Honduras:
Constitutional Law Issues

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HONDURAS

CONSTITUTIONAL LAW ISSUES

Executive Summary

The Supreme Court of Honduras has constitutional and statutory authority to hear cases against the President of the Republic and many other high officers of the State, to adjudicate and enforce judgments, and to request the assistance of the public forces to enforce its rulings. The Constitution no longer authorizes impeachment, but gives Congress the power to disapprove of the conduct of the President, to conduct special investigations on issues of national interest, and to interpret the Constitution. In the case against President Zelaya, the National Congress interpreted the power to disapprove of the conduct of the President to encompass the power to remove him from office, based on the results of a special, extensive investigation. The Constitution prohibits the expatriation of Honduran citizens.

I. What are the provisions, if any, in the Honduran Constitution for their Judicial Branch and the Legislative Branch (National Congress) to remove an elected President?

The concept of the political procedure known as impeachment, previously contained in Article 205, Section 15 of the Honduran Constitution, was repealed by Decree 175-2003.[1] The provision, before being repealed, stated that the National Congress had the power to declare whether cause existed to file charges against the President and other high officers of the three branches of government. It did not, however, provide the procedure to follow in such cases.[2] The same Decree also repealed Article 200 of the Constitution, which granted general immunity to the Deputies of the National Congress.[3] Therefore, currently, no public officer has immunity in Honduras.

Regular judicial proceedings against the President may be heard by the Supreme Court based on Article 313, Section 2 of the Constitution, which grants it the power to hear cases against the highest officers of the State and the Deputies.[4]

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[1] Decreto No. 175-2003 del 28 de Octubre del 2003 art. 1, LA GACETA, Dec. 19, 2003, *ratified by* Decreto No. 105-2004 del 27 de Julio de 2004, LA GACETA, Sept. 11, 2004.

[2] Decreto No. 412-2002 del 13 de Noviembre de 2002, LA GACETA, Feb. 20, 2003, *ratified by* Decreto 154-2003, del 23 de Septiembre de 2003, LA GACETA, Dec. 1, 2003.

[3] Decreto No. 175-2003 del 28 de Octubre del 2003 art. 1.

[4] CONSTITUCIÓN DE LA REPÚBLICA DE HONDURAS, as amended, art. 313, § 2. The amended Constitution is available online, at http://www.gobernacion.gob.hn/descargas/leyes/ (last visited Aug. 7, 2009). The Constitution was originally published officially in LA GACETA, Jan. 20, 1982.

Until 2003, Article 313, Section 2 stated that the Supreme Court had the power to "hear cases against the highest officers of the State and the Deputies when the National Congress had declared that cause existed to level charges [against them]."[5] When this impeachment provision of the Constitution was repealed, Article 313, Section 2 was also amended by the removal of the last part of the provision referring to the procedure of the National Congress.[6] In addition, Article 304 of the Constitution grants the courts the authority to apply laws to specific cases and to adjudicate and enforce judgments.[7]

II. Did the Honduran Supreme Court have the authority under the Honduran Constitution to request that the military remove the President because the National Congress, the Supreme Court, the Human Rights Ombudsman, and the Attorney General found an action of the President unconstitutional?

This question raises the following issues under the laws of Honduras:

A. Whether the Supreme Court has the authority to hear a case (and consequently issue an arrest warrant) against a sitting President; and

B. Whether the Supreme Court has the authority to order the public forces (*fuerza pública*) to carry out an arrest warrant against a sitting President.

A. Authority of the Supreme Court to hear a case (and consequently issue an arrest warrant) against a sitting President

Article 313, Section 2 of the Constitution grants the Supreme Court of Justice the power to hear cases against the highest officers of the State and the Deputies.[8] In harmony with this provision, the Code of Criminal Procedure provides that cases against these officers must be heard by the Supreme Court, following the procedures established in that Code.[9] According to available sources, this procedure was applied in the case filed by the Chief Prosecutor (*Fiscal General de la República*) against President José Manuel Zelaya Rosales. On June 26, 2009, the Supreme Court, upon the Chief Prosecutor's complaint, accepted the case and unanimously voted to appoint one of its Justices to hear the complaint in the preparatory and intermediate phases. The appointed Justice carried out the request to issue an arrest and raid warrant.[10]

The Chief Prosecutor's complaint before the Supreme Court was based on an administrative procedure filed before the Court of Administrative Litigation (*Juzgado de Letras*

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[5] Decree 38-2001 of Apr. 16, 2001, LA GACETA, May 29, 2001, at 2 (translated by the author).

[6] Decreto No. 175-2003 del 28 de Octubre del 2003, *supra* note 1, art. 2.

[7] CONSTITUCIÓN DE LA REPÚBLICA DE HONDURAS art. 304.

[8] *Id*. art. 313, § 2.

[9] Código Procesal Penal, arts. 414-417 (Editora Casablanca, Tegucigalpa, 2006).

[10] Corte Suprema de Justicia, Comunicado Especial, June 30, 2009, at 4, *available at* the Judiciary website, http://www.poderjudicial.gob.hn (last visited July 8, 2009).

de lo Contencioso Administrativo), which was presented to the Supreme Court to support the complaint. This documentation may be summarized as follows:

On March 23, 2009, President Zelaya issued Executive Decree PCM-05 2009 ordering a public consultation (*Consulta Popular*, or referendum) throughout the national territory so that the Honduran people could express their opinion as to whether, during the 2009 general elections, a fourth ballot box should be installed at the polling stations to decide whether to convene a National Constituent Assembly for the purpose of drafting a new political Constitution. The same Decree gave a mandate to the National Institute of Statistics (INE) to take charge of the survey.[11]

On May 8, 2009, the Chief Prosecutor, acting as guarantor of the Constitution, filed a law suit before the Court of Administrative Litigation requesting that the Court declare the illegality and nullity of the administrative act carried out by the Executive Branch under the Executive Decree.[12]

On May 26, President Zelaya issued another Executive Decree PCM-19-2009, rescinding the previous Decree and ordering a national poll (under the new title of *Encuesta de Opinión Pública*) on the same issue to be conducted on June 28, 2009.[13] The next day, the Court of Administrative Litigation issued a ruling ordering the President to suspend the Public Consultation and all acts in its support.[14]

On May 29, the Court of Administrative Litigation clarified its ruling, stating that:

> suspension of the consultation ordered on March 23, 2009, includes any other administrative act, whether general or particular, which has been issued or might be issued, whether explicitly or implicitly, by publication or lack thereof in the Official Gazette, which might be conducive to the same administrative act which has been suspended, as any other procedural consultation or question which may be designed to avoid obeying this ruling [of May 29].[15]

The same day, May 29, President Zelaya informed the Honduran people through the Secretary of Defense, that he had issued Executive Accord No. 027-2009, by which he ordered that a national public opinion poll be carried out by the National Institute of Statistics. The President also ordered the armed forces to lend logistical and all other necessary support to the National Institute of Statistics.[16]

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[11] Expediente Judicial, Requerimiento Fiscal, Documentación Soporte – Punto No. 8, at 2, *available at* the Judiciary website, http://www.poderjudicial.gob.hn/ejes/Comunicados/ (last visited Aug. 5, 2009).

[12] *Id*. at 2.

[13] *Id*. at 3.

[14] *Id*.

[15] *Id*.

[16] *Id*. at 3-4.

On June 3, the Court of Administrative Litigation issued the first judicial communication, through the State Secretary for the Presidency, asking the President to abide by the Court's ruling.[17]

On June 16, the Court of Appeals for Administrative Disputes unanimously ruled inadmissible the appeal filed by President Zelaya, who was represented by a private attorney, against the May 27 ruling of the Court of Administrative Litigation and the May 29 clarification.[18]

On June 19, the Court of Administrative Litigation issued a second judicial notification, through the State Secretary for the Presidency, to the President, requesting that he abstain from conducting any kind of public consultation that might violate the Court's rulings of May 27 and May 29.[19] On the same day, the Administrative Court issued a third judicial notification to the President, through the State Secretary for the Presidency, giving him five days to inform the court what measures he had taken in order to abide by the court ruling. No answer was received by the Court.[20]

On June 26, the Chief Prosecutor filed a Criminal Complaint before the Supreme Court of Justice, requesting that Zelaya be arrested under an accusation of the crimes of acting against the established form of government, treason against the country, abuse of authority, and usurpation of functions.[21] On the same day, the Supreme Court of Justice unanimously voted to appoint one of its Justices to hear the process in its preparatory and intermediate phases; that Justice carried out the request, issuing an arrest and raid warrant.[22] Two days later, on June 28, 2009, Zelaya was arrested.[23]

After his arrest, on June 28, the military, acting apparently beyond the terms of the arrest warrant,[24] took Zelaya out of the country.[25] Under the Honduran Constitution, "[n]o Honduran may be expatriated nor handed over to the authorities of a foreign State."[26]

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[17] *Id*. at 4.

[18] Corte Suprema de Justicia, Comunicado Especial, June 30, 2009, at 2, *available at* the Judiciary website, http://www.poderjudicial.gob.hn (last visited July 18, 2009).

[19] Expediente Judicial, Requerimiento Fiscal, Documentación Soporte – Punto No. 8, at 5, *available at* the Judiciary website, http://www.poderjudicial.gob.hn/ejes/Comunicados/ (last visited Aug. 5, 2009).

[20] *Id*.

[21] *Id*. at 1, 15.

[22] Corte Suprema de Justicia, Comunicado Especial, June 30, 2009, at 4, *available at* http://www.poderjudicial.gob.hn.

[23] *Id*. at 5.

[24] Assessment by the author based on the facts and the law. The ruling of the Supreme Court consisted only of an arrest and raid warrant. Corte Suprema de Justicia, Comunicado Especial, June 30, 2009, at 4, *available at* http://www.poderjudicial.gob.hn.

[25] *The Crisis in Honduras*, 111th Cong. 4 (July 10, 2009) (statement of the Hon. Guillermo Pérez-Cadalso before the U.S. House Committee on International Affairs, Subcommittee on the Western Hemisphere). Mr. Pérez-Cadalso, who is a former Honduran Supreme Court Justice and Secretary of Foreign Relations, testified before

B. The authority of the Supreme Court to order the public forces (*fuerza pública*) to carry out an arrest warrant against a sitting President

Article 304 of the Constitution grants the courts the authority to apply laws to specific cases and to adjudicate and enforce judgments.[27] Article 306 states that the courts may request the assistance of the public forces (*fuerza pública)* to obtain enforcement of their rulings.[28] Under this legal authority, the Supreme Court ordered the Chief of the Joint Chiefs of Staff to implement the arrest warrant.

III. Did the Honduran National Congress properly approve Articles of Impeachment of the President as provided for by the Honduran Constitution?

As stated above, the concept of the political procedure known as impeachment, previously contained in Article 205, Section 15 of the Honduran Constitution, was repealed by Decree 175-2003.[29] The Constitution does not contain an express provision giving the National Congress the authority to remove a President from office. Nonetheless, the National Congress apparently used several other constitutional powers to remove President Zelaya from office. Among them are the following:

- Article 205, Section 20 of the Constitution gives the National Congress the power to "approve or disapprove" the administrative conduct of the Executive and Judicial Branches, the National Tribunal of Elections, and many other high officers of the State;
- Article 218, Section 3 reaffirms this power by stating that the decrees issued by the National Congress in reference to the conduct of the Executive Branch cannot be vetoed by the President;
- Article 205, Section 21 authorizes the National Congress to appoint special commissions for the investigation of matters of national interest;
- Article 208, Section 5 grants power to the Permanent Commission of the National Congress to receive complaints of violations of the Constitution;
- Article 205, Section 10 grants the power to the National Congress to interpret the Constitution;
- Article 218, Section 9 reaffirms the Congressional power to interpret the Constitution by stating that Congressional resolutions issuing constitutional interpretations cannot be vetoed by the President; and

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Congress as "a concerned Honduran citizen" and not as a government representative. *Id*. (printed copy of the statement in the collection of the author.

[26] CONSTITUCIÓN DE LA REPÚBLICA DE HONDURAS art. 102.

[27] *Id*. art. 304.

[28] *Id*. art. 306.

[29] Decreto No. 175-2003 del 28 de Octubre del 2003 art. 1, LA GACETA, Dec. 19, 2003. The provision basically stated that Congress had the power to declare if cause existed to file charges against the President and other high officers of the three branches of government. It did not, however, provide a procedure to follow. Decreto No. 412-2002 del 13 de Noviembre de 2002, LA GACETA, Feb. 20, 2003, *ratified by* Decreto 154-2003, del 23 de Septiembre de 2003, LA GACETA, Dec. 1, 2003.

- Article 205, Section 12 gives the National Congress the power to receive the constitutional oath of the President and Vice-President of the Republic and to fill their vacancies where any of the officers were absolutely unable to discharge the powers and duties of the office [*falta absoluta*].[30]

Article 242 of the Constitution, which provides the line of succession for the Presidency, and Article 205, Sections 12, 20, and 10, and Article 218, Section 9, referred to above, are translated below due to their relevance (the order in which they appear is based on the relevance of the subject matter):

> **Article 242.** In the temporary absence of the President of the Republic, the Vice-President shall replace him in his functions. If the absence of the President were permanent, the Vice-President shall exercise and hold Executive Power for the time that remains to complete the constitutional term. But if the Vice-President were also permanently absent, the Executive Power shall be exercised by the President of the National Congress, and, where the President of the National Congress is absent, by the President of the Supreme Court, for the time that remains to complete the constitutional term.[31]
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> **Article 205.** The following Powers are assigned to the National Congress:
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> > **Section 12:** To receive the constitutional oath of the Office of President and Vice-President of the Republic [who have been] declared "elect," and the rest of the officers for whom it chooses to grant leave and to accept or reject their resignation and to fill the vacancies in the case where any of the officers were absolutely unable to discharge the powers and duties of the office [*falta absoluta*].[32]
> >
> > **Section 20:** To approve or disapprove the administrative conduct of the Executive Power, the Judicial Power, the Electoral Supreme Tribunal, the Comptroller General of the Republic, the Attorney General of the Republic, the Environmental Attorney Office, the Chief Prosecutor, the Ombudsman, the National Registry of Persons, and decentralized and auxiliary institutions of the State.[33]
> >
> > **Section 10:** To interpret the Constitution of the Republic in ordinary sessions in a single term, with a two-thirds vote of all its members. Articles 373 and 374 of the Constitution may not be interpreted through this procedure.[34]

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[30] CONSTITUCIÓN DE LA REPÚBLICA DE HONDURAS art. 205, §§ 20, 21, 10 & 12; art. 208, § 5; & art. 218, §§ 3 & 9.

[31] *Id*. art. 242 (translated by the author).

[32] *Id*. art. 205, § 12. (translated by the author).

[33] *Id*. art. 205, § 20.

[34] *Id*. art. 205, § 10 (translated by the author).

> **Article 218.** Authorization [from the Executive] shall not be necessary, nor shall the Executive Power be entitled to veto the following cases and resolutions:
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> …
>
> **Section 9:** In the interpretations to the Constitution of the Republic enacted by the National Congress.[35]

On June 29, the National Congress, after hearing a special report prepared and submitted by a special congressional commission on Zelaya's actions, which was based on an extensive investigation prepared by the same commission,[36] issued a decree in which many articles of the Constitution were invoked; key among them was Article 205, Section 20,[37] translated above. The Decree provided that the National Congress:

> (1) Disapproved the President's conduct of repeated violations of the Constitution and laws of the country and his disregard of the rulings and resolutions of the judicial authorities;
> (2) Removed President Zelaya from the office of the Presidency; and
> (3) Nominated the next person in the line of succession for the presidency, according to Article 242 of the Constitution. This person was the then-President of the National Congress, Roberto Micheletti, since the Vice-President had resigned from office six months earlier.[38]

The question of which Constitutional provision gives the National Congress the power to remove the President still remains. As noted above, Article 242 does not grant the National Congress the power to remove the President, but does state the line of succession.[39] Although Article 205, Section 12 was not invoked in the Decree, that Section gives intrinsic power to the National Congress and must be analyzed. Article 205, Section 12 does not grant Congress the power to remove the President, but only to receive the Constitutional oath of the President and other high officers and to fill vacancies in the case that any of the officers were absolutely unable to discharge the powers and duties of the office [*falta absoluta*].

The only other article germane to this issue is Article 205, Section 20, giving the National Congress the power to approve or disapprove of administrative conduct of the Executive Power. The reading of Article 205, Section 20 raises the issue of the meaning and scope of the word

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[35] *Id*. art. 218, § 9 (translated by the author).

[36] The report was read by Ricardo Rodríguez, a deputy of the Liberal Party. *Congreso Destituye a Manuel Zelaya*, LA TRIBUNA, June 29, 2009, *available at* http://www.latribuna.hn/web2.0/?p=14265&print=1.

[37] There is an apparent typographical error in the Decree in which art. 220, § 20 was cited. However, art. 220 has no subsections, and in addition, it is not relevant to the issues at hand. Therefore, it is logical to consider that the reference was in regard to art. 205, § 20, which is applicable.

[38] An official copy of the text of the Decree is not available to date. An unofficial version was published in *Congreso Destituye a Manuel Zelaya*, *supra* note 36. *See also* Statement of the Hon. Guillermo Pérez-Cadalso, *supra* note 25, at 4.

[39] CONSTITUCIÓN DE LA REPÚBLICA DE HONDURAS art. 242, *supra* note 4.

"disapprove," whether a congressional disapproval of the President of the Republic can be limited to censure or may also encompass the possibility of removal from office. An analysis of the facts of the case and the aforementioned constitutional provisions leads one to the conclusion that the National Congress made use of its constitutional prerogative to interpret the Constitution and interpreted the word "disapprove" to include also the removal from office.[40]

A systematic reading of the different constitutional provisions dealing with the right of Congress to interpret the Constitution (such as Article 205, Section 10 and Article 218, Section 9) also indicates that the Honduran National Congress has the power to interpret the Constitution with general effect. This task is performed through interpretative laws, decrees, or other acts.[41] One may conclude that the National Congress implicitly exercised its power of constitutional interpretation in the case of Zelaya when it decided that its power to "disapprove" the President's actions encompassed the power to remove him.

The fact that the National Congress did not cite all of the constitutional provisions granting it intrinsic powers,[42] such as those mentioned in Articles 205, Sections 10, 12, and 21, does not imply that it surrendered or relinquished its constitutional powers. In other words, it must be assumed that when the National Congress issued its Decree removing President Zelaya from office, it used its powers as needed.

Although the National Congress unanimously approved an alleged letter of resignation by Zelaya, dated four days before his arrest, no mention of this letter was made in the Decree issued by Congress removing the President from office.[43]

IV. Did the Supreme Court follow up by holding a proper, constitutionally mandated trial of the President?

As stated in the answer to question II(a), above, the Supreme Court, based on its constitutional powers, heard the case against Zelaya and applied the appropriate procedure mandated by the Code of Criminal Procedure.

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[40] This line of analysis was confirmed in an August 3, 2009, telephone interview with Mr. Guillermo Pérez-Cadalso, a Honduran attorney who formerly served as Supreme Court Justice and Secretary of Foreign Relations.

[41] CONSTITUCIÓN DE LA REPÚBLICA DE HONDURAS arts. 205, § 10 & 218, § 9.

[42] It is well recognized that the branches of government exercise their powers according to their constitutional mandate. Therefore, one of the branches may not exercise powers not expressly conferred by the Constitution. Likewise, a branch of government may neither delegate its constitutionally-mandated powers to the other branches of government, nor refrain from exercising them in the absence of an express constitutional provision.

[43] *Congreso Destituye a Manuel Zelaya*, *supra* note 36. It is believed by some in Honduras that Zelaya signed the letter on June 24, before his arrest, to make use of it after the referendum, when presumably the National Constituent Assembly was going to be initiated, on June 29, because Zelaya anticipated that he would be elected President of the Assembly. It also generally understood that that the letter was not included in the Congressional Decree because Zelaya denied writing the letter. Telephone Interview with Mr. Guillermo Pérez-Cadalso, a Honduran attorney who formerly served as Supreme Court Justice and Secretary of Foreign Relations (Aug. 3, 2009).

The Chief Prosecutor filed a complaint (*requerimiento fiscal*) against President Zelaya before the Supreme Court on June 26, 2009. The complaint: (1) accused the President of acting against the established form of government, treason against the country, abuse of authority, and usurpation of functions; (2) requested that the Court order the arrest of the President; (3) requested that the Court notify the President of the facts alleged against him; (4) requested that the President's testimony be heard; and (5) requested that the President be suspended from office.[44]

The Supreme Court, based on its constitutional[45] and statutory[46] powers, appointed one of its Justices to hear the process in the preparatory and intermediate stages. Following the procedure, the Justice admitted the complaint and issued an arrest and raid warrant.[47] The process at the Supreme Court did not continue due to the events that occurred after Zelaya's arrest.

In light of the fact that Zelaya was formally removed from office on June 28 by the Congressional Decree described above, on June 29, the Supreme Court unanimously ordered that the proceedings be forwarded to the Unified District Trial Court[48] to continue through the ordinary proceedings established by the Code of Criminal Procedure, "given that citizen José Manuel Zelaya Rosales is no longer a high-ranking government official."[49] These ordinary proceedings are the ones applied to regular citizens in criminal cases.

V. Was the removal of Honduran President Zelaya legal, in accordance with Honduran constitutional and statutory law?

Available sources indicate that the judicial and legislative branches applied constitutional and statutory law in the case against President Zelaya in a manner that was judged by the Honduran authorities from both branches of the government to be in accordance with the Honduran legal system.

However, removal of President Zelaya from the country by the military is in direct violation of the Article 102 of the Constitution, and apparently this action is currently under investigation by the Honduran authorities.[50]

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[44] Expediente Judicial, Requerimiento Fiscal, Documentación Soporte – Punto No. 8, at 1, *available at* the Judiciary website, http://www.poderjudicial.gob.hn/ejes/Comunicados/ (last visited Aug. 5, 2009).

[45] CONSTITUCIÓN DE LA REPÚBLICA DE HONDURAS art. 313, Sec. 2, *supra* note 4.

[46] CÓDIGO PROCESAL PENAL art. 416.

[47] Corte Suprema de Justicia, Comunicado Especial, June 30, 2009, at 4, *available at* http://www.poderjudicial.gob.hn.

[48] The vernacular name of the court is *Juzgado de Letras Penal Unificado*.

[49] Corte Suprema de Justicia, Comunicado Especial, June 30, 2009, at 5.

[50] Telephone Interview with Mr. Guillermo Pérez-Cadalso, a Honduran attorney who formerly served as Supreme Court Justice and Secretary of Foreign Relations (Aug. 3, 2009).

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