominance in fact is at least partly attributable to the advantages they bring to bear in each of the areas noted above. In El Salvador, each of these areas is crucial to promoting the competence, integrity and effectiveness required of judicial institutions.

The creation of a career judiciary in El Salvador would involve three key changes to the current system of lower-court judicial appointments. First, initial entrance to the judicial career would be subject to competitive examinations. Second, formal rules would govern promotion and seniority during the judicial career. Third, the creation and implementation of the merit-based system would be administered in an open and transparent manner by the administrative body described and defended in the immediately preceding item (i.e., the newly-empowered Judicial Council).

The formation of a career judiciary does not require the re-organization of the bar or re-organization of the law school curriculum. It does require the elimination of “fly-by-night” law schools, the heightened scrutiny of judicial candidates and their

qualifications to serve on the judiciary, and the re-organization of judicial assignments and promotions on the basis of merit and seniority.

Modification of the principle of judicial immunity

Modification of the principle of judicial immunity, allowing for the prosecution and removal of judges who violate the criminal law, is perhaps the easiest to describe and the most difficult to put into practice. In a constitutional democracy subject to the rule of law, there is no justification for endowing arbiters of the law with near absolute legal immunity. Indeed, the very existence of this institution goes a long way to discrediting the commitment to the rule of law.

Four reforms are required to achieve the desired balance between judicial autonomy and legal responsibility. First, the Lei Organica de Justica should be amended to provide a regime of qualified judicial immunity. Judges should be granted immunity from legal challenge for violations of the civil law, but remain personally liable for criminal actions and subject to vigorous prosecution. Second, the provisions granting life-time tenure to judges should be modified to conform to this regime of legal responsibility. Third, the Judicial Council should be required to monitor and investigate all suspected cases of judicial corruption. Fourth, the Fiscalia General should be required to pursue, through a special, non-judicial enforcement procedure, all cases of substantiated judicial misconduct, free from interference or involvement of the Judiciary itself.

Increased regulation of Salvadoran law faculties and of appointments to the national judiciary

The earlier discussion of the Titulos Falsos identified two key aspects of the “sham” law school situation: first, the failure of the Salvadoran Ministry of Education effectively to supervise and regulate inadequate (or non-existent) institutions of

legal education. Second, the absence of the requirement that lawyers or judges pass qualifying bar or judicial examinations, in order to serve as lawyers and judges.

These two changes to current practice are easy to understand and implement. Each would be beneficial in two respects: one substantively, the other, symbolic. The energetic regulation of law school faculties and degrees could both improve their performance in fact, and signal the importance of this improvement to the profession and the country generally. The same argument applies to the creation in law of minimum standards for the practice of law and the performance of the judicial function. The creation of these standards alone, and their enforcement through strict regulation, contributes to the rule of law generally, and the respect for institutions that the rule of law requires.

In the current circumstance of the country, support for these proposals cannot be expected to come from within the judiciary or the organized bar. Instead, support must be found (or generated) outside the traditional channels of legal and judicial power: from enlightened members of the bar (i.e., those who clamored against the *Titulos Falsos* even before the case was brought by the Procurador); public-spirited groups within civil society, and from political parties, committed to improving the courts as part of the larger program of reform currently being debated in the country.

Increased openness and transparency in judicial proceedings

The final element in this proposal for judicial reform involves mechanisms within and beyond the courts for increased transparency and accountability. As mentioned in the earlier section, there is no law in El Salvador today that requires or confers public access to judicial archives and decisions. There is no law in El Salvador today that requires publication of judicial opinions in a timely or efficient manner.

As a result, much of the activity of the Salvadoran courts remains shrouded in secrecy.

Two reforms would contribute to a partial opening of this situation. First, the courts should be required to publish on a timely basis all judicial opinions, not merely those of the SJC. These opinions should be made available to all on the internet, and compiled in a general registry that is easy to survey and interpret.

Second, court proceedings at all levels of the judiciary should be open to the public, in fact and in law. Records of judicial proceedings should be available for public inspection. The new administrative body of the judiciary, in conjunction with the Judicial Council, should be responsible for compiling and making publicly available judicial records as well as decisions.

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