

National Lawyers Guild, Association of American Jurists and IADL
Report on Constitutional Issues re Honduras Coup
(from August 2009 joint delegation to Honduras)

Constitutional and Political Aspects

Our delegation was able to verify that the rule of law and democratic institutions were violated based upon information obtained from the media, independent reports made personally available to us, as well as from our own investigation during our official visit. We interviewed both judges and prosecutors who supported the coup d'etat, as well as prosecutors, judges and prominent lawyers who opposed the coup who then became objects of persecution and reprisals for their public protest against the coup, in flagrant violation of their freedoms of expression, communication and association.

It became evident to us that functionaries of the de facto regime are backing each other and have tried to justify their actions by basing them upon constitutional principles, alleging that they were forced to take action in order to defend the *Magna Carta*. We conclude that it is impossible to defend their thesis.

Upon promulgation of the 1982 Constitution¹, the military was replaced by a civil regime under Robert Suazo Córdoba, which opened the way for Honduras to appear to be a democratic government. In reality, Honduras was converted into a center for the United States' CIA operations to recruit, organize and train Nicaraguan Contras and to carry out support operations against guerrilla movements in El Salvador and Guatemala. It was also during this period in Honduras that there were systematic violations of human rights and the Battalion 316 of Military Intelligence was formed to repress, torture and disappear human rights defenders, defenders of labor rights, the student, leftist and progressive movements of Honduras. Billy Joya Améndola, who today is part of the de facto government, was a well known perpetrator of this repression.

On August 28, 2009, a pivotal meeting took place between our delegation and the President of the Honduran Supreme Court of Justice, Chief Justice Jorge Alberto Rivera Avilés and Judge Victor Manuel Martínez Vilo of the Administrative and Labor Court.

The justices alluded to the supposed violations of the Constitution committed by the deposed President Manuel Zelaya, justifying his immediate and automatic removal from office, based upon their interpretation of the second paragraph of Article 239 ("*Whoever violates this disposition or proposes its reform...will immediately cease in the discharge of their respective responsibilities and will be barred for ten (10) years from exercising any public function.*") However, they were neither able to indicate to our delegation what type of legal proceedings had been followed, nor what specific orders had been dictated, other than ordering the immediate removal of President Zelaya from power. What they did confirm, is that Zelaya had not been accused of the crime of narcotics trafficking, as reported by some of the international press.

In summary, the Justices maintained that:

- The Supreme Court had no option but to order the dismissal of President Zelaya due to the legal situation that he created, as the Supreme Court must enforce respect for the

¹ When we refer to "the Constitution", it is of the State of Honduras, pursuant to Decree Number 31 of January 11, 1982, entering into effect on January 20, 1982, when published in *La Gaceta*, Official Daily of the Republic of Honduras (found at <http://pdba.georgetown.edu/Constitutions/Honduras/hond05.html> [85 of 85 (8/5/2009 11:17:48 AM)]); and when reference is made to articles, they also refer to this fundamental law.

- perpetual (*normas pétreas*) non-derogable constitutional provisions that President Zelaya had intended to modify.
- The situation of the Rule of Law and of Democratic Institutions must yield to the permanent and unmodifiable character of the Constitution;
 - By his simple intention of including a question via a “fourth ballot box” (whose ballot sheets they were unable to show to us when asked), President Zelaya violated the Constitution and de facto lost his position as president; there was no need to provide him any due process because he was aware that he could not modify the Constitution, as set forth in Article 374. and therefore he AUTOMATICALLY lost the presidency;
 - That Venezuela financed the printing of the ballot sheets for the “fourth ballot”, constituting interference from a foreign State and also necessitating Zelaya’s immediate removal;
 - By Zelaya’s attempt to survey the population about whether they wanted to modify the Constitution by adding a “fourth ballot box” (“cuarto urno”), “we all knew that his intention was to be reelected and thus he violated the Constitution, automatically terminating his position as President”;
 - There was no need to provide him with a special proceeding because under the Constitution his removal from office as President is automatic, nor must there be any judicial procedure because the Constitution states that the termination of office is automatic and immediate;
 - The Police were not ordered to execute the legal order because the Police were loyal to Zelaya and not to the defenders of the Constitution; for this reason, in order to guarantee impartiality and to safeguard security and protect Mr. Zelaya, the order was entrusted to the armed forces.

Our delegation notes that the justices could not state with precision the dates and times of the proceedings in the Administrative Chamber resulting in the removal of Zelaya. They admitted that the Army overstepped its authority by capturing Zelaya but that a , although they recognized that one could have been.

Legal rationale that undermines support of these stated allegations:

The basic constitutional principle, in all democratic states, must be the guarantee of equity and a fair legal process. In order to be effective, a norm such as the one cited (Article 239), necessarily and obligatorily must be subjected to an open legal process with all legal guarantees (Article 8 of the American Convention²) because the contrary leads to an arbitrary departure from justice.

Although Articles 373 and 205, clause 10, mandate that these provisions can neither be reformed nor interpreted, partial reform is in fact authorized through Article 373, by decree of the National Congress in regular sessions, by the requisite vote of two thirds of the members. This has been done on at least 163 occasions in the 22 years between 1982 and 2004. Therefore, the assertion is not correct regarding the “*pétrea*” immutable character of the Constitution.

Considering the assertion of automatic suspension (second paragraph, Article 239), the second paragraph of Article 375 sets forth the standard for judging someone who attempts to violate the Constitution. Only a fair, impartial legal proceeding can be used, requiring access to the right of defense. As such, there indeed exists a judicial procedure that should have been carried out against President Zelaya.

The duty of the Judicial Power (Articles 393, 394) is to impart justice, to apply the law to concrete cases, to judge and execute court affairs. However, the court lent itself to favor a political and military sector, by its actions, or by its failure to act or to sanction omissions, violating and not

² When we refer to “the Convention”, it is the American Convention on Human Rights, Pact of San José, subscribed November 22, 1969, ratified by Honduras on September 8, 1977.

fulfilling the essence of its offices: “At no time shall special jurisdictional forums be able to be created.”

In addition, Article 5³ provides some institutional mechanisms in a democracy for citizen consultations, such as the referendum and plebiscite, legal models that President Zelaya was planning to invoke after receiving the results of the citizens’ survey. The justices we interviewed argued that President Zelaya should have utilized these mechanisms rather than the “fourth ballot”. For the justices it was implicit that the “fourth ballot” constituted a popular consultation of this order.

Thus there is neither a foundation for the accusation of violating or of intending to unjustifiably reform the Constitution. By the same token, if we invoke the principles of legal interpretive theory, carefully reviewing the Constitution, article by article, we do not encounter foundation or support of de facto procedures for justifying the coup d’etat.

The Preamble states that the intention of the Constitution is to strengthen and perpetuate the rule of law, within justice, liberty, pluralism, peace, representative democracy and the common good - all principles that were violated with the breaching of constitutional order and of the rule of law.

Our delegation verified that diverse and wide sectors of the citizenry organized in resistance against the coup have been extremely repressed by the armed forces.⁴ Criminal charges have been brought against citizens seeking to fulfill the provisions of Constitutional Article 3:

“No one owes obedience to a usurper government nor to anyone who assumes public functions or employs by force of arms or using means or procedures that break or make unrecognizable that which this Constitution and the laws establish. Verified acts by such authorities **ARE NULL, THE PEOPLE HAVE THE RIGHT TO RESORT TO AN INSURRECTION IN DEFENSE OF CONSTITUTIONAL ORDER.**” (Bold type and underlines are NOT of the original)

Furthermore, Article 40, clause 1 dictates, as duties of citizens, the fulfillment, defense and vigilance for compliance to the Constitution and the laws.

If mechanisms exist for the consultation of citizens (i.e. plebiscite or referendum: Article 5), if the text of the consultation to establish the “fourth ballot” (or “cuarto urno”) was not – by its own text – intended to reform Article 374, and if Congress can determine the limits of the consultation, with

³ **Article 5***. The government must be based upon the principle of participatory democracy from which national integration is derived, which implies the participation of all political sectors in public administration, in order to assure and strengthen progress in Honduras based on political stability and on national conciliation.

In order to strengthen and make functional participatory democracy, mechanisms for consultation of citizens, such as the referendum and the plebiscite are instituted for issues of fundamental importance for the life of the nation.

A special law approved by two thirds of the National Congress, will determine the procedures, requirements and other necessary aspects for the exercise of popular consultations. A Referendum will be convoked regarding any Regular Law or any constitutional norm or its reform approved for ratification or not approved by the citizenry.

A plebiscite will be called requesting that the citizenry to make a pronouncement regarding constitutional, legislative or administrative issues, for those which the Constituted Powers have not made a prior decision.

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Modified by Decree 242/2003 and ratified by Decree 177/2004

⁴ See details further in this report.

the help of the Supreme Electoral Tribunal, why did Congress prohibit President Zelaya from going forward with his constitutionally protected consultation of the citizens? If they thought that President Zelaya was violating the Law or breaking the legal order, the members of the Judicial Power should have proceeded pursuant to Article 326, which states, "it is a public action that of pursuing those who offend the rights and guarantees established in this Constitution, and it will be exercised without hesitation or formality by a simple accusation."

Again we ask: why did they not do this, if the true motivation of their actions was to comply with the Constitution and the Laws?

In fact what the Judicial Authority actually did was to sentence President Zelaya, authorizing the usurpers of power to execute arbitrary de facto decisions, based solely on their supposition of the intentions of President Zelaya. It would be like convicting a citizen without trial and sending him immediately to prison based on supposedly having the intention to commit a crime, without having carried out the intent.

Furthermore, the rights of the citizenry contained in Article 37, clauses *a*) and *b*), were also violated as the decision of the people to elect President Zelaya was violated, when he was dismissed by force from public office for which he was elected, and not by legal decision and judicial process. He was thereby impeded from complying with clause 4 of Article 40: "To perform, unless resigning with justified cause, the duties for which popularly elected."

During the meeting with the Supreme Court justices, the only legal proceedings they referred to was an administrative complaint filed by Magistrate Martínez Vilo against the popular referendum. They presented neither argument nor proof of indictment. Even so, the Magistrates justified the detention of President Zelaya, regardless of the provision of Article 98 that prohibit detention unless a crime or misdemeanor have been committed.

In addition, the Constitution states (Article 99) that one's domicile is inviolable (also protected by Article IX of the American Declaration of Human Rights), except by a specific order of a competent authority (which did not exist, as we already have seen.) The raid did not comply with valid normative requirements and formalities, since the raid of President Zelaya's home was performed outside the hours of the normal operations established by law and was executed by the Army, not the police as mandated by law (Article 306 and the Penal Code).

Furthermore, not only was it [the detention] not authorized, but it was expressly prohibited in Article 102 to deport or expatriate a citizen. This violation was aggravated even more by turning him over to a foreign State.

The magistrates of the Supreme Court of Justice admitted that the Army overstepped its authority, and in response to a question from our delegation, they admitted that they had not initiated any judicial process, against either the soldiers or their superiors for this transgression, although they recognized that it was warranted.

The Armed Forces, who acted in complicity with the usurpers, failed to comply with the requirements and exceeded the powers conferred by Articles 272 and 306. They arrogated unto themselves Police functions and violating their apolitical role of safeguarding peace, of protecting the exercise of free elections and their duty to cooperate with the State Ministries, (Article 274). Instead of giving protection to State authority, they became the executioners of the constitutional Presidency, violating the chain of command outlined by Article 277, and of the population protesting the breach of institutional stability.

In addition, the Armed Forces went too far in executing orders and failed to comply with Article 22 of the Convention⁵ that, in order to have been legal, would have been accomplished by the

⁵ Article 22. Right of Free Transit and of Residency

national police. Furthermore they fulfilled their orders without authority of the President of the Republic and acting at the margin of the principles of legality, by the breaking of military professionalism.

The delegation received information regarding cases of forced military conscription of citizens, after the coup, including minors, in violation of the terms of Article 276.

In a communiqué of the Armed Forces, divulged on July 25 (and reported internationally by the daily *La Nación* of Costa Rica), the Army endorsed the Accord of San José, which includes the return of President Zelaya to Honduras, and a peaceful solution to the Honduran problem.

So it remains to be asked: Why did they continue disrespecting instead of following the legal process. Also, on the night of July 25th, General Romeo Vásquez, Joint Chief of Staff, promised not "to shoot at civilians", in statements made to *Radio Globo*, however, they did so in violation of the constitutional mandate, when they could have refused pursuant to the mandate of Article 323: **"No civil or military functionary or employee is obligated to comply to illegal orders or to those which implicate the commission of a crime."** (Bold type is NOT of the original)

Consequences of establishing the curfew of September 26 and the suspension of constitutional guarantees:

If the situation was already highly critical after the coup, decreeing the curfew worsened it, leaving the population more isolated and in an emergency situation due to the repeated and constant violations of human rights, without institutional guarantees of their rights. For that reason, the actions taken and the complaints issued by Human Rights organizations are so important.

By way of Executive Decree number PCM-M-016-2009, published in La Gaceta of September 26, 2009, the coup regime sought to give legal actions that had been carried out for months by the army and the police, permitting them to continue restricting individual guarantees and rights for 45 days. However, this decree does not comply with the dispositions of Articles 187 et al, (nor the presuppositions of Article 27 of the Convention), because it limits fundamental rights without indicating specific conditions nor was it based on reasons expressly provided by the Constitution. Furthermore, the de facto regime limited all freedoms to carry out electoral campaigns during those 45 days, aggravating its international image.

The suspension of guarantees allows us to glean that the true motivation of the perpetrators of the coup was to destroy President Zelaya, due of the confrontation and objection, by certain powerful economic and political sectors, to policy decisions made by the Executive Power.

As a result of the suspension of fundamental guarantees, various interviewees informed us that between 3000 to 4000⁶ people have been detained arbitrarily in protest demonstrations against

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1. All persons that are found legally inside the territory of a State have the right to circulate freely within the jurisdiction as well as reside within it, while abiding with the law.
 2. All persons have the right to leave freely from any country, including one's own.
 3. The exercise of the above rights cannot be restricted except by a law, within the framework of a democratic society, to prevent penal infractions or to protect national security, public security or order, public morale or health or the rights and freedoms of others.
 4. The exercise of the recognized rights in clause 1 may likewise be restricted by law, in determined areas, for reasons of public interest.
 5. No one can be expelled from the territory of the State of which he or she is a national, nor be deprived of the right to enter into the same.
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⁶ According to the Second Report of the Committee of Families of the Disappeared in Honduras (COFADEH) circulated October 22, 2009, more than 4000 persons have had their human rights violated by

the coup, thereby further violating the fundamental rights contained in Articles 2 and 3 of the Constitution, that grant the right of recourse, even of insurrection to defend of constitutional order.

Definitively it has been demonstrated that in Honduras there was a rupture of institutional order and of the Rule of Law by the unconstitutional dismissal, sequestration and the forced expatriation of the legally elected President, and the military removal of the complete Executive branch.

It was alleged that “the Honduran Constitution does not contemplate the manner by which to remove the president.” However, generally accepted constitutional norms, including those established by international conventions and treaties ratified by the Honduran State, contain an elemental principle, the guarantee of the right to a defense and the due process of law..

As stated above, the expulsion of President Zelaya violates fundamental rights and guarantees of the Honduran Constitution: Article 102, and the Preamble that establishes the constitutional precept, “that it may fortify and perpetuate the rule of law”. Other Constitutional violations include:

- Article 1 that ratifies the Rule of Law, its character as a free and democratic Republic, the enjoyment of justice, which was denied to the deposed President and those who support him;
- Article 2 was usurped by arbitrary and de facto measures, the supplanting of peoples sovereign right to legitimately express themselves in the ballot boxes;;
- Article 4 that provides for Presidential elections and the division of state powers among the three branches of the State;
- Article 5, because the decision taken by Congress, without the participation or the convocation of various Deputies who were against the coup, was neither based upon, nor contributed to, political stability or national conciliation.

We must conclude that the Honduran Special Prosecutor for Human Rights has to act more impartially and diligently.

We sustain that no Constitution may be petrous, it must permit reform or amendments. For this reason, it is necessary that all social and political sectors of the country recognize this. The people have the right to decide on the formulation of their own laws, including the Constitution, and the possibility of convoking a Constituent National Assembly should not be prohibited or punished. All citizens must be able to participate to guarantee the appropriate and universal operation of constitutional principles, including the possibility of constitutional reform or amendment, as permitted with all other democratic constitutions of the world, pursuant to the principal and inalienable right of popular sovereignty.

Content and elemental guarantees of due process

In conformity with all legal norms, national and international, every individual has the right to defend himself/herself against charges brought against him, and to be brought before an impartial and objective judicial proceeding, where guilt or innocence can be argued, proved and judged.

Even the bloodiest of criminals have the right to defense and to due process under law. The pretext of automatic dismissal which the coup perpetrators claim against President Zelaya, departs from all legal norms..

The decision to depose Zelaya, by an emergency vote in the National Congress, that only called for participation of Representatives who supported the coup, and none who opposed it, also violated President Zelaya’s rights as a citizen, and the terms and guarantees of Articles 41 and

way of executions, illegal detention, attempts on lives, threats, persecution and disappearances. At this date, the number is calculated at 6000 [persons] according to human rights organizations.

42, the provisions of Article 187 et seq., without a stated justification. Furthermore, by impeding the presence of certain legislators opposed to the coup, and voting to remove the President and name as usurper Roberto Micheletti on a Sunday, rather than on a day of regular session, they violated the rights of Chapter I, Title V, regarding the operation and jurisdiction of the Legislative Power. Also, they did not take into consideration the power of the Legislature (Article 205, clause 20), to approve or not approve of the conduct of the Executive,⁷ not to dismiss whomever heads it in absence of any proceedings or formal investigative process⁷.

The coup perpetrators neither respected nor applied Article 239 regarding re-elections, the right to defense (Article 82), the presumption of innocence (Article 89), the existence of a natural judge (Article 186), or the guarantee of due process (Article 94).

Articles 330 et seq. of the Penal Code, refer to crimes against the form of governing; but there is not any specific procedure for applying it, or for declaring the violation of this norm, much less for declaring the automatic cessation, without the right of defense on behalf of the responsible functionary, or about the form and content for the instituting rehabilitation.

If the intention would have been to defend the Constitution and legal order, the actors would have investigated and ordered an open legal process, to investigate and to resolve the allegations against de facto president Micheletti as well, who has been accused of corruption. As to the point we were able to investigate, there were no legal proceedings initiated against him.

The legitimate president, Manuel Zelaya, was not legally notified, nor has he been granted any procedural guarantees, and he has not been permitted to exercise the right to a defense. The regime threatens him with detention and incarceration. In fact, none of the functionaries we met with were able to answer the question: How are they guaranteeing him the right to a defense and due process?

Meanwhile, we read in the press [AFP] on Tuesday August 11, 2009 08:32 p.m., that the International Police – Interpol – ordered the capture of four members of the Zelaya Government, including the Ministers Enrique Flores (Energy), Rebeca Santos (Finance), Rixi Moncada (Energy) and Arístades Mejía (Vice-President).

⁷ “Impeachment”