

EL SALVADOR

Testimony of Co-Conspirators -
A Comparison with Other Hispanic Nations

The subject is governed by provisions of the national Code of Criminal Procedure,¹ Book 2, Part 3, on Evidence and Sentencing. Concerning the credibility of witnesses, it provides that the credibility of statements made by witnesses must be subject to consideration of the following conditions and circumstances, and may be paraphrased as follows:

...the capacity of the witness to assess the facts according to his/her age and education;
...the objectivity that must be derived from the witness' integrity, independence, detachment from the parties concerned, and the witness' background.²

The Code provides that all persons are capable of testifying, notwithstanding the judge's power to evaluate their testimony according to the standards on sound judgments [*sana critica*].³ But it also specifically provides (as paraphrased) that:

"...co-participants in criminal offenses [*coautores*] or accomplices are disqualified [*incapaces*] to testify as witnesses against each other on the same offenses or misdemeanors."⁴

¹ *Código Procesal Penal*, compiled by Banco Hipotecario de El Salvador (San Salvador, 1977/78).

² *Id.* art. 497 (1) and (2).

³ *Id.* art. 497 (1) and (2).

⁴ *Id.* art. 499.

In this regard a prominent Salvadoran scholar in the field of criminal procedure commented that the Code is referring to what Carnelutti⁵ alluded to regarding "the person's qualifications to participate in judicial proceedings as inferred from his/her personal character [*cualidades personales*].⁶ The Code provides further that these witnesses, once their "incapacity" is known, will not be admitted to testify on the judge's own motion.⁷ The author cited goes on to state that the reasons are obvious in support of the assumption of a likely inaccuracy or falsehood in their testimony in exchange for their own benefit or safety.⁸

The above Salvadoran standard, as the reference to Professor Carnelutti indicates, has been inspired by the theories developed in an effort to ensure a maximum degree of impartiality as a necessary component of the concept of due process of law. As such, it is found reflected variously in almost all Hispanic jurisdictions. However, these reflections may not necessarily be of the same rigidity.

⁵ Francesco Carnelutti (1879-1965), a prominent Italian legal scholar.

⁶ Manuel Arrieta Gallegos, *El Proceso Penal en Primera Instancia* (Imprenta Nacional, San Salvador, 1980) at 265.

⁷ *Supra* note 1, art. 295.

⁸ *Supra* note 5, at 271.

Costa Rica

For instance, in neighboring Costa Rica, even though the underlying theory on credibility of witnesses is known and understood, the Code of Criminal Procedure leaves the issue of evaluation entirely to the judge. Presumably, the parties (the defense attorney or the prosecutor) may move to exclude or disqualify a witness based on specific elements of credibility.⁹ But no fixed standards are provided.

Argentina

Argentina's Code of Criminal Procedure comes closer to the Salvadoran Code stating (as paraphrased) that:

the following may be not be witnesses. They may be admitted, however, to provide "simple indications" and only to the effects of the pretrial proceedings [*indagación sumaria*]:

"...those under prosecution; offenders penalized with imprisonment while serving the sentence except in cases of offenses perpetrated in the penitentiary where the witness is an inmate; those convicted of perjury or those who have incurred in falsehood in their statements and oaths; ...intimate friends of the defendant, their partners, dependents or domestic servants and

⁹ *Código de Procedimientos Penales*, in Colección de Códigos, *Stvdivm Generale Costarricense* (San José), arts. 224-237.

the accomplices; ...those that have an interest in the results of the case."¹⁰

The Argentinean courts have, however, interpreted the above provisions of the Code not to be of an absolute character, particularly those referring to disqualifications based on family relationship, friendship, social linkage, or partnership. It must be established to the satisfaction of the court that the witnesses so affected are indeed inspired by their own interest, affection of hatred or whenever the presumption of partiality [bias] of a witness is viable. If not, the testimony will stand, and, as such, will be subject to the evaluation of the court at the time of adjudication.¹¹

Brazil

In Brazil, the parties may move to disqualify or exclude witnesses according to the Code of Criminal Procedure, provided they do so before the deposition takes place, substantiating their allegations on the circumstances or defects affecting the credibility of the witness concerned. The judge will then ask the witness for an answer to the motion and either grant or reject it

¹⁰ *Código de Procedimientos en Materia Penal*, compiled, commentated and annotated by José Alberto Seyahian et al., (Pensamiento Jurídico Editora, Buenos Aires, 1978), art. 276, 2nd., 3rd., 7th, and 8th.

¹¹ *Id.* Annotation to arts. 276 and 277.

according to his or her own judgment.¹² There are no specific grounds for exclusion or disqualification of witnesses related to co-participation in the commission of offenses. Conceivably, however, the argument may be made under the provision of the Code cited, that witnesses may be biased in serving his or her own self interest to the detriment of the defendant's.

Peru

In Peru, The Code of Criminal Procedure provides for exclusion of witnesses based on substantiation of alleged grounds. The judge may investigate the credibility of witnesses on his or her own motion. The fact that a witness has been subject to such motion may or may not preclude his or her deposition which will be evaluated by the judge at the time of adjudication.¹³

Hispanic Systems Generally

Hispanic scholars and judges alike have elaborated extensively on the subject of credibility in court. Their arguments may be summarized by simply stating that there are several circumstances affecting the credibility of witnesses that courts must consider in weighing their testimony. Depending on the nature of these circumstances, their influence in the

¹² *Código de Proceso Penal, Teoría e Prática*, compiled by F.A. Gomes Net (Leia Livros Ltda., Sao Paulo, 1985), art. 214 and commentary thereto.

¹³ *Código de Procedimientos Penales*, compiled by Carlos Tucto Rodil (Talleres Gráficos Ojeda, Lima, 1986), art. 156.

credibility of witnesses may be critical enough to invalidate their judicial acceptability. Of special concern are those circumstances bearing a definite adverse effect, such as those related to the intensity of personal interests in given family and business situations. They are considered sufficiently high to warrant legal presumptions upon which judges, either as a response to motions filed by the parties or on its own, were obligated by law to prevent certain witnesses from testifying or to reject their testimony if they did so.

Reportedly, however, legal systems have gradually evolved from a strict set of standards in evaluating evidence to broader standards allowing the courts and the parties involved wider latitudes to argue and decide on the actual relevance of such circumstances in specific cases. In this regard, theoreticians believe that the updated versions of procedural codes are more likely to refer in their provisions to "all and any circumstances that may influence the witness to depose in a manner discordant with the interest of justice rather than abstract presumptions that may not necessarily serve justice."¹⁴

In the above context, it may be stated that the Salvadoran rules on evidence concerning witnesses belong to an older tradition where judges were granted less trust for the performance of their adjudicatory functions.

¹⁴ "Tacha a los Testigos," in *XXV Enciclopedia Juridica Omeba*, (Editorial Bibliográfica Argentina, SRL, Buenos Aires, 1976), at 1026-1027.

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