



Lic. Carlos Mauricio Funes Cartagena
 President of El Salvador

Santa Rosa de Copán, Panama, Mexico, Lima, La Paz, San Salvador, Washington, D.C., June 30, 2011

Dear President Mauricio Funes Cartagena,

We are writing to express our deep concern regarding the state of judicial independence and respect for the rule of law in El Salvador. As you know, every democratic society requires a strong and independent justice system which can protect the basic rights of citizens without distinction, ensure legality irrespective of the interests at issue, and act as a check on any excesses and arbitrary practices of the other two branches of government. This has been the role the Constitutional Chamber of the Salvadoran Supreme Court has played so far. In this letter, the undersigned organizations would like to express our **rejection of Decree No. 743, as we believe that it undermines the independence of the Salvadoran judiciary and it violates El Salvador's international obligations in these matters.**

The organizations signing this letter are based in several countries in the region: Asociación de Organismos No Gubernamentales (ASONOG) and its 14 member organizations in Honduras; Alianza Ciudadana Pro Justicia and its 24 member organizations in Panama; Red Iberoamericana de Jueces (REDIJ); Instituto de Defensa Legal (IDL) in Peru; Fundación CONSTRUIR in Bolivia; Fundación de Estudios para la Aplicación del Derecho (FESPAD); Fundación Nacional para el Desarrollo (FUNDE); Coalición para la Reforma Política y Electoral and its 13 member organizations; and Fundación para el Desarrollo Económico y Social (FUSADES) of El Salvador;

the Washington Office on Latin America (WOLA) and the Due Process of Law Foundation (DPLF), based in Washington, D.C., United States. The above organizations work towards promoting judicial independence in Latin America, among other goals.

Several international instruments signed by the Republic of El Salvador recognize the fundamental right of all citizens to be tried by an impartial and independent tribunal. The *American Convention on Human Rights* provides in Article 8(1) that '[E]very person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law,' and the same is stated in Article 14(1) of the *International Covenant on Civil and Political Rights*. The *United Nations Human Rights Committee* has noted that this right 'is an absolute right that may suffer no exception' (Com. 263/1987, para. 5.2). In addition to the above, the *Inter-American Court of Human Rights* has established that judicial independence is 'a fundamental guarantee of due process' (Case of Herrera Ulloa, para. 171; Case of Reverón Trujillo, para. 67) and that this principle is 'necessary for the protection of fundamental rights' (Case of Reverón Trujillo, para. 68).

The separation of powers is essential for the respect of judicial independence. Therefore, the *Inter-American Court of Human Rights* has held that 'one of the principal purposes of the separation of public powers is to guarantee the independence of judges.' (Case of the Constitutional Court, para. 73; Case of Reverón Trujillo, para. 67). This was confirmed by the *Special Rapporteur on the independence of judges and lawyers* in her report of March 2010 to the United Nations General Assembly, noting that 'this principle must be respected by all States.' The Rapporteur also specified that '**an independent judiciary is fundamental for the respect of the rule of law and the development of democracy**' (para. 93).

The principles of separation of powers and judicial independence are also enshrined in the *Inter-American Democratic Charter* of the Organization of American States, which provides in Article 3 that '[e]ssential elements of representative democracy include, inter alia, respect for human rights and fundamental freedoms [...] and the separation of powers and independence of the branches of government.' These same terms were used in Resolution 2002/46 of the *United Nations Human Rights Commission*, called Further measures to promote and consolidate democracy.

Pursuant to Article 174 of the Salvadoran Constitution, the role of the Constitutional Chamber of the Supreme Court of Justice is 'to take cognizance of and resolve the petitions of unconstitutionality of laws, decrees and regulations, cases on *amparo*, habeas corpus, the controversies between the Legislative and Executive Bodies referred to in Article 138, and the causes mentioned in the 7th power of Article 182 of this Constitution.' Article 172 of the Constitution also provides that '[t]he Magistrates and Judges, in matters referring to the exercise of jurisdictional functions, are independent and are subject exclusively to the Constitution and the law.'

Given the above, it can be concluded that Decree No. 743, promulgated on June 2, 2011, not only contravenes the Constitution but also the principles of separation of powers and judicial

independence. The Decree exclusively applies to the Constitutional Chamber (and not to other Chambers of the Court) and creates a provisional regime that will be in force until July 31, 2012, when five new members of the Supreme Court will be appointed. This provisional regime alters the rules established in the Organic Law of the Judicial Branch regarding substitute justices (*suplentes*) in this Chamber, and requires that all decisions concerning constitutional challenges and suspension or loss of citizenship rights are adopted by unanimous vote.

Several issues should be noted about the Decree. First, it is important to identify that the Legislative Assembly is legislating on the internal procedures of a specific Supreme Court chamber for a specified and limited period of time, rather than to establish a general rule which would apply to the Court as a whole starting with the next Court term, and this clearly interferes with the work of the Constitutional Chamber. Article 183 of the Constitution states that this Supreme Court Chamber is the only competent authority to deal with constitutional challenges. **Constitutional interpretation is, therefore, a vital part of its work rather than an abuse of power by this Chamber, as some of its critics claim.** Any limitation to this power would constitute a serious violation of judicial independence, as previously explained. An attempt by the Legislative Assembly or the Executive Power to modify these procedures, as Decree No. 743 does, constitutes a serious violation of the principle of separation of powers as in practice, it restricts the interpretative freedom of the Constitutional Chamber that is recognized by the Constitution and protected by the international standards described above.

Moreover, Article 186 (3) of the Constitution provides that the Supreme Court of Justice is a collegiate tribunal which seeks to represent 'the most relevant currents of judicial thought.' It thus becomes clear that there are several valid conceptions of judicial theory. As a result, requiring that all decisions by the Supreme Court chambers be made unanimously constitutes an undue restraint. It is important to note that **the requirement that decisions should be made by unanimous vote does not exist in other, similar, tribunals worldwide:** Spain's Constitutional Court decides by majority vote (Art. 90 LOTC), and so do the Colombian Constitutional Court (Art. 54, Law 270/1996) and the Peruvian Tribunal (Art. 5 LOTC), among others.

The **security of tenure of judges and magistrates** is another essential element of judicial independence, and a fundamental principle recognized by several instruments and international authorities. First, Principle 11 of the *UN Basic Principles on the Independence of the Judiciary* provides that '[t]he term of office of judges... shall be adequately secured by law'. In accordance with Principle 12, 'judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the conclusion of their term of office' [...].

Also, in General Comment No. 32 the *United Nations Human Rights Committee* noted that 'the dismissal of judges by the executive, e.g. before the expiry of the term for which they have been appointed, without any specific reasons given to them and without effective judicial protection being available to contest the dismissal, is incompatible with the independence of the judiciary' (Comm. 814/1998, para. 20).

Similarly, the *Inter-American Court of Human Rights* has clearly stated the importance of the principle of security of tenure (Case of the Constitutional Court, para. 75; Case of Palamara Iribarne, para. 15; Case of Apitz Barbera, para. 138). The Court clarified that ‘tenure is a guarantee of the judicial independence that at the same time is made up by the following guarantees: continuance in the position, an adequate promotions process, and no unjustified dismissals or free removal.’ This means that **‘if the State does not comply with one of these guarantees, it affects the tenure and, therefore, it is not complying with its obligation to guarantee judicial independence’** (Case of Reverón Trujillo, para. 79).

It is worth stating that transferring justices from or within the Supreme Court of Justice is not within the powers of the Executive or the Legislative Bodies. In fact, the removal or unjustified transfer of justices to a different chamber by a body which lacks such authority would constitute a serious violation of the judicial independence guaranteed by the above-mentioned international instruments. The interference with the security of tenure of magistrates and their substitute justices in the Supreme Court, as intended by Article 1 of Decree No. 743, already constitutes a violation of such principle and a serious violation of the international obligations of El Salvador.

Experience shows that respect for the above rules by public institutions is essential for building public trust. We are confident that you share this same concern and that, in the exercise of your duties, you will respect these important principles for the development of El Salvador. Based on the international obligations undertaken by El Salvador and described in this letter, establishing the constitutional rule of law and judicial independence, **the undersigned organizations urge the Legislative Assembly to abolish Decree No. 743 and to refrain from any attempt to interfere with the independence of the courts or justice operators in El Salvador.**

Sincerely,

José Ramón Ávila
Executive Director
Asociación de Organismos No-Gubernamentales (ASONOG)
Santa Rosa de Copán,
Honduras
www.asonog.hn

Abraham Ábrego
Deputy Director
Fundación para la Aplicación del Derecho (FESPAD)
San Salvador, El Salvador
www.fespad.org.sv

Daniel Urrutia Laubreaux
Coordinator
Red Iberoamericana de Jueces
Juez del Séptimo Juzgado de Garantía de Santiago de Chile.
Mexico City, Mexico
www.redij.org

Magaly Castillo
Executive Director
Alianza Ciudadana Pro Justicia
Panama, Panama
www.alianzaprojusticia.org.pa

Ramiro Orías
Executive Director
Fundación CONSTRUIR
La Paz, Bolivia
www.fundacionconstruir.org

Roberto Rubio Fabián
Executive Director
Fundación Nacional para el Desarrollo (FUNDE)
San Salvador, El Salvador
www.funde.org

Claudia Umaña

Director of the Legal Studies
Department
*Fundación Salvadoreña para
el Desarrollo Económico y
Social (FUSADES)*
San Salvador, El Salvador
www.fusades.org

David Lovatón

Member of the Steering
Committee and program
coordinator
Justicia Viva
*Instituto de Defensa Legal
(IDL)*
Lima, Peru
www.idl.org.pe

Geoff Thale

Program Director
*Washington Office on Latin
America (WOLA)*
Washington, D.C., United
States
www.wola.org

Ramón Villalta

Coordinator
*Coalición para la Reforma
Política y Electoral (CREE)*
San Salvador, El Salvador
www.isd.org.sv

Katya Salazar

Executive Director
*Due Process of Law
Foundation (DPLF)*
Washington, D.C.
www.dplf.org

CC:

- Dr. Santiago Sánchez Cerén, Vice President of El Salvador
- Lic. José Manuel Melgar Henríquez, Minister of Justice and Public Security
- Ing. Hugo Roger Martínez Bonilla, Minister of Foreign Relations
- Lic. Franzi Hasbún Barake, Secretary of Strategic Matters for the Presidency
- Members of Congress of El Salvador
- Dr. María Otero, Subsecretary of State for Democracy and Global Issues, US Department of State
- Dr. Arturo Valenzuela, Subsecretary of State for the Western Hemisphere, US Department of State
- Dr. Santiago Cantón, Executive Secretary of the Inter-American Commission Human Rights
- Lic. Gabriela Carina Knaul de Albuquerque e Silva, UN Special Rapporteur on the independence of judges and lawyers
- Lic. Carmen Rosa Villa, Regional Representative of the OHCHR in Central America
- Dr. Carlos Felipe Jaramillo, Director of Central America, World Bank
- Dr. Rodrigo Parot, Representative of the Inter-American Development Bank (IDB) in El Salvador
- Lic. Carl Derrick, Chief of mission of USAID in El Salvador
- Embassies in El Salvador