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El Salvador’s Legislature Backs Down After Lengthy Standoff With High Court

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Three months and seventeen rounds of negotiations later, things are finally back to "normal" in El Salvador, where a disagreement on high-court judge appointments triggered a drawn-out and debilitating showdown between the legislature and judiciary.

President Mauricio Funes announced an end to the impasse on Aug. 19, explaining in a late-night press appearance that lawmakers had finally come up with a formula allowing the two protagonists in the crisis—the Corte Suprema de Justicia (CSJ) and the Asamblea Legislativa (AL)—to return to business as usual. The AL made the agreement official two days later, at last heeding CSJ demands that it reappoint two-thirds of the court’s judges. The agreement followed nearly a month of talks between party leaders.

"We’ve reached a final, complete agreement even though some sectors doubted the willingness of the political parties and questioned the impartiality of the president," said Funes.

The president declined to answer questions from reporters, leaving many in El Salvador scratching their heads and asking themselves how and why a standoff of this magnitude could have been allowed to develop, and what—if anything—it accomplished.

High-stakes power struggle

Under Salvadoran law, the AL has the power and responsibility to decide who sits on the 15-member CSJ. But it can make those decisions only once every three years, selecting in each case five new judges to serve nine-year terms. Although the Constitution does not say so specifically, the three-year rule has generally been understood to mean the AL is limited to just one round of CSJ appointments per legislative term.

The outgoing AL broke that de facto norm this past April, voting in a second allotment of CSJ judges just before its 2009-2012 term was set to expire. The move was not without precedent. The 2003-2006 AL—dominated at that point by the far-right Alianza Republicana Nacionalista (ARENA) —did the same thing at the end of its term.

At the time, the CSJ ignored the protocol breach. This time around, however, the high court’s five-member Sala de lo Constitucional intervened, declaring both the 2006 and 2012 appointments to be unconstitutional. In a June 5 ruling, the Sala instructed the AL to rectify the situation by scheduling new elections for all 10 of the judges in question.

The legislature bristled, accusing the CSJ of abusing its authority. Rather than heed the Sala’s call for new CSJ appointments, the AL voted instead to refer the matter to the Corte Centroamericana de Justicia (CCJ), a regional court that soon afterward agreed to hear the case. The Nicaragua-based CCJ eventually sided with the AL, calling the Sala’s demands "inapplicable."
The CSJ held its ground, insisting that it is in no way beholden to outside rulings. Complicating matters was that during much of the crisis El Salvador had, in effect, two supreme courts: one made up of pre-impasse judges; the other of judges whose appointments were frozen by the Sala de lo Constitucional but who, with support from the AL, continued to show up to work.

"Bolivarian stalkers"

The standoff began to spell trouble on the economic front as well. An early August report by the Fundación Salvadoreña para el Desarrollo Económico y Social (FUSADES), a conservative think thank, warned that the crisis was drawing government attention away from looming economic problems. FUSADES noted a sharp decline so far this year in both exports and foreign direct investment (FDI).

There were warnings, too, that the crisis could end up costing El Salvador millions of dollars in grant money from the Millennium Challenge Corporation, a US government aid agency. In mid-July, US Sens. Robert Menendez (D-NJ) and Marco Rubio (R-FL) publicly urged US President Barack Obama to deny further Millennium Challenge funds should the AL continue to defy the CSJ. El Salvador’s accomplishments in the past two decades, the senators wrote in a press release, "are threatened by the recent unconstitutional actions of their legislature."

Some major US newspapers went even further in their criticism, saying the real culprits behind the crisis were President Funes and the leftist Farabundo Martí para la Liberación Nacional (FMLN), which were trampling on the Constitution in an effort to maintain power at any cost. A July 16 editorial in The Washington Post accused Funes and the FMLN of embracing "the tactics that brought other leftist strongmen to power in the region."

Conservative Wall Street Journal columnist Mary Anastasia O'Grady made similar allegations in a July 29 piece entitled "Rescuing Salvadoran Democracy." She wrote, "[Venezuelan President] Hugo Chávez may be terminally ill and [Raul] Castro’s Cuba may be hitting the economic wall. But that doesn't mean Latin American liberty is now safe from the Bolivarian stalkers who have been collecting the scalps of formerly free nations for the past decade. Today El Salvador is ground zero in the Chávez revolution."

An independent streak

The stubborn AL-CSJ standoff was, upon closer examination, far more nuanced than O'Grady and the Post would have their readers believe. Chávez had little to do with the situation. Shifting power dynamics among El Salvador's principal political parties did. Also key to understanding the crisis is the "activist" role played in recent years by the Sala de lo Constitucional, which has come under fire from both the right and left for efforts to assert more judicial independence.

In the lead-up to this year’s municipal elections, the Sala struck down a ban on independent candidates, angering party insiders—particularly within the FMLN—who said the ruling favors conservatives. Only wealthy individuals (who tend to lean right) have the resources to run without party backing, FMLN leaders warned. President Funes also objected to the Sala’s decision, suggesting it could lead to campaign financing by organized crime (NotiCen, Jan. 5, 2012).

The Sala de lo Constitucional has butted heads with ARENA as well. In June 2011, acting on rumors that the Sala was considering repealing the country’s amnesty law, ARENA deputies rushed through a controversial bill called Decree 743, which upped from four to five the number of votes the Sala
needs to overturn existing legislation. FMLN leaders opposed the measure (NotiCen, July 28, 2011). President Funes, who represented the FMLN in the 2009 election, signed Decree 743 into law regardless. Popular pressure, a media outcry, and an eventual about-face by ARENA ended up killing the controversial measure. As far as CSJ-AL relations were concerned, however, the damage had already been done.

Politics as usual

That tensions between the AL and the Sala de lo Constitucional would once again boil over is not, in retrospect, all that surprising. And yet, the proverbial straw that broke the camel’s back this time around—the legislature’s decision to squeeze in a last-minute round of CSJ appointments—was an essentially political maneuver that had more to do with party rivalries than with any ill feelings lawmakers may have about the high court.

Both the FMLN and the center-right Gran Alianza por la Unidad Nacional (GANA), a conservative party formed in early 2010 by a core of ARENA dissidents, lost ground in this year’s parliamentary elections. The once-dominant ARENA, in contrast, scored a modest political comeback (NotiCen, March 22, 2012). FMLN and GANA deputies, knowing they would soon lose some of their influence in the legislature (starting in May), pushed for the April appointments as a last-ditch effort to put their stamp on the CSJ, over which ARENA has traditionally held more sway.

Political rivalries not only set the stage for the ensuing constitutional crisis, they also prevented a quick solution to the impasse. President Funes, a moderate who represented the FMLN in the 2009 election, called lawmakers together for talks beginning July 24. Progress was painfully slow. The FMLN and GANA had little interest in accepting the annulment of their April high-court picks. They were even more concerned that ARENA, which now has a slight numbers advantage in the legislature, would be in a position to dictate the election not just of five, but of 10 CSJ justices: a full two-thirds of the court.

"The result is slanted toward the interests of ARENA and the financial oligarchy of this country," FMLN legislative leader Norma Guevara told reporters in June.

ARENA leaders seemed to have their own incentives for keeping the standoff going. The rightist party made it clear from the beginning that it supported the Sala’s original ruling and was thus able to posit itself as the "guardian angel of El Salvador’s Constitution," Tim Stauffer, a former Peace Corps volunteer in El Salvador, wrote in a recent analysis of the crisis.

"The FMLN made a bad bet in choosing to endorse its own party at the expense of judicial independence and a worse one by deciding to double down in support of an illegitimate Supreme Court. Of course, ARENA played the same games while in power, but the FMLN won with Funes because people hoped for something different," Stauffer explained. "Three years of constant discord in the Funes’ administration—this recent constitutional crisis is only the latest example—has left both Funes and the FMLN looking unfit for the task."

Funes and the FMLN are not the only ones looking bruised and battered after the months-long political soap opera—particularly in light of its sudden and rather perplexing conclusion. On Aug. 21, the AL voted to "ratify" the five judges elected in 2006 and "elect" the same judges originally chosen in April. The makeup of the CSJ thus remains the same as it was before the standoff. The only exception is that Salomón Padilla has replaced Ovidio Bonilla as head of both the CSJ and the Sala de lo Constitucional. Both are considered sympathetic to the FMLN.
In the end, the AL "basically heeded the Sala’s [original] rulings," Salvadoran Procurador para la Defensa de los Derechos Humanos Óscar Luna told reporters. "It’s a shame they wasted so much time reaching a solution… that could have been reached from the beginning."

-- End --