

## SUMMARY<sup>1</sup>

### “Challenges in Tackling and Prosecuting Corruption”

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#### Speakers

- Mat Tromme, Project Lead and Senior Research Fellow, Bingham Centre for the Rule of Law (Chair).
- Gabriel Pérez Barberá, Attorney General for Penal and Economic Matters, Federal Court of Appeals of Buenos Aires.
- Claudia Escobar, Former Judge, Court of Appeals of Guatemala; Robert G James Scholar at Risk Fellow, Radcliffe Institute for Advanced Study, Harvard University.
- Heloisa Estellita, Professor, FGV São Paulo School of Law.
- Eric Snyder, Partner, Jones Day.

Presentations and speaker’s material are available online from the [Conference page](#).

#### Overview

Speakers presented their views on what makes combatting corruption a challenging endeavour. In her opening remarks, Heloisa Estellita focussed on how tax fraud can undermine the rule of law and the fight against corruption, particularly as it creates – among other things – a culture of indifference and a disregard for public life. Referring to the Panama Papers, Eric Snyder argued that it would result in ramping up exposure of political figures in Argentina, Brazil, and across the globe. Acknowledging that the Foreign Corrupt Practices Act (FCPA) is not enough for prosecuting foreign corrupt leaders, he claimed, the United States will likely take advantage of data included in the Panama Papers to prosecute money laundering.

Gabriel Perez Barberá contended that criminal law may be used or co-opted by interests seeking to undermine the idea of justice and that an arbitrary application of criminal law may result in impunity, selectiveness, and partial persecutions. He also proposed a number of ideas to prevent this. Finally, Ms Escobar listed several

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<sup>1</sup> This Summary was prepared for the Bingham Centre by Patricia Regules and does not reflect the views of the Bingham Centre for the Rule of Law. The purpose of this note is to summarise Portuguese and Spanish content included in the relevant audio recording, and does not therefore include a full summary of the session as a whole.

institutional weaknesses (including judicial independence and appointments) that result in a number of risks accounting for current corruption levels in Guatemala.

## **Details**

### **1. *The Panama Papers – A game changer for prosecuting international corruption by the United States***

In his opening presentation (which can be [found online](#)), Eric Snyder began by providing a quick overview of the Panama Papers. He highlighted their significance as 'the biggest whistle-blowing event in history' and also discussed the impact of the papers. The most important effect relates to the exposure of political figures, including for example the serving President of Argentina (Mauricio Macri) (who appears to be listed as director of a Bahamas-based company, according to the Panama Papers) and former politicians. In Brazil, the current *Petrobras/Lava Jato* scandal has also been tangled up in the Panama Papers, as many politicians and companies investigated in the case opened offshore companies.<sup>2</sup>

Mr Snyder remarked that, as part of its money laundering investigations, the US Department of Justice may use some of the revelations included in the Panama Papers. For example, 'many existing investigations will likely be strengthened due to newly exposed evidences such as business records and emails.'

During the questions and answer session, Mr Snyder touched on the role of lawyers in the Panama Papers. Arguing that they normally have a duty to check the origin of the money and run background checks on those who set up companies, the speaker noted that many lawyers often fail to do this, thus becoming complicit in promoting the offshore system. Instead, he encouraged lawyers to 'act lawfully and uphold the rule of law'.

### **2. *Tax fraud has an auxiliary effect on the prosecution of corruption***

Heloisa Estellita explored the relationship between tax fraud and corruption in the realm of the Rule of Law.

The speaker contended that the worst effect of tax frauds on society is the creation of a culture of political indifference and disregard for the Public Good, which 'is one of the characteristics of Brazilian society and especially of the Brazilian elite', she remarked.

That said, tax crimes may have an auxiliary role in the prosecution of corruption. Scrutiny of payments and tax returns has made the *Receita Federal* (Brazil's Department of Federal Revenue) the first organ to report suspicious practices to law enforcement agencies. The Department of Federal Revenue is also expected to play a major role in the prosecution of corruption due to automatic exchange of information with foreign authorities made available by the United States FACTA (Fair and Accurate

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<sup>2</sup> Lava Jato (translated as car wash) is an ongoing criminal investigation initiated by Brazil's Federal Police in 2009. Operation *Lava Jato* is allegedly the largest corruption and money laundering investigation in Brazilian history.

Credit Transactions Act), and the OECD Convention on Mutual Administrative Assistance in Tax Matters.

The speaker also noted that exchange of information among national authorities must abide by another fundamental element of the Rule of Law, which is legality. 'The Brazilian judiciary has and will have, especially in the case of the Panama Papers, a central role in preventing Brazil from receiving illegal evidence obtained abroad', she said.

### **3. Arbitrariness and vested interests can undermine trust in a fair application of the criminal law and an independent Judiciary**

'Argentina's criminal system is suffering from a lack of legitimacy due to (i) impunity, (ii) selectivity and (iii) arbitrary judicial persecution', stated Gabriel Pérez Barberá, criticising that moral values are lacking among those who administer Justice.

He attributed *impunity* to the lack of diversity in the jurisdiction of courts. However, in his view, it is not beneficial to have a few specialized judges or courts in charge of prosecuting corruption and economic crimes. Instead, Argentina's criminal system would gain from a system of popular juries, or even a system of technical judges that would rotate in their post, as is the case in Germany.

With regards to the second problem- *selectivity* in the prosecution of persons or crimes- Pérez Barberá suggested that the lack of ideological pluralism in the Judiciary is a serious problem, since it indirectly affects judicial independence. One solution to this problem could be the adoption of Juries, as in United States and Britain, and not merely lay judges, as in Germany or Spain.<sup>3</sup>

Last, in order to avoid *arbitrary judicial persecution*, Mr. Pérez Barberá suggested a reform in criminal procedures. Investigation of the facts of the case should be placed in the hands of the prosecution. In this sense, a system similar to the German legal system could be adopted, or even a more adversarial system, as in the US. He also remarked that charges are too often brought against defendants, but the Courts fail to hand down a sentence.

Reflecting on the linkages with money laundering and tax fraud, moreover, Pérez Barberá acknowledged that 'a bad law is worse than a bad fact'. Referring to President Macri, the speaker stressed his attempt to make the city of Buenos Aires an offshore haven. This was repealed by the Courts, but a recently instated judge has overruled this decision. Pérez Barberá urged for caution against laws that enable these kinds of offshore havens.

### **4. A profound reform of the Justice system in Guatemala is long overdue**

Claudia Escobar noted that while the country is no longer under military rule, the level of violence in Guatemala is alarming. Guatemala lacks the minimum institutional

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<sup>3</sup> 'lay judge' typically refers to people in good standing that do not have the full qualification/competence to be judges, but nevertheless assist judges in court proceedings and/or oversee minor cases, comparable to the role of magistrates in the UK

framework needed for the proper development of the country. 'The Judiciary has been unable to fulfil its mandate. That is, it has failed to ensure peace and justice to the people of the country', the speaker noted.

Ms Escobar suggested that the current system of judicial appointments in Guatemala must be reformed in order to strengthen judicial independence. In addition, although a Law of the Judicial Career was created (*Ley de la Carrera Judicial* or LCJ)<sup>4</sup>, in practice, this Law has only been applied at the lower levels of the judiciary. She highlighted the contribution of the International Commission against Impunity in Guatemala (Comisión Internacional contra la Impunidad en Guatemala or CICIG), a United Nations funded body, which has been a vital tool in fighting impunity and fostering the Judiciary in Guatemala.

The speaker concluded her presentation by sharing her experience as a Judge in Guatemala, where she refused to accept a bribe in exchange for a ruling in favour of a politician, a fact which ultimately led to her resignation. Ms. Escobar's speech concluded with a call for action: 'the time has come for the Judiciary to demonstrate that it has the ability to address the serious corruption cases that are brought to its judgment'.

When questioned about the role of CICIG in Guatemala in prosecuting economic and administrative crimes (i.e. bigger companies as well as public servants), Claudia Escobar emphasised that 'old paradigms' and the status quo are progressively starting to change. Investigations targeting private sector actors (a cement company, as well as a bank) are ongoing.

The usefulness of having a regional body (similar to CICIG) fighting corruption was mentioned, but the consensus among the speakers seemed to be that although it is important to keep economic crimes on the international agenda, the effectiveness of this proposal is doubtful. Foreign constituencies, however imperfect, have some means to tackle extra-territorial corruption (e.g. the FCPA and the UK Bribery Act), and have started creating positive changes. Suggesting that supra-national bodies might be bogged down by many similar problems experienced by national bodies, Ms. Estellita suggested instead that instances such as 'automatic exchange of information' might be best to investigate corruption.

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<sup>4</sup> Decree number 41-99, enacted February 26th, 2000.