



# MUZZLED JUSTICE

## The capture of El Salvador's Justice System

### EXECUTIVE SUMMARY

# Contents

---

Introduction	3
1. Brief overview of the conceptual framework	5
2. Recent history of judicial independence in El Salvador	7
3. The judicial independence crisis in El Salvador	10
4. Responses to the crisis	17
5. Impacts of the crisis	19
Conclusions	20
Recommendations	22

---

# Introduction

Judicial independence is the backbone of democratic systems, as the judiciary has the fundamental role of exercising oversight over the actions of the other branches of government—the executive and legislative branches—to ensure that they are consistent with the law. It is also ultimately responsible for the protection of the human rights and fundamental freedoms of individuals. Although no judges, at any level of the judiciary, come to office through popular elections, their legitimacy derives directly from the Constitution and is strengthened through their tenure.

Based on this conceptual framework, this report documents the crisis of judicial independence in El Salvador and its various stages, brought about by the co-optation of the judiciary and the institutional subordination of the judiciary to the political bodies: the executive branch (the office of the president), and the legislative branch (the Legislative Assembly). After dismantling the leadership of the judiciary and the public prosecution service, the Legislative Assembly passed two unconstitutional decrees (decrees 144 and 145) ordering the immediate dismissal—without compensation—of all judges and prosecutors aged 60 years or older, or who had over 30 years of public service as a judge, which affected more than one-third of the country's judicial officials.

This report also documents the impacts of the

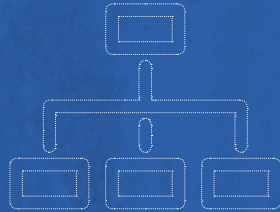
crisis: the chaos within the justice system; the use of the new legal framework by the Supreme Court to take measures that deepened or aggravated the effects on judicial independence, such as the offer of a financial bonus to those who voluntarily resigned before the entry into force of the reforms; the use of transfers as a system of rewards and punishments; and the direct appointment of replacements to fill the vacancies created, without following the regular mechanism for entry into the judicial career service.

Finally, it identifies several actions taken at the time in response to the crisis: the previous members of the Constitutional Chamber—made up of legitimate judges—declared *sua sponte* that their removal and the imposition of their replacements was unconstitutional; interim measures were ordered to halt the application of the amendments to the Judicial Career Law (LCJ) based on international instruments for the protection of the human rights of older persons; and this blow to justice was condemned before international human rights organizations. Judges have also participated in street protests, issued statements, and organized press conferences, and different sectors of the national and international community have expressed their opposition to the measures taken by the Legislative Assembly.

Despite this, the capture of the judiciary continues to have a serious impact on the

quality of democracy—by diluting the principle of separation of powers—and on the protection of rights and freedoms. Today, President Bukele openly orders that certain judges be investigated or disciplined for the content of their decisions. Judicial independence in El Salvador has been seriously and extensively undermined, citizens have been left without protection, and their rights are contingent on the interests of an authoritarian power.

# 1. Brief overview of the conceptual framework



## 1.1 JUDICIAL INDEPENDENCE IN DEMOCRATIC SYSTEMS

The Inter-American Democratic Charter is an international instrument that reflects the commitment of the States of the Americas to protect and defend representative democracy. Article 3 of this instrument, to which El Salvador is a signatory, defines the essential elements of this system, including “access to and the exercise of power in accordance with the rule of law,” “separation of powers and independence of the branches of government,” and “respect for human rights and fundamental freedoms.”

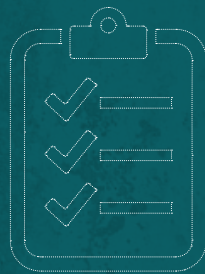
Democracy is also enshrined in the Salvadoran Constitution of 1983, which establishes that the government is democratic, republican, and representative (Article 85). “Republican” means that public authority is shared by three separate and independent bodies (legislative, executive, and judicial), which exercise powers derived from the same Constitution and exercise mutual checks and balances. The Salvadoran Constitution also embraces a model of constitutional rule of law, which grants judges the power and duty not to enforce any laws or regulations that contradict the principles or rights guaranteed in the Constitution (Article 149) or in international human rights treaties.

## 1.2 THE RIGHT TO A COMPETENT, INDEPENDENT, AND IMPARTIAL JUDGE UNDER INTERNATIONAL HUMAN RIGHTS INSTRUMENTS BINDING ON EL SALVADOR

The international human rights instruments—both universal and regional—binding on El Salvador recognize the principle of judicial independence as the right of every person to be heard by a competent, independent, and impartial tribunal.

In the universal system, this right is recognized, *inter alia*, in the Universal Declaration of Human Rights (Article 10), the International Covenant on Civil and Political Rights (Article 14.1), and the Convention on the Rights of the Child (Articles 37.d, 40.2.b.iii, and 40.2.b.v), as well as in specific documents such as the Basic Principles on the Independence of the Judiciary and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Articles 37.d, 40.2.b.iii, and 40.2.b.v). In the inter-American system, it is included in the American Convention on Human Rights (Article 81), and has been developed in multiple judgments of the Inter-American Court of Human Rights that have specifically established that it includes these guarantees: (i) an appropriate appointment process, (ii) irremovability from office; and (iii) protection from external pressures (Inter-American Court of Human Rights, 2001, 73-75).

## 2. Recent history of judicial independence in El Salvador



### 2.1 REPORT OF THE TRUTH COMMISSION AND STRENGTHENING OF THE JUDICIAL SYSTEM

One of the main points of the 1992 Peace Accords (PA) was restructuring the judicial system to make it more independent. Several constitutional amendments were adopted,<sup>1</sup> including changes to the mechanism for the selection of the justices of the Supreme Court of Justice (CSJ). It also provided for the renewal of the CSJ's membership by thirds, so that a change in its composition would require three legislatures and almost two presidential terms in the executive branch, thus preventing its capture by the political branches.

The PA included the creation of a Truth Commission to investigate serious human rights violations committed during the armed conflict. The Commission confirmed that the Salvadoran justice system, in complicity with other government bodies, allowed serious human rights violations to go unpunished.

In its final report, the Commission stated that the “judicial system was weakened because intimidation had taken hold of it and the foundations for corruption were laid” and that “it had never enjoyed institutional independence

<sup>1</sup> These amendments include: (i) creation of a Judicial Training School under the responsibility of the National Council of the Judiciary, (ii) new powers for the National Council of the Judiciary, authorizing it to put forward nominations for the Supreme Court and shortlists for the appointment, training, and evaluation of judges of other courts, (iii) minimum budget allocation for the judiciary of 6% of the current revenues of the State budget, (iv) strengthening of the judicial career system by guaranteeing, among other things, the irremovability of judges from office and the prohibition of their removal except for reasons established by law and following a predetermined procedure, (v) reforms to the process for selecting Supreme Court justices, extending the term of office of its members from 5 to 9 years, and introducing the possibility of term renewal.

from the legislative and executive branches, and its ineffectiveness only increased until it became, due to its inaction or regrettable subservience, a contributing factor in the tragedy that the country has suffered” (Truth Commission, 1993, 85). It also asserted that, had the judiciary functioned properly, it would have shed light on many crimes and imposed penalties, “but its incapacity was part of the reality.”

## 2.2 REPORTS OF INTERNATIONAL BODIES

The situation of judicial independence in El Salvador has been assessed and documented by international human rights organizations and other actors in the international community through visits and reports. Recently, on May 3, 2021, the Inter-American Commission on Human Rights (IACHR) condemned the dismissal of the prosecutor general and the justices of the Constitutional Chamber of the Supreme Court that occurred on May 1 (IACHR, 2021a). On September 7, 2021, the two bodies issued a joint statement against the amendments to the Judicial Career Law and the Implementing Law of the Public Prosecutor’s Office and urged the State to respect the independence of both bodies (IACHR, 2021b).

## 2.3 FREEDOM OF ASSOCIATION OF JUDGES

Judges’ associations and federations play an essential role in defending judicial independence. In El Salvador, there are six such associations.<sup>2</sup>

<sup>2</sup> The Association of Judges of El Salvador (AMJUES), founded in 1994; the Association Magistrates of El Salvador (AJUPES), created in 1995; the Forum of Democratic and Independent Judges, created in 2001; the Chalatenango Association of

However, they have played a very limited, nearly invisible role during the justice crisis triggered by the events of May 1, 2021. There have been no categorical statements from judges as a group; any criticisms and objections have been voiced by individual judges. There are two Supreme Court justices who are or have served as presidents of the judicial associations and who have not reacted to the attacks from the political branches.<sup>3</sup>

## 2.4 THE GUARANTEE OF JUDICIAL INDEPENDENCE IN THE CONSTITUTION

The principle of judicial independence is enshrined in Article 172, paragraph 2 of the Salvadoran Constitution. Other constitutional articles guarantee specific aspects of this principle, such as the prohibition that forbids any authority from taking over pending trials or proceedings or creating external commissions to audit the work performed by judicial authorities (Article 17, paragraph 1); the requirement that the organization and functioning of the judicial branch be determined by the legislature (Article 172, paragraph 2); the exclusive right of the Supreme Court to propose laws related to the judiciary (Article 133, paragraph 3); the obligation to appoint senior judicial authorities based on merit and the precept that judges may not engage in the private practice of law, provide notary public services, or hold public office (Article 188);

Judges (AJUCHAL), created in 2008; the Association of Judges for the Democratization of Justice in El Salvador (AJUDJES), and the Association of Women Judges of El Salvador (AMJES).

<sup>3</sup> Supreme Court Justices Roberto Carlos Calderón Escobar and Leonardo Ramírez Murcia have been presidents of the Association of Judges of El Salvador (AMJUES) and the Democratic and Independent Judges Forum (JDI), respectively. Elsy Dueñas, one of the justices installed on May 1, served as president of the Association of Women Judges of El Salvador (AMJES).



the allocation of a minimum budget (Article 172); the guaranteed security of tenure (Article 172, paragraph 4); the guarantee of protection and fair remuneration for judges (Article 186, paragraph 5); the establishment of a judicial career system (Article 186, paragraph 6) and the judicial authority to not enforce laws that violate the Constitution (Articles 185 and 149).<sup>4</sup>

## 2.5 DEVELOPMENT OF THIS GUARANTEE IN CONSTITUTIONAL CASE LAW

The Constitutional Chamber of the Supreme Court has developed extensive case law on various dimensions and aspects of judicial independence. These include the principle that judges are not subordinate or subject to any legal or social authority other than the law;<sup>5</sup> the principle of judicial impartiality;<sup>6</sup> the guarantee of independence from the authorities of the judiciary itself;<sup>7</sup> and the connection between independence and public confidence in the exercise of jurisdiction,<sup>8</sup> among others.

The judgments that have invalidated the appointments made by second-degree elections (by the Legislative Assembly)—in which the Chamber found that ties with political parties

affected the independence of the appointees—occupy a special place in this body of case law.<sup>9</sup>

4 Other secondary legislation that also contains regulations on judicial independence are the Organic Law of the Judiciary, the Judicial Career Law, the Code of Criminal Procedure, the Code of Civil and Commercial Procedure, and the Law of the National Council of the Judiciary, among others.

5 Ruling of inadmissibility handed down by the Constitutional Chamber in *amparo* proceeding 756-2006, dated 3/29/2007, filed by the magistrate judge of Santa Clara, department of San Vicente, against the Chamber of the Third Section of the Central District in San Vicente. See also Judgment of Unc. 46-2003 of 4/19/2005.

6 Judgment of Unc.15-96, Consolidated, of 2/14/1997.

7 Judgment of Unc.5-99 of 7/20/1999.

8 Judgment of Unc. 149-2013 of 5/23/2018.

9 Such as the chief judge and the judges of the Supreme Electoral Tribunal (Judgments of Unc. 7-2011 of 5/13/2011 and 18-2014 of 6/13/2014); Supreme Court justices (Judgments of Unc. 19-2012 and 23-2012 of 6/5/2012), the prosecutor general of the republic (Judgment of Unc. 29-2012 of 7/10/2012), judges of the Court of Auditors of the Republic (Judgment of Unc. 49-2011 of 1/23/2013); and the president of the National Council of the Judiciary (Judgment of Unc. 122-2014 of 4/28/2015). The most emblematic case ruled that the selection of the chief justice of the Supreme Court and the Constitutional Chamber was unconstitutional because of his direct ties to the political party in power at the time (Judgment of Unc. 77-2013 of 10/14/2013).

# 3. The judicial independence crisis in El Salvador



## 3.1 THE LEAD-UP TO THE CRISIS: ATTACKS FROM THE EXECUTIVE BRANCH PRIOR TO MAY 1, 2021

From the beginning of his term in 2019 and before taking control of the legislature, President Nayib Bukele remained in open confrontation with the other branches of government. In the case of the judiciary, he created a hostile narrative, directed specifically at the Constitutional Chamber. Many of these attacks were related to decisions issued by the Chamber during the COVID-19 pandemic in which it exercised oversight over the actions of the executive branch<sup>10</sup> and protected citizens' rights and freedoms.

Bukele criticized the Chamber's rulings, announcing that he would not abide by them. Particularly noteworthy are those rulings ordering him to not deprive people of their liberty or impose forced confinement on those who disregarded home quarantine.<sup>11</sup> The president has also sought to hold the Constitutional Chamber responsible for the deaths that occurred during the pandemic. On August 9, 2020, in a nationwide broadcast, he said: "Dictator? I would have shot them all, or something like that, if I were really a dictator. You save a thousand lives in exchange for five" (Elsalvador.com, 2020). In May 2020, he announced that he would file a petition with the Inter-American Commission on Human Rights (IACHR) against the legislature and the Chamber "for violating the Salvadoran people's right to life and health" (DW, 2020). This narrative served as

10 Executive Decree No. 5 of 3/13/2020, prohibiting entry into the country and meetings of all kinds, among many other things.

11 Rulings of March 26, 2020, and April 8, 2020, rendered in writs of habeas corpus 148-2020 and *amparo* [petition for a constitutional remedy] 167-2020, respectively.

a prelude to the events of May 1, 2021, and was intended to discredit the justice system in the eyes of the public and justify the subsequent strategy of capture.

## 3.2 THE BEGINNING OF THE CRISIS: THE CAPTURE OF TOP OFFICIALS

### 3.2.1 Dismissal and selection of Constitutional Chamber justices and the prosecutor general of the republic

On May 1, 2021, the new legislative assembly, with a “supermajority” from President Bukele’s party (Nuevas Ideas) resolved to remove the justices and alternate justices of the Constitutional Chamber and the prosecutor general of the republic from their posts, and directly appointed their replacements, without following an established procedure that would have allowed them to exercise their right to a defense. All of these decisions were adopted with 64 out of a possible 84 votes, and violate the Constitution for the following reasons:

#### 3.2.1.1 The dismissals

- i. The Salvadoran Constitution establishes that the justices of the CSJ and the prosecutor general are selected for nine and three-year terms, respectively, and enjoy security of tenure, unless they are removed for causes previously established by law, and after a procedure in which they are afforded full guarantees<sup>12</sup> (Article 186, paragraph 2 and Article 192, paragraph 2). Furthermore, Judgment of Unconstitutionality 19-2012,

12 Articles 2, 11, 72, paragraph 3; 186, paragraph 2; and 192, paragraph 2 of the Constitution.

dated 6/5/2012, established that the justices of the Constitutional Chamber may not be removed or transferred to other chambers during their term of office.

- ii. Although the Judicial Career Law establishes a disciplinary system for judicial officials, which provides for infractions and penalties (including removal), this system is not applicable to Supreme Court justices, who require special regulations. To date, such legislation does not exist.

- iii. By removing all the members of the Constitutional Chamber, on grounds not established by law, and without a procedure in which they could participate or mount a defense, the Legislative Assembly has violated the Constitution and the rights recognized in international human rights treaties, specifically the irremovability of judges from office—which is inherent to the principle of judicial independence—and due process guarantees.

#### 3.2.1.2 The selection of Constitutional Chamber judges

- iv. The mechanism for selecting the justices of the Supreme Court, which includes the Constitutional Chamber, is a complex process that involves the participation of various bodies.<sup>13</sup> The direct appointment

13 Under this mechanism, every nine years, one-third of the seats (five vacancies) are renewed. There are two ways to submit a candidacy: the first is election by direct voting by all the lawyers in the country, organized by the Federation of Lawyers’ Associations of El Salvador (FEDAES), and the second is by submitting the candidacy to a public, merit-based competition organized by the National Council of the Judiciary (CNJ). Each procedure results in a list of fifteen people. The two are combined into a list of 30 candidates and sent to the Legislative Assembly, which, after a public interview stage, makes the final selection.

of five individuals to replace the justices removed from the Constitutional Chamber on May 1, 2021, did not follow this process. The names of these individuals did not go through the established mechanisms, nor did they come from any list, either from FEDAES or the National Council of the Judiciary (CNJ); there were no interviews, no merit evaluations, and no civil society participation. Their direct appointment violated the Constitution, in relation to both the selection of high court judges and the recognition of the CNJ's constitutional powers in the selection mechanism.

### 3.2.2. The takeover of the Supreme Court's facilities through public force

There is reasonable evidence that the assault on the judicial branch was carefully planned by the political bodies (executive and legislative) and the armed wing of the State. When the Constitutional Chamber justices were removed, they were out of their offices. The National Civil Police cordoned off the CSJ building with precise instructions to bar the removed justices from entering their offices and to admit the individuals installed to replace them.

### 3.2.3 Attitude of the other Supreme Court justices toward these events

After these individuals were installed by law enforcement, many people expected that the remaining eight CSJ justices would refuse to sit on the Plenary with them, given the serious and blatant constitutional violations that had put them there. However, this did not happen,

even though the justices had legal grounds to refuse to recognize the replacements and refuse to incorporate them into the Plenary of the Supreme Court, in support of their colleagues in the Constitutional Chamber who had been unlawfully removed from office.<sup>14</sup>

### 3.2.4 The construction of a hostile narrative toward the justice system

The removal and replacement of the legitimately elected justices of the Constitutional Chamber continued with the appointment, in late June 2021, of an additional one-third of the justices of the CSJ, to replace those who had completed their term of office. In doing so, the political branches of government succeeded in appointing ten of the fifteen justices to the Court, even though the Constitution prohibits the legislature from appointing more than one-third of this body. These measures were justified with an official narrative that, among other things, accused the removed justices of being corrupt, being accomplices of organized crime, and ruling in favor of members of organized crime groups.

## 3.3 THE DEEPENING OF THE CRISIS: TOP-

14 First, they could have reacted publicly by invoking various principles of the applicable Code of Judicial Ethics (judicial independence, decorum, transparency, integrity, institutional responsibility, and the principle of fortitude). Second, they could have prioritized the public interest and refused to form the Plenary with the unlawfully imposed individuals, invoking the provisions of the Organic Law of the Judiciary governing the quorum to form the Plenary (Article 50, paragraph 1 and 51, subsection 8, which require the participation of the chief justice or the acting chief justice and at least seven justices) and those governing precedence, i.e., replacements in the event of the absence of certain justices.

## DOWN CONTROL, TAKEOVER, AND REMOVAL OF INDEPENDENT JUDGES FROM KEY POSITIONS

### 3.3.1 Amendments to the Judicial Career Law and voluntary retirement offers

On August 31, 2021, the Legislative Assembly passed Decree 144 to amend the Judicial Career Law, arguing the need to “modernize” it to bring it into line with the country’s current situation. These reforms consisted essentially of:

i. Changing judges’ terms of office from unlimited to a maximum of 60 years of age or 30 years of service in the judiciary.

ii. Prohibiting the transfer of members of the judiciary without the consent of the Plenary of the CSJ.

iii. The immediate mandatory dismissal of judges who, as of its entry into force, have reached 60 years of age or 30 years of service in the judiciary. The justices of the CSJ were exempted from this rule.

iv. The creation of an “availability regime,” that those who have left office because of the reforms may join, provided they expressly request it and the CSJ authorizes it. This system would allow dismissed judges to continue to work, but with no guarantee of stability and subject to the “needs of the service,” their “specialty” or the “complexity” of the cases, as determined by the CSJ.

v. Authorization for the CSJ to transfer judges to courts of the same category, regardless of

geographic location or whether the judges reside in their new jurisdiction.

vi. The restructuring of the system of classes and categories within the judiciary, to reduce the number of categories and expand their geographical coverage, allowing transfers to any part of the country.

vii. Authorization for the CSJ to fill vacancies resulting from the immediate dismissal of judges affected by the age or length of service limit and who have not been placed in the availability regime.

These amendments allowed the Supreme Court to exert top-down control over the judiciary, and are unconstitutional for both procedural and substantive reasons.

In terms of procedure, only the CSJ can propose legislation related to the judiciary (Article 133, paragraph 3 of the Constitution);<sup>15</sup> members of the legislature cannot, as happened in this case. Moreover, the adoption of Decree 144 at the initiative of a body or person not authorized by the Constitution violates the principle of separation of powers (Article 86 of the Constitution).

Second, this decree was adopted with an “exemption from procedure,” meaning that it was not studied in any parliamentary committee (which would have been the responsibility of the Legislation and Constitutional Points Committee), and no explanation was given for exempting this initiative from the regular parliamentary procedure. Finally, the grounds for passing the

<sup>15</sup> This is also established in the constitutional case law. See Judgment of Unc. 6-2016/2-2016 of 2/09/2018.

amendments were not documented, in violation of Article 135, paragraph 1 of the Constitution.<sup>16</sup>

Regarding the substantive reasons, these reforms violated various constitutional and treaty-based rights and guarantees: (i) judicial independence (Article 172), by allowing the arbitrary removal or transfer of judges; (ii) security of tenure (Article 186), since judges may be dismissed only for causes established by law and following due process;<sup>17</sup> (iii) the judicial career service (Article 186), since the reforms arbitrarily alter the admission, promotion, and transfer system, as well as the disciplinary system; (iv) the legal certainty of judicial officials (Article 2), since it affects the life plans of the affected persons, including their right to decide to retire from employment, due to the immediate termination of their employment without legitimate reasons; (v) equality and nondiscrimination on the basis of age, established in the Inter-American Convention on Protecting the Human Rights of Older Persons ( Article 144), which prohibits legislating to the detriment of older persons; (vi) elimination of the CNJ's authority to propose candidates for appellate judgeships (187 and 182), since the reform amends this constitutional procedure and empowers the CSJ to do so directly.

16 Regarding the need for parliamentary debate and the restrictive interpretation of the exemption from procedure, many rulings have declared it unconstitutional for the majorities in the Legislative Assembly to proceed in this manner. See, e.g., Judgments of Unc. 67-2014 of 11/14/2016 and 96-2014 of 5/28/2018.

17 On the security of tenure of members of the judiciary, constitutional case law has held that: "The security of tenure of judicial officers enshrined in paragraph 4 of Art. 186 of the Constitution is not a right to employment understood as the right to permanent tenure, but rather a right that tends to prevent the arbitrary removal of judicial officers from their positions, requiring that a procedure be followed before the competent authority and on legally preestablished grounds." Judgment of Unc. 5-99 of 7/20/1999.

### 3.3.2 Impact of implementing the amendments to the Judicial Career Law

The Supreme Court's implementation of the reforms to the Judicial Career Law led to chaos, extending to the courts at all levels of the justice system. The Court has taken several actions and measures that have deepened the impact of the crisis:

i. The Plenary Court issued an order<sup>18</sup> approving the **payment of a bonus<sup>19</sup> of 24 months' salary<sup>20</sup>** to judges affected by Legislative Decree 144, **in exchange for their resignations** before its entry into force.

ii. By order of the Plenary Court, **a term of five years was established for the "availability regime," which is not provided for in Decree 144.**<sup>21</sup> The presiding judge in the case of the *Massacre of El Mozote and Surrounding Areas*, was even offered ten years in the availability regime, which he declined.

iii. **Irregular judicial appointments were made to fill vacancies created by the**

18 With Justices López Jerez, Dueñas, Pérez Chacón, Suárez Magaña, Martínez García, Marroquín, Chicas, Flores Durel, and Clímaco Valiente voting in favor of the measure.

19 Under the Judicial Career Law, the voluntary retirement bonus can be at least six months' salary, although several years ago the CSJ approved the increase of this bonus to the equivalent of 12 months' salary.

20 Justices López Jerez, Dueñas, Pérez Chacón, Suárez Magaña, Martínez García, Marroquín, Chicas, Flores Durel, and Clímaco Valiente voted in favor of this decision. Record No. 74 of the Plenary Court of 9/17/2021, available on the CSJ website, <https://www.csj.gob.sv/wp-content/uploads/2021/09/74-17092021-ACTA-AUTORIZADA-EXTRAORDINARIA-2.pdf>, accessed on 4/3/2022.

21 Record No. 74 Cit.

**resignations**, without following legal procedures and based on criteria not subject to public scrutiny.<sup>22</sup> **Relatives of Supreme Court justices have even been appointed to judicial positions** (Factum, 2021). This has also created a state of legal uncertainty regarding the validity of the decisions rendered by persons who have come to occupy judicial positions through irregular appointments.

The availability regime created by Legislative Decree 144 has turned judges into a “**reserve resource**” that can be used arbitrarily by the Supreme Court. Those who are reliant on this regime are no longer part of the judicial career service. They have had to relinquish their security of tenure and have been rendered powerless; if they remain in their positions, it is not by application of the law but by a decision of the Plenary Court, which can be reversed at any time.<sup>23</sup>

### 3.3.3 Strategy of rewards and punishments: the use of transfers

According to abundant constitutional case law, transfers of public servants must meet certain requirements,<sup>24</sup> including that they be made

22 Magistrate judges have been promoted to the appellate courts; law clerks have been appointed as judges.

23 Record No. 74 of the Plenary Court of 9/17/2021. The issue was whether the judges in this regime would continue to enjoy the benefits of the career judges. Ultimately, the Court ruled in the affirmative.

24 These requirements are: (i) the need to reorganize human resources; (ii) the need for specialization in the position to be filled and that the public servant meets this requirement; (iii) that it is the same place where the person to be transferred is located; (iv) **that the new position is in the same category**; (v) that the judge’s duties remain the same; and (vi) that the judge retains his or her salary. See, among many, *amparo* 218-2016, dated 1/17/2018.

within the same category of position. Decree 144 amended the previous category structure and authorized the CSJ to make transfers (Articles 4, paragraph 1 and 6, paragraph f of the LCJ, as amended), turning transfers, in practice, into a system of “rewards and punishments.”

Thus, judges with lengthy careers in the judiciary who have shown signs of independence, or who have questioned improper interference in the judiciary, have been transferred to other courts,<sup>25</sup> their employment conditions being affected with no explanation as to the need for these transfers.<sup>26</sup> Transfers have also been used to promote certain individuals<sup>27</sup> to positions for which they would have had to undergo a public merit-based competition for promotion. Under the previous regulations, these persons could not have been placed in higher category positions, since transfers only operated within the same

25 Some specific cases—but not the only ones—of the use of relocation as a means of punishment include: (i) Judge Martín Rogel Zepeda, who was a judge of the Third Criminal Chamber of San Salvador, was transferred to the Chamber of the Second Section of the Central District in Cojutepeque; (ii) Judge Cesia Romero, who held the position of judge of the Environmental Chamber of Second Instance in Santa Tecla, was transferred to the Civil Chamber of the First Section of the Western District in Santa Ana; (iii) Judge Samuel Alivén Lizama, who served as judge of the Environmental Chamber of Second Instance of the Central District, was transferred to the Chamber of the Third Section of the Central District in San Vicente, with the position of second judge; (iv) Judge José Antonio Durán Ramírez, who was a judge of the Third Trial Court of San Salvador, was transferred to the Second Trial Court of Zacatecoluca.

26 They include (i) Judge Fausto Paiz Romero, magistrate judge of Chapeltique, San Miguel, was promoted to the Criminal Chamber of San Miguel; (ii) Judge Saúl David Argueta, who was acting judge of the Magistrate Court of San Agustín, Usulután, was promoted to the First Trial Court of San Miguel; (iii) Edwin Salvador Cruz Mejía, a law clerk of the Civil and Commercial Court of San Miguel, was appointed as judge of the Civil and Commercial Court of La Unión; (iv) Xiomara Haydanidía Segovia Guzmán, alternate judge of the First Magistrate’s Court of Santa Rosa de Lima, La Unión, was appointed judge of the Trial Court of San Francisco Gotera Morazán; (v) Judge Oscar Mauricio Escalón Fuentes, a judge at Specialized Trial Court C of San Salvador, was promoted to the First Specialized Criminal Court of San Salvador.

27 Plenary Court Record No. 78 of 9/26/2021.

class and category (Article 6, paragraph f, as amended, and 39 of the LCJ).

### **3.3.4 Unconstitutional judicial appointments by the Supreme Court**

The direct appointment of judges by the CSJ to fill the vacancies created by resignations is unconstitutional, first, because it has not verified compliance with the requirements for entry into the judicial profession or followed the admission mechanism provided for in the Constitution (Articles 176, 177, 179, and 180), which requires the CSJ to make appointments from short lists drawn up by the National Council of the Judiciary. This same defect plagues all those “relocations” within the judicial career service that involve promotion and that have evaded the appropriate selection processes.

Second, it is not known whether an objective, public, and reasonable procedure has been followed to verify the qualifications or skills required to hold the positions, or whether the candidates have been interviewed; and finally, none of the appointments made with the participation of the five individuals irregularly appointed to the Constitutional Chamber since May 1, 2021, have been made by the competent authority because the Chamber has not been lawfully constituted.



## 4. Responses to the crisis



A few reactions and responses to the crisis that was unleashed on May 1, 2021, and deepened with the amendment of the Judicial Career Law by Decree 144, are of particular note.

### 4.1. ORDER 1-2021 OF THE CONSTITUTIONAL CHAMBER

On May 1, 2021, the legitimate justices of this body held an emergency meeting outside their offices, and issued, *sua sponte*, an order<sup>28</sup> declaring such removals unconstitutional for violating El Salvador's form of government and political system and for suppressing democratic oversight and judicial independence.

### 4.2 INTERIM MEASURE SUSPENDING THE JUDICIAL CAREER LAW AMENDMENTS

At the request of a group of judges, filed on September 21, 2021, the Family Court of San Miguel ordered the immediate suspension of Decree 144, for violating the rights recognized in the Inter-American Convention on Protecting the Human Rights of Older Persons (Article 4, paragraph d), specifically, the rights to equality, to not be subjected to age-based discrimination, and to work and security of tenure. However, the CSJ did not comply with the measure; instead, it immediately began to enforce the decree.

28 Unconstitutionality Order 1-2021 of 5/1/2021, available at: [https://www.jurisprudencia.gob.sv/pdf/M\\_1-2021.pdf](https://www.jurisprudencia.gob.sv/pdf/M_1-2021.pdf), accessed on 5/7/2022.

## 4.3 PUBLIC PROTEST BY JUSTICE AUTHORITIES

Several judges with a commitment to democracy have reacted to attacks on judicial independence by participating in public protests,<sup>29</sup> open letters, press conferences, and legal actions, such as filing a collective complaint against the State of El Salvador with the Inter-American Commission on Human Rights on September 17, 2021.

---

<sup>29</sup> Public demonstrations held on September 1, 7, 15, 30, 2021, and January 16, 2022.

## 5. Impacts of the crisis



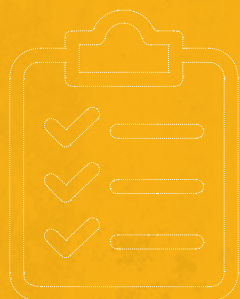
### 5.1 ON THE GUARANTEE OF THE BALANCE OF POWERS AND THE DEMOCRATIC SYSTEM

The separation of powers in El Salvador has been reduced to a minimum, and only operates when the other bodies debate matters in which the executive branch has no interest. Rather than three independent and separate branches of government, there is a single political force in control of them all, concentrated in the executive branch. The system of democratic checks and balances has disappeared; the only remaining counterweight comes from civil society organizations, the academic sector, and investigative journalism.

### 5.2 ON THE PROTECTION OF RIGHTS AND FREEDOMS

The guarantee of rights is in serious jeopardy. Conditions have been created for selective justice, in which judges must investigate—before any decision is rendered—whether political actors have any interest in the matters before them, or one of the parties is protected by such actors. This has a substantial bearing on the decision of whether to exercise oversight over the other branches of government, or to protect the rights and freedoms at stake.

# Conclusions



## 1. THE HISTORIC CHALLENGE OF JUDICIAL INDEPENDENCE

Judicial independence in El Salvador has been an ongoing challenge. During the armed conflict, the judicial system was absent and, according to the Truth Commission, this contributed to the spread of human rights violations.

## 2. DELIBERATE WEAKENING OF THE JUDICIARY

The executive and legislative branches, in complicity with the Supreme Court, have pursued a strategy aimed at capturing the justice system and weakening the principle of separation of powers. These actions have been meticulously structured in three major phases: (i) laying the groundwork for the crisis, starting with the capture of top judicial officials, (ii) removing and replacing senior judicial authorities, and (iii) exerting top-down control, expelling or undermining the stability of one-third of the country's judges, and filling the vacant posts through irregular appointments.

## 3. ATTEMPTS TO HALT INSTITUTIONAL DETERIORATION

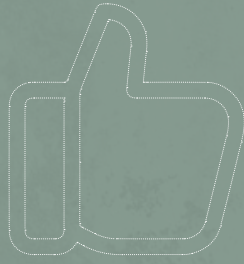
Faced with the co-optation of the entire judicial system, some judges have tried to halt the institutional deterioration by declaring the acts of May 1, 2021, unconstitutional, granting interim measures to stop the implementation of judicial reforms, publicly protesting in the streets, issuing press releases and holding press conferences, and condemning these events before international

bodies. Neither the Supreme Court, nor the executive or legislative branches of government have listened to or followed any of these decisions or recommendations.

#### **4. IMPACTS OF THE JUSTICE CRISIS**

The capture of the justice system has led to the violation of multiple aspects of judicial independence, a breach of the principle of the separation of powers, and the serious undermining of the democratic system. The guarantee of rights and freedoms has also been jeopardized because it depends on keeping political interests or persons from exerting influence over the judiciary and creating the conditions for selective justice.

# Recommendations



1. **Promote the activation of the mechanisms established in Articles 18 to 21 of the Inter-American Democratic Charter**, so that, through the intervention of the OAS bodies, constitutional order may be restored in El Salvador.
2. **Foster the development of a consensus across different sectors** (universities, churches, trade associations, unions, political parties, communities and NGOs, etc.) on the need to restore constitutional order, judicial independence, and the republican-democratic nature of the government of El Salvador, in line with the Constitution. Joint, combined, or complementary activities between the different sectors should be organized for this purpose.
3. **Organize a team or commission made up of prominent public figures**, representative of various social sectors, so it can implement the first two proposals and serve as an authoritative and internationally recognized point of contact, and propose a dialogue with the government of El Salvador, if possible.
4. **Promote the resurgence of judges' associations or their organization**, so they may actively participate in restoring the independence of the judiciary, as well as in restoring the constitutional order.
5. **Request that international bodies** continue monitoring the situation of judicial independence in El Salvador, and to use their various mechanisms to urge the State to respect international treaties that obligate it to guarantee a competent, independent, and impartial judiciary.

6. **Call on the international community to urge the three branches of government**—executive, legislative, and judicial—to reinstate the justices of the Constitutional Chamber, the judges of the Second Instance Chambers dismissed under the amendments to the Judicial Career Law, and the judges transferred in retaliation for the content of their decisions.
  
7. **Promote, within the formal education system,** reflections on the importance of judicial independence, the principle of separation of powers, and the foundations of a democratic system, in order to raise awareness about the forms of government and political system provided for in the Constitution.

