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MODERN JUDICIAL REFORM IN EL SALVADOR AND BRAZIL

Dina Bernardelli

INTRODUCTION

A comparative assessment of the successes and failures of the judicial reform efforts of El Salvador and Brazil in the 1980's produces striking results. The reforms varied greatly in scope and were conducted in very different socio-political and economic backgrounds. While El Salvador's reforms seemed narrow and ill-planned, on paper it appeared that Brazil's broad reforms would be a successful model for any country with a fledgling democracy. Brazil's reforms were an exercise in Constitutionalism, implementing genuine separation of powers and receiving legislative and executive support. I was very surprised that these different approaches produced strikingly similar negative effects on the people's assessment of the judiciary. From this outcome I concluded that while judicial reform of a corrupt or inefficient judiciary is an important step in ensuring the rule of law in society, it can not be the vehicle through which democratic reform is implemented. Quite to the contrary, for successful judicial reform to take place there must be considerable penetration of the law in society through enforcement of unbiased legislation, consistency in the laws and their enforcement, and sufficient time for the reform to have an effect on society.

RESEARCH PROCESS

This comparative assessment is relatively narrow in scope and provides detailed comparisons of the mechanics behind the attempted reforms in both countries. For the analysis portion of my project, I was interested in both understanding why these reforms had failed and in making my own analysis of what might have helped them turn out differently. For the first piece, I attempted to illuminate common problems in Latin American judicial reform and the desired factors in creating rule of law in society. In transitioning

from desired effects to possible solutions, I found myself relating the situations in both countries more to the Russian Federation than any other situation in Latin America we had studied in class. Social, political, and even rule of law problems from the transition to democracy in Russia were similar to problems encountered in Brazil and to the penetration problems in El Salvador. Seeing a relationship between the reform failures in Brazil and El Salvador, and similar issues with the courts and the advancement of rule of law abroad, I felt I could take a prescriptive view of the elements necessary to effect successful judicial reform. I relied upon law review articles on judicial reform in Brazil and Latin America, law review articles analyzing the progress of legal reform and the rule of law in Russia, and a look into Russia's socio-political history. The result is a potentially universally applicable set of conditions that are necessary for successful judicial reform to take root.

EL SALVADOR

When José Napoleón Duarte took office as elected president in 1984 he was faced with many challenges including ending the chronic state of civil war in El Salvador, guarding his office against another military take-over, and reinvigorating a struggling economy where the GDP was rapidly declining and almost half of the national budget went to war efforts.¹ Duarte's most valuable resource to accomplish these goals was the more than \$225 million in economic and military aid accompanied with technical units pouring into El Salvador from the U.S. With this money, however, came demands from Washington - and Reagan wanted to see action taken on Human rights violations against U.S. citizens in El Salvador.² Within six-weeks of taking office Duarte launched a narrow, high-level judicial reform aimed at taking the fastest path to showing the international community that El Salvador could adjudicate on human rights.³

¹ WILLIAM C. PRILLMAN, *THE JUDICIARY AND DEMOCRATIC DECAY IN LATIN AMERICA: DECLINING CONFIDENCE IN THE RULE OF LAW* 44 (Praeger Publishers 2000).

² THOMAS E. SKIDMORE & PETER H. SMITH, *MODERN LATIN AMERICA* 345-46 (5 ed., Oxford Univ. Press 2001).

³ Prillman, *supra* note 1, at 44.

The judicial reform of 1984 sought to achieve two main goals: first, to increase the individual independence of justices trying high-profile human rights cases, assuming that more independent-minded judges would emerge from the process and serve as a catalyst for broader reforms; and second, to increase efficiency in the courts by decreasing the number of cases dropped and increasing the technical and investigative capabilities of the criminal court system.⁴ This narrow method of reform, however, did not address the underlying structural problems of the system and thus did not see success in either area.

Four organizations were created to achieve these goals. First, The Judicial Protection Unit (JPU) was designed to provide physical protection to judges hearing controversial human rights cases. The goal was to allow judges to rule on cases without being influenced by threats against themselves or their families, thereby increasing judicial independence. This protection would also increase efficiency by greatly reducing or eliminating the number justices that would leave the country because of threats and the number of human rights cases dropped by judges for fear of endangering their families.⁵ The JPU, however, was staffed by prison guards because senior security personnel could not be trusted to protect the judges since there was suspicion that they were behind many of the threats against the judges on human rights cases. Prison guards were a poor substitute since many had been dishonorably discharged from the military and were often times uneducated. While the JPU did achieve the goal of protecting judges on high-profile U.S. human rights cases, protection never extended to achieve greater independence and security for judges throughout the country.⁶ Even on other human rights cases, threats against judges and lawyers did not decrease.⁷

⁴ *Id.* at 39.

⁵ *Id.* at 45

⁶ *Id.* at 46-48.

⁷ *See id.* at 47-48.

Secondly, the Special Investigative (SIU) and Forensic Unit (FU) were created to professionalize evidence-gathering and preservation techniques.⁸ Salvadoran law had a very high bar for evidence gathering and admittance, which could only be done by an “auxiliary agent” of the court. An “auxiliary agent” was defined as members of the armed forces or national law enforcement.⁹ Duarte could not change this process through legislation because Congress was controlled by opposition parties. Thus limited to what Duarte could pass by executive decree, the SIU and FU were to oversee these agents who, like the senior security officers, had an interest in not seeing defendants, who were many times high-ranking military personnel, be convicted.¹⁰ The military were chosen to be the auxiliary agents on human rights cases, which inhibited the effectiveness of the units by creating a revolving-door effect. Because El Salvador was in a state of civil war, all military personnel were in an active duty rotation. Shortly after auxiliary agents were trained, they would be rotated out to another job, like monitoring roads or the front lines. The units would then have to start from the beginning, training a new set of agents. Not surprisingly this resulted in mistakes in evidence collection and preservation, and courts stopped calling on the units to collect and process their evidence.¹¹

Third, a Legal Advisory Committee (CORELESAL) was created to revise the Criminal Code, last revised in 1940, and the Civil Code, last revised in the 1870. Congress, however, did not support the judicial reform and would not pass the new reforms through legislation making CORELESAL almost completely ineffective.¹²

Finally, an Administrative Training Program (AID) was constructed to educate judges and their staff on the law and to modernize capabilities in the courtroom. The hope was that a judiciary better educated

⁸ *Id.* at 45.

⁹ *Id.*

¹⁰ *Id.* at 44.

¹¹ *Id.* at 48-49.

¹² *Id.* at 43, 50.

about the law would give rulings that more closely adhered to it.¹³ AID held seminars in the capital, at universities throughout the country, and in small towns and was at first a great success. When an earthquake hit the capital in 1986, AID headquarters at the Judicial Center were destroyed along with their research, materials and training facilities. Because all other areas of reform had failed, the government did not renew funding for the project.¹⁴

BRAZIL

Judicial reform in Brazil followed the Constitution of 1988, which reinstated the separation of powers and judicial review.¹⁵ Brazil's judicial reform was enacted in an environment far friendlier to successful reform than the war-torn and politically divided El Salvador. The rights of Brazil's judiciary were preserved in the Constitution and the reform saw both legislative and executive support.¹⁶ Drafting of the reform, its scope, and the mechanisms of implementation were put into the hands of legal experts whose objective was to achieve a broad reform by simultaneously increasing the independence, access, and efficiency at all levels of the judiciary.¹⁷ While Brazil was working without outside monetary or technological support for reform, it was also uninhibited by international demands and free to focus on what could most benefit the people of the State.¹⁸

The Judicial Reform Committee sought to increase the independence of individual judges, lower courts, and the entire court system from pressure, political or other, that could deter from reliance on the law alone when making judicial decisions. Individual independence of judges was written into the Brazilian constitution which gave life tenure for all judges, a prohibition on transfer and reduction of salary, and a

¹³ *Id.* at 46.

¹⁴ *Id.* at 51.

¹⁵ Megan J. Ballard, *The Clash Between Local Courts and Global Economics: The Politics of Judicial Reform in Brazil*, Berkley J. of Int'l L. 230, 245 (1999).

¹⁶ *Id.*

¹⁷ The Judicial Reform Committee was composed of members of the judicial lobby, Brazilian Bar Association, and Human Rights groups. Prillman, *supra* note 1, at 80.

¹⁸ See Ballard, *supra* note 15, at 245 (discussing the popular call for judicial reform).

process of removal for Supreme Court justices that mirrors judicial impeachment in the U.S.¹⁹ The Independence of the lower courts was created by limiting the cases that could be taken away by higher courts and expanding their freedom to rule by taking precedent out of the legal system. Lower court justices were insulated from political influence by legislation that they could only be removed by superior court justices. Finally, the courts on every level were protected from the most prevalent force of political influence by giving the Supreme Court the authority to create the budget for the entire court system. This budget could not be altered by the executive and could be submitted directly to Congress for approval.²⁰

Independence of the judiciary was both the biggest success of Brazil's judicial reform and a back-firing failure. Brazil to this day has the most independent judiciary in Latin America when measured by independence in rulings on politically sensitive issues and checks on legislative and executive actions.²¹ In establishing the independence of the judiciary, however, the reformers swept away all means by which to limit its power and thus all accountability. This has resulted in severe corruption within the judiciary in abuse of salary control, and the promotion of nepotism which threatens the entire system by placing unqualified judges on the bench.²²

The Brazilian judicial reform also sought to increase access to the court for individual plaintiffs by passing legislation to allow states to create small claims courts, implementing the presumption of innocence, and removing liability of the plaintiff to pay defendant's attorney costs if the suit is not successful. The reform committee also increased access to the Supreme Court by allowing more parties the ability to request the Supreme Court hear a case. When any of these specifically designated parties

¹⁹ *See id.*

²⁰ *See Prillman, supra* note 1 at, 80-81.

²¹ *Id.* at 83.

²² *See id.* at 83, 85-88; *see also* Luz Estella Nagel, *The Cinderella of Government: Judicial Reform in Latin America*, 30 Cal. W. Int'l L.J. 345, 364-66 (1999-2000)(on the effects of incompetence within the judiciary on the rule of law in Latin America).

requested a hearing, the Supreme Court could not deny the case on standing and was required to hear arguments.²³

Finally, the judicial reform sought to increase the efficiency of the Federal courts by adding a new level of court - the Superior Court. The Superior Court was the level directly below the Supreme Court, and would ideally give final hearings to cases that did not have issues large enough to warrant a hearing before the Supreme Court.²⁴

These measures were fatally flawed from the outset. Increasing access treated only a symptom and not the problem. People did not have access to the court because of the severe over-booking of the docket.²⁵ Enacting the access and efficiency measures at the same time doomed any potential of increased efficiency and created a worse backup in the courts than before.²⁶ Furthermore, without precedent in the system, each case took even longer to decide because there was no previous ruling on that type of case on which one could rely.²⁷

RESULTS

The result of the judicial reforms enacted in El Salvador and Brazil was in both cases the failure of the programs themselves, and strikingly similar impacts on public perceptions of the judiciary. While people exhibited "little or no confidence in the judiciary," they also had little interest in the judiciary and its effectiveness.²⁸

This lack of interest can be traced back to three main sources. Firstly, the effects of judicial reform never reached the people themselves. In El Salvador, the reforms were enacted on such a narrow and high scope that it would have been virtually impossible for individuals to be reached directly by the reform.

²³ Prillman, *supra* note 1, at 81-82.

²⁴ *Id.* at 82.

²⁵ *Id.* at 88.

²⁶ *See id.* at 92-93.

²⁷ *See* Rosenn, *Latin American Legal Culture* 148.

²⁸ Prillman, *supra* note 1, at 59, 94.

The fact that the reform focused on resolving foreign human rights cases only weakened the connection between Salvadoran society and the judicial reform.²⁹ In Brazil the reforms were specifically enacted to increase individual access to courts, but because so many people brought cases none of them were heard, and the effect was as if there had been no reform at all.³⁰ Secondly, the people saw problems in society that they felt were more pressing than judicial reform. In El Salvador, an end to the civil war and saving the economy were not surprisingly the foremost concerns.³¹ In Brazil, the economy and education were more important to people than judicial reform.³² In discerning why judicial reform was so low on the list in two such different environments, the answer may lie in the final factor: that neither society had been able to depend on the judiciary before, so there was not a reliance on legal adjudication of cases.³³

The aftermath of unsuccessful reform was an unsettling collapse in the rule of law. People gave up on the courts and turned to a "privatization of justice"- executing the law at the legal enforcement level rather than through adjudication.³⁴

ANALYSIS

While the change from military rule to democracy in both El Salvador and Brazil was not a forceful supplanting of foreign law over a conquered nation, both societies faced problems of adaptation to the new laws, even if put in place by their own government.³⁵ From this I theorize that successful judicial reform in a state in political transition must take into consideration some of the same issues facing conquered nations. I also base this in part on a study of the flash-implementation of democracy in the Russian Federation after the fall of the Soviet Union in 1991. Even though there was a desired change to a democratic state, the communist roots of the Soviet society were in place affecting how people expected

²⁹ *See id.* at 41.

³⁰ *See id.* at 91.

³¹ *See id.* at 44; Skidmore & Smith, *supra* note 2, at 345-46.

³² Prillman, *supra* note 1, at 95.

³³ *See* Nagel, *supra* note 22, at 358-59.

³⁴ *See* Prillman, *supra* note 1, at 60-61, 96-97.

³⁵ *See* Rosenn, *supra* note 27, at 146; MARY MCAULEY, *SOVIET POLITICS 1917-1991* 90-91 (1992).

the law to be executed and their view of the courts as a politically motivated arm of the executive, and therefore untrustworthy.³⁶ In such a society judicial reform alone will not strengthen the rule of law or even change the people's perception of the judiciary. From the ground up, there must be changes people can see such as the uniform enforcement of the law and procedurally accurate adjudication.³⁷

Unfortunately, my thesis produces a "chicken or the egg" paradox insofar as I call for penetration of the laws into society before judicial reform will be successful. Can one truly achieve penetration of the law if it can not be properly adjudicated? The adoption of "privatization of justice" has shown us that enforcement of laws is the most important part of the legal system to the people.³⁸ Enforcement of the laws in place, therefore, is the most important step in preventing a gap in society between the written law and the law by which people actually live.³⁹ Additionally, since the law must first be enforced before a conflict or violation can ever be adjudicated it is clear what relationship effective enforcement must have to the judiciary's retaining of its legitimacy. If the laws are not enforced, people will see the newly-reformed judiciary as powerless to grant them relief in the law and turn instead to remedy outside the law.⁴⁰ Furthermore, essential to the penetration of the law is constitutionalism: separation of powers, and a process of checks and balances even against the judiciary.⁴¹ As seen in Brazil, although there was legislative support of reforms and constitutionally preserved independence, the lack of accountability of the courts resulted in corruption and thus contributed to the crumbling rule of law in Brazilian society.⁴²

Penetration of the law and the prevention of the gap effect is only as enduring as there is consistency both of the laws and their application. The rights and duties of the people must remain intact through law enforcement and the rights of the judiciary even when political parties running the country

³⁶ Jeffrey Kahn, *The Search for Rule of Law in Russia*, 37 *Geo. J. Int'l L.* 353, 392-94.

³⁷ See Todd J. Zywicki, *The Rule of Law, Freedom, and Prosperity*, 10 *Sup. Ct. Econ. Rev.* 1, 2-3 (2003).

³⁸ See Prillman, *supra* note 1, at 61 (on Marxist "justice squads" in El Salvador and police violence in Brazil).

³⁹ See M.C. MIROW, *LATIN AMERICAN LAW: A HISTORY OF PRIVATE LAW AND INSTITUTIONS IN SPANISH AMERICA* 235-37 (2004).

⁴⁰ See Prillman, *supra* note 1, at 60-61, 96-97.

⁴¹ Zywicki, *supra* note 37, at 6.

⁴² See Prillman *supra* note 1, at 86-87.

change. This gives legitimacy and predictability to the law so that citizens know their rights and duties under the law are enduring.⁴³ Precedent is an important part of consistency because it provides a guard against future politically-motivated judges ruling outside of the law.⁴⁴

Finally, the ability to achieve penetration of the law into society, its consistency, and the success of judicial reforms when they are implemented, all depend on time. Reformers must allow for time to establish the predictability and legitimacy of law and let the rule of law take control, and time to allow the culture to shift to expect law enforcement and resolution of conflicts through the court.⁴⁵ I think this latter aspect may be influenced by the access of the people to the judicial reform. The more people are able to see the law working for them and the courts resolving cases, the faster the adaptation to the judicial reform and rule of law will be.⁴⁶ To this end, publicity for the successful adjudication of cases in the courts could be implemented. Stories in the newspapers or clips on the radio would both bring the success of judicial reform to the people who might not otherwise feel it themselves, and would show the people that if and when they do need resolution of a legal problem, the courts are effective.

CONCLUSION

While I believe that my thesis correctly points out that judicial reform alone is not the proper vehicle with which to strengthen the rule of law or implement democracy and identifies the foundation that would ideally be in place for successful judicial reform to take hold, I am not sure how realistic its implementation would be. Further research to substantiate my thesis could involve taking a look at the specific mechanics diverse states have used in their judicial reforms, and the successes and failures of these reforms in their socio-political and economic environments. Perhaps a broader view such as this would help to create an even more workable thesis that would be more feasible to implement.

⁴³ See Zywicki, *supra* note 37, at 3-4; see also Mirow, *supra* note 39, at 238.

⁴⁴ See Rosenn, *supra* note 27, at 148.

⁴⁵ See Prillman, *supra* note 1, at 171.

⁴⁶ See Kahn, *supra* note 36, at 401.

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