



## **REPORT OF THE ASSOCIATION OF JUDGES FOR DEMOCRACY FOR THE UNIVERSAL PERIODIC REVIEW OF THE STATE OF HONDURAS.**

### **Introduction**

1. The Judiciary in Honduras is currently going through a critical situation because of problems related to judicial independence, which have been notorious in recent years, both before and after the coup of June 2009. Added to this is the enactment of new legislation, such as the Law on the Judicial Council and the Judicial Profession (*Ley del Consejo de la Judicatura y de la Carrera Judicial*), which, far from leading to greater order and institutional strengthening, has led to a situation of instability for judges and magistrates, in particular because of the authoritarian way that the Law is being implemented, with the main emphasis on disciplinary actions, and the clearly impairment of guarantees of judicial due process for judges.<sup>1</sup>

### **Composition and actions of the Judicial Council**

2. The aim of the Law on the Judicial Council, approved by Legislative Decree No. 219-2011,<sup>2</sup> was to separate the administrative functions of the court, and to create a professional body to ensure judicial independence and the proper appointment of judges. However, the spirit of this law has been diminished due to the way that members of the Judicial Council have been elected by Congress, violating the representation and composition of this body, and resulting in the exclusion of the representatives of the Association of Judges for Democracy,<sup>3</sup> denying them their right to be part of this governmental body of the Judiciary.
3. Unfortunately, the issue of the representation and composition of the Judicial Council was decided by Congress, not the most appropriate body due to the high level of party politics in this State entity and their habit of appointing officials to the justice system not on merit or suitability, but instead on the basis of party political preferences.<sup>4</sup>
4. The Judicial Council is currently conducting disciplinary proceedings despite the fact that in the Law on the Judicial Council and the Judicial Profession, there is no disciplinary procedure to follow or a catalogue of offences and sanctions, which was omitted by the legislature and which is being determined by a regulation that has not yet been approved. This is inadequate, as these behaviours and their

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<sup>1</sup> Report "Administración de Justicia y Fragilidad Institucional", presented by the AJD to the Inter-American Commission on Human Rights (IACHR), during the 147th period of sessions of this body.

<sup>2</sup> Which was published in the Official Gazette No. 32706 dated December 28, 2011 and became effective on January 18, 2012, ie twenty days after its publication, as provided in Article 76.

<sup>3</sup> See the section "El nombramiento e integración del Consejo de la Judicatura violentando la normativa legal", in the report: **La Independencia Judicial en Honduras: Erosionada en el marco de la Crisis Institucional**, presented by AJD before the Commission during the 149<sup>th</sup> period of sessions, on October 28, 2013.

<sup>4</sup> Article 4 of the Law on the Judicial Council and the Judicial Profession, last paragraph, states: "The plenary of Congress will elect counsellors by qualified majority who lend their oath to the same"

consequences must be exhaustively established under law. It is important to highlight that in spite of this regulatory vacuum, the Judicial Council is issuing sanctions via a disciplinary guideline (*circular disciplinario*) approved by the Council itself.

5. These mass, unjustified sanctions (imposed on judges and judicial officers) are justified by the Judicial Council, as part of its so-called “judicial cleansing” process,<sup>5</sup> which is producing an intimidating climate that seriously impairs the institutional environment for the independence of judges, who are harassed and disturbed by these measures, given that judges do not know if their legal decisions may be subject to disciplinary action.<sup>6</sup> Through these actions “38 judicial officers have been dismissed, an equal number have been suspended and 12 judicial and administrative staff have been reinstated to their posts”.<sup>7</sup> These measures in turn lead to discontent for citizens who come into contact with the judiciary, as they believe that judges do not enjoy the level of independence to decide on their claims because of the restrictions to which they are exposed.

### **Mandatory polygraph test for judges**

6. Also of equal or greater concern, is the enforcement and mandatory nature of “trust tests”, including: psychometric, performance evaluation, toxicological, polygraph and the investigation of assets.<sup>8</sup> These so-called trust tests have been applied since the Law on the Judicial Council and the Judicial Profession was reformed.<sup>9</sup>
7. Of these, only the investigation of assets was expressly authorised by the Law on the Judicial Council and Judicial Profession (art. 24), however, it is the polygraph which has generated the most opposition.<sup>10</sup> The Association of Judges for Democracy submitted an appeal for the protection of constitutional rights (*amparo*) against these provisions, on March 11, 2014, considering that they infringe guarantees of non-incrimination in criminal and disciplinary matters referred to in Article 88 of the Constitution.<sup>11</sup> The Supreme Court has admitted the *amparo* and suspended the Law, and the Constitutional Court is currently examining the merits of the case, so that the application of this test is on hold pending the decision of the Court.<sup>12</sup>
8. It is important to note that after the initial drafting of this report, the injunction against the polygraph tests was finally settled in December 2014 by the

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<sup>5</sup> <http://www.elheraldo.hn/Secciones-Principales/Sucesos/Acciones-para-depurar-Poder-Judicial-no-están-reglamentadas>

<sup>6</sup> See press release from the AJD, *Posicionamiento de AJD respecto a las recientes sanciones disciplinarias aplicadas a jueces y juezas*, dated January 22, 2014.

<sup>7</sup> Available at <http://www.elheraldo.hn/pais/732482-214/suspenden-a-cuatro-funcionarios-judiciales>

<sup>8</sup> The amended Article 3 of the Law on the Judicial Council established in subsection m) “Practice on appeal court judges, judges, officials, and administrative, judicial, and technical staff of the Judiciary in general or selective tests of trust including toxicological, psychometric, psychological, polygraph, studies and investigations of assets, performance evaluation and compliance with legal terms”.

<sup>9</sup> Decree No. 291-2013 which reform Articles 3 and 4, 6,9,23,24,34,36,41,63, and 74 of the Law on the Judicial Council and the Judicial Profession.

<sup>10</sup> *Jueces se oponen a prueba del polígrafo*. *La Prensa*, 05/08/2013.

<sup>11</sup> In the following days after the action was brought, some interesting statements appeared in the national press written by renowned Argentine jurist and judge Raúl Zaffaroni, who, as part of a visit to the country, noted that “I do not believe at all in polygraph tests, and moreover the dignity of officials must be respected. But here this is being applied to the whole world not only to police and determines whether or not people stay in their posts. Soon, the next step will be to inject 5 centimetres of sodium pentothal into the individual’s veins and hey presto, it’s more sure than the polygraph”. *Eugenio Raúl Zaffaroni*. *Día 7, La Tribuna*, 15/03/2014 (digital version).

<sup>12</sup> *Pleno de la CSJ admite recurso de amparo contra el polígrafo*. *Proceso Digital*, 28/05/2014.

Constitutional Chamber which declared it inadmissible thereby allowing the application of polygraph tests on judges and judicial officers to continue.<sup>13</sup> This decision gives way to a situation that will surely lead to undue intervention in the private lives of judges and this will bring consequences or restrictions to judicial independence, especially when it is announced that tests such as polygraphs and other so-called trust tests will be applied by the Armed Forces.<sup>14</sup>

### **Insufficient Procedures for the Judicial Profession**

9. Aside from the publicised disciplinary proceedings for judges and auxiliaries, which can be interpreted as a willingness to clean up the judiciary, but also as submitting to the security policies of the Executive branch, members of the Judicial Council have failed, almost a year after their appointment,<sup>15</sup> to structure their own proposal for institutional strengthening of the Judiciary, in technical, legal and policy terms.
10. The Judicial Council has not implemented transparent mechanisms based on merit, for entry to the judiciary; it has instead continued the practice of appointing court officials outside the competition mechanism, supposedly on an interim basis.<sup>16</sup> Promotions are made without following the pre-established criteria and parameters; in both cases political recommendation or affinity prevails. These practices hinder the professionalisation of the judiciary by institutionalising regulated and transparent competition practices for entry and promotion.<sup>17</sup> To this situation we must add the lack of planned actions for vocational training, which limits the judicial function and to some extent contributes to impunity in the country.

### **Independence of the Judiciary**

11. Supreme Court judges in Honduras are currently chosen in decisions which are clearly motivated by party politics. The last two election processes in January 2002 and 2009, were conducted using a broadly representative nominating committee as a mechanism, who presented to Congress a list of 45 candidates. While this body has not been without accusations of politicisation, the problem does not appear to lie with the list of candidates but in the selection of the 15 judges by Congress.<sup>18</sup> Both times an 8-7 deal between the two major parties has prevailed, leaving out candidates with high academic and professional profiles nominated by the Board, who have no political patronage.
12. Judicial independence in Honduras is and has been in the recent past a highly contested constitutional guarantee. In particular, the lack of judicial independence during the coup of June 2009 has been noted. This can be seen in the support of the

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<sup>13</sup> <http://www.tiempo.hn/naci%C3%B3n/item/14453-en-firme-el-pol%C3%ADgrafo-para-los-servidores-judiciales>

<sup>14</sup> <http://www.latribuna.hn/2015/03/04/ff-aa-aplicaran-pruebas-de-confianza-en-poder-judicial/>

<sup>15</sup> The Judicial Council was installed and began functions on October 11, 2013

<http://www.elheraldo.hn/csp/mediapool/sites/ElHeraldo/Pais/story.csp?cid=583582&sid=299&fid=214>

<sup>16</sup> <http://www.laprensa.hn/honduras/tegucigalpa/716155-98/emiten-reglamentos-y-manuales-para-jueces-y-magistrados-de-honduras>

<sup>17</sup> See "Hacia una verdadera carrera judicial en Honduras: Análisis y Propuestas", study by Andrés Pérez, 2014, pág. 56 (currently in print)

<sup>18</sup> International Commission of Jurists, *Honduras: La administración de justicia, la independencia judicial y la profesión legal*, Geneva, 2004, p. 25

- Supreme Court for the *de facto* authorities “defending restrictive measures at the expense of the protection of human rights and the rule of law”.<sup>19</sup>
13. This impairment or lack of judicial independence and impartiality “negatively affects the effectiveness of the administration of justice and the potential of judges to act as human rights defenders”.<sup>20</sup> This was evident in the events after the rupture of constitutional order when three judges and a magistrate, members of the Association of Judges for Democracy who opposed the coup, were dismissed. At that time the judges in question were promoting critical measures for the protection of citizens’ rights.<sup>21</sup> As a result of taking this position in favour of upholding the rule of law and jurisdictional responsibilities, they were repressed and subsequently expelled from the Judiciary.
  14. Regarding the reinstatement of the three judges and one magistrate dismissed for opposing the coup d’état,<sup>22</sup> the State has not shown any willingness to amicably resolve this case, which has already been submitted by the Inter-American Commission to the Court.<sup>23</sup>
  15. In December 2012, Congress decided to dismiss four judges from the Constitutional Chamber of the Supreme Court, which raised concerns in both domestic and international sectors about the precariousness of judicial independence in Honduras.<sup>24</sup> This time the Legislature, acting outside of the boundaries established for the separation of powers, imposed their power, thereby exposing the subordinate nature of the judiciary with regards to the legislature.<sup>25</sup>
  16. In relation to the subject of the subordination of the Judiciary by the Legislature, the UN Special Rapporteur on the Independence of Judges and Lawyers, said: *The National Congress of Honduras exerts considerable control over the judiciary, which is incompatible with the principle of separation of powers and independence of the judiciary, fundamental elements of any democracy and any rule of law.*<sup>26</sup>
  17. The United Nations Rapporteur on the Independence of Judges and Magistrates, Gabriela Knaul, also stated: “*The dismissal of four judges represents a serious attack on democracy in Honduras*”, considering that: “*Judges may be dismissed only on serious grounds of misconduct or incompetence, after a procedure that*

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<sup>19</sup> Report of the High Commissioner of the United Nations Human Rights on Violations of Human Rights in Honduras since the coup d’état in 2009, released on March 3, 2010, paragraph 68, page 16.

<sup>20</sup> Declaration of the United Nations Rapporteur on the Situation of Human Rights Defenders, Margaret Sekaggya, on the conclusion of her official visit to Honduras, from 7 to 14 February 2012.

<sup>21</sup> See, Report of the United Nations High Commissioner for Human Rights on Violations... Op. cit., paragraph 68, p. 16.

<sup>22</sup> Recommendation No. 61 from Slovenia; Recommendation No. 71 from Argentina; Recommendation No. 77 from Mexico and Recommendation No. 131 from Slovakia.

<sup>23</sup> Available at <http://www.oas.org/es/cidh/prensa/comunicados/2014/032.asp>

<sup>24</sup> On the case of the four dismissed justices expressed concern the Inter-American Commission on Human Rights and the Special Rapporteur of the United Nations on the independence of judges and lawyers, Gabriela Knaul, see: <http://www.oas.org/es/cidh/prensa/Comunicados/2013/003.asp>  
<http://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=12958&LangID=S>

<sup>25</sup> See, “Honduras: magistrados destituidos califican de ilegal acto de diputados”, available at: <http://www.laprensa.hn/Secciones-Principales/Honduras/Tegucigalpa/Honduras-Magistrados-destituidos-califican-de-ilegal-acto-de-diputados#panel1-1>; “Congreso destituye a 4 magistrados de la Corte”, available at: <http://tiempo.hn/portada/item/3420-congreso-destituye-a-4-magistrados-de-la-corte>; See also, Honduras: FIDH Denuncia Destitución de Magistrados de la Corte Suprema <http://www.fidh.org/FIDH-denuncia-destitucion-de-12665>, December 21, 2012, See also: press release of the International Commission of Jurists dated December 13, 2012

<sup>26</sup> See, “Grave atentado a la democracia de Honduras la destitución de cuatro magistrados de la Sala Constitucional”, available at: <http://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=12958&LangID=S>

*complies with due process and the guarantees of a fair trial and that also includes independent review of the decision”.*<sup>27</sup>

### **Protection mechanism for judges and justice operators**

18. Our country is currently experiencing a situation of violence and insecurity of truly alarming proportions, reaching in recent years an average rate of 85 homicides per 100,000 inhabitants. This insecurity is counterbalanced by the deep crisis in our justice institutions. Judicial officers are among those who have been murdered, which is worrying because it is indicative that if they are targets or objectives of pressures and manifestations of violence, it is a sign of the impunity that individuals or groups linked to common or organized crime seek to deepen in the country.<sup>28</sup>
19. The murder on July 24, 2012 that claimed the life of Sentencing Judge Mireya Efigenia Mendoza Peña,<sup>29</sup> shows the risks facing judges, especially those who administer justice in criminal matters. We must add to this tragic event, the murder of Orlan Chávez, Special Prosecutor in the Unit against Money Laundering, which occurred on April 18, 2013, and also the Prosecutor for Human Rights, Eduardo Díaz Mazariegos<sup>30</sup> on September 24, 2012. Also, on March 13, 2014, Lenin Castañeda<sup>31</sup>, a Justice of the Peace from the Iriona municipality, Department of Colon, was killed. And in addition, after the initial drafting of this report, it should be noted that on October 8, 2014, Public Prosecutors Marlene Jeanneth Banegas and Olga Eufragio were killed in the city of San Pedro Sula.<sup>32</sup>
20. Following the murder of Judge Mireya Mendoza, the Association of Judges for Democracy proposed to the Judges of the Supreme Court, that urgent steps be taken to establish and put into effect a **protection mechanism** in the short term, for judges, magistrates, public defenders and judicial assistants who face serious threats or security risks because of their roles in the administration of justice.<sup>33</sup> Unfortunately this request has been ignored by the authorities, meaning that judges are defenceless and subjected to new threats or pressures against them.<sup>34</sup>
21. The protection mechanism for judges has recently been reiterated by the AJD, during the discussion in Congress of the draft “Law on the Protection of Human Rights Defenders, Journalists and Justice Operators”, which is currently awaiting the third and final debate on its approval.<sup>35</sup> Specifically, the AJD proposed a mechanism of protection for judges who work within the judiciary, with a procedure for receiving complaints of threats, risk and attacks against justice officials.<sup>36</sup> Once

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<sup>27</sup> Ibid. “Grave atentado a la democracia de Honduras la destitución de cuatro magistrados de la Sala Constitucional”, available at: <http://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=12958&LangID=S>

<sup>28</sup> Letter from the Association of Judges for Democracy sent to the President of the Supreme Court, soon after the murder of Judge Mireya Mendoza Peña, who also served as the director of the association.

<sup>29</sup> <http://www.laprensa.hn/csp/mediapool/sites/LaPrensa/Sucesos/Policiales/story.csp?cid=364998&sid=951&fid=98>

<sup>30</sup> <http://www.elheraldo.hn/csp/mediapool/sites/ElHeraldo/Sucesos/story.csp?cid=620419&sid=293&fid=219>

<sup>31</sup> <http://honduprensa.wordpress.com/2014/03/14/sicarios-asesinan-al-juez-de-paz-de-iriona/>

<sup>32</sup> <http://www.laprensa.hn/lasultimas24/574324-97/honduras-asesinan-a-un-juez-y-a-un-abogado-en-el-norte>

<sup>33</sup> <http://www.laprensa.hn/sucesos/756809-410/matan-a-dos-fiscales-en-el-norte-de-honduras>

<sup>34</sup> Ibid., footnote 23 supra.

<sup>35</sup> <http://www.elheraldo.hn/pais/737909-331/aumentan-amenazas-a-muerte-contra-jueces-de-lo-penal-en-honduras>, see also: <http://www.radioprogreso.hn.net/~rprog/index.php/comunicaciones/noticias/item/1276-ajd-%E2%80%99Cameras-doblegan-impartici%C3%B3n-de-justicia-en-el-pa%C3%ADs%E2%80%9D>

<sup>36</sup> <http://www.elheraldo.hn/pais/736466-331/pasa-en-segundo-debate-ley-de-protecci%C3%B3n-de-periodistas>

<sup>36</sup> Ibid., footnote 23 supra.

evaluated, these situations of risk must be addressed with specific protection measures to safeguard the lives of judges, their families and to preserve their independence.

**RECOMMENDATIONS TO THE STATE:**

- I. The Judicial Council must promote transparent and impartial selection, appointment and promotion of judges to the effect that party-politics or other influences limiting the independence of such officials is avoided.
- II. The selection and appointment processes undertaken by the Judicial Council, must be conducted based on principles of equality and merit. The people selected must have integrity and the appropriate legal qualifications and training.
- III. Ensure that processes for selecting judges are widely publicised and open to scrutiny by social sectors and that civil society participates in the shortlisting of those selected.
- IV. The State must strengthen guarantees of judicial independence, through actions to strengthen the stability of judges.
- V. The State must develop measures to demand respect for judicial independence, a necessary condition for access to justice for victims of human rights violations.
- VI. Reform the Law on the Judicial Council and the Judicial Profession in order to establish via the law the regulatory framework for disciplinary proceedings against judges.
- VII. The Judicial Council must promote disciplinary proceedings with respect for due process, ensuring an effective remedy for judges to review decisions.
- VIII. The Honduran State must revise its policy of judicial cleansing due to the impact this has caused to judicial activity, especially the independence of judges.
- IX. A mechanism for judicial protection must be devised offering protection measures for judges who are at risk or suffering threats because of their judicial function.
- X. The protection mechanism for judges at risk must be developed by authorities of the Judiciary, to avoid interference by the executive branch in judicial independence.