Coup D'état in Honduras. A Juridical Analysis
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I. EVENTS LEADING UP TO THE COUP

1. The Fourth Ballot Box

The need to review the Constitution in its entirety was put forward during the electoral campaign, because the present Constitution is a poor copy of the Constitutions of 1957 and 1965. Contradictions within it are abundant, many of its articles are written in stone, it does not allow the effective participation of citizens in the processes of deciding and solving local and national problems and, most importantly, it is not responsive to the national reality of the Twenty First Century.

President Zelaya decided to propose the revision of the Constitution and, for this effort, met with different social sectors, including the political parties. From these explorations of opinion arose the idea of a National Constitutional Convention and the inclusion of a fourth ballot box [along with the normal three ballot boxes for presidential, congressional, and mayoral candidates] in the elections of the 29th of November. The object was to ask the Honduran people if they desired to convene a Constitutional Convention to issue a new Constitution.

The Constitution requires that certain aspects of the Constitution may not be revised under any circumstances, so the idea [of a Constitutional Convention] is at the Constitution's outer limits. These [non-revisable] aspects are the following: the form of government, the national territory, the presidential period, and the prohibition on re-occupying the Presidency of the Republic by any person who had carried out presidential duties under any title and who could not be candidates for the president in the next term. The Articles which dealt with these topics may not be reformed, i.e. are written in stone.

Those sectors which were consulted were in agreement that that the idea of a new Constitution would remain legitimate if the people voted in favor of it. But the electoral legal system only recognizes three ballot boxes in the general election: that of the President, that of Congressmen, and that of Mayors. That which was essential to approve the legal standards to regulate in future would become known as THE FOURTH BALLOT BOX.

The next step was to seek the road to achieve approval of the legal standards which would permit the placement of this ballot box in the general election. The National Party, whose candidate publicly expressed his support for the idea and the Democratic

Unification [Party], which was enthusiastic about the idea, each decided to propose through their Congressmen separate legislative initiatives with the goal of regulating a ballot box with this aim. The process of approval began immediately.

2. The Ballot Question

President Zelaya chose a different approach. In place of submitting the legal project to the National Congress that it might approve or not (a question which he constitutionally could pose, just as the National Party and the National Unification Party had done) he preferred to ask the People if it wanted this FOURTH BALLOT BOX, so that, if the response were in the affirmative, he would have sufficient justification to submit the legal project to the National Congress.

President José Manuel Zelaya Rosales, in the Cabinet Meeting, decided to carry out the People's Ballot Question. Presidential Decree PCM-005-2009 as approved had the following characteristics: to ask the Honduran people if it agreed to inclusion of one more ballot box in the November elections in addition to the three which corresponded to the President, the Congressmen, and the Mayors with the asking them if they wished in the following presidential period to convene a Constitutional Convention.

3. Intervention of the Court of Administrative Disputes

This Decree from the Cabinet Meeting was challenged by the Public Minister before the Administrative Disputes Authority, alleging that it was illegal because it said that it would perform a "consulta" (ballot question) of the people; the Constitution only recognizes plebiscites and referenda, whose conduct is solely within the competency of the Supreme Electoral Tribunal (Art. 5, paragraph 5) as the only permitted ballot questions

The Court of Administrative Disputes decided, in an incidental ruling, to stay the effectuation of this Decree of the Cabinet, while it decided for a final ruling on whether the Decree was legal or illegal. That is, the Court did not qualify the Act as illegal. It simply suspended its effectuation to avoid [the possibility that] the achievement [of the Decree] would nullify the final judgment.

The Council of Ministers, in acceptance of the plaintiff's aim, revoked Decree PCM-005-2009, whose effectuation had been suspended by the Court, despite the fact that it had never become effective because it was not published in the Official Journal, La Gaceta, a requirement demanded by the Constitution so that ordinary Acts may have juridical consequences.

Honduran legislation recognizes two kinds of rulings: the *final* and the *incidental*. The first are delivered in ordinary opinions and, given no further challenge during the passage of the appeal period, are converted into final judgments or matters beyond the statute of limitations. The incidental [ruling] is issued for *incidences*, which are questions posed within the larger proceeding and which, when they are of prior and special ruling, should

be resolved before this [the proceeding] is settled by a final verdict. Among such incidences is that of the suspension of the Act challenged in an ordinary trial of the administrative dispute. The objective of the suspension is to avoid [the situation in which], with the execution of the Act under challenge, may be produced irreparable damages which cannot be undone even with the verdict that the principal ruling may pronounce.

4. The Poll

"*ARTICLE 5. – The citizen initiative is a mechanism of participation through which the citizen shall present the following requests and initiatives: 1) to request that the tenured heads of public organs or sections of any of the Powers of the State [Executive, Judicial, and Legislative] convene the general citizenry; the residents of a Municipality, a neighborhood or district; or trade unions, sectors, or organized social group so that they may issue opinions or formulate proposals for the solution to collective problems which affect them. The results will not be binding but will be the set of facts for the exercise of the functions of the convener.*

The aforementioned Decree having been revoked, it was decided to invoke the Law of Citizen Participation, approved in the first session of the National Congress of the government of President Zelaya. This law recognizes, in Article 5, the legal mechanism of participation called "citizen initiative," conceived as a right of the citizen to request that the tenured heads of organs of the State might ask of the general citizenry or the residents of a Municipality to issue opinions or formulate proposals for the solution to collective problems which affect them. The results are not binding but shall serve as the set of facts for the exercise of the functions of the convener.

This formulation was the legal basis that the Executive required to have the Honduran people make a pronouncement regarding the relevance of a law that had as its object the regulation of The Fourth Ballot Box.

With this legal foundation, a new Decree of the Cabinet (Number PCM-019-2009, dated 26 May 2009) was approved. Through this would be provided the conduct of a poll (now not a ballot question) to obtain the opinion of the citizens around the advisability of the FOURTH BALLOT BOX in the elections of November, as a justification to send the legal project to the National Congress was approved.

The question which would be done in the poll is the following: Do you agree that in the general elections a fourth ballot box should be installed by which the people may decide on the convening of a Constitutional Convention.

5. Clarification of the Ruling

What the Court had to resolve, always at the request of the plaintiff, was the adoption of precautionary measures to ensure the result of the verdict, a question permitted by our legislation. Among these measures is the prohibition against the passage of new Acts.

On the 29th of May, 2009, the Court of First Instance of Administrative Disputes, faced with a petition of clarification of the incidental verdict, resolved that in the matter [of the incidental verdict] were implicitly included not only the Act challenged in the request petition, but all Acts which the Executive might order with the aim [of posing a Ballot Question].

The court made an inexcusable error, to wit: to attempt that in the verdict would be included not only the Act that had been challenged, but also all future Acts of the defendant. With that, in practice, the clarification became a new verdict, which would rule on Acts which were not the object of the verdict and, additionally, which lacked physical reality, since it attempted to command regarding Acts which the judge imagined the Executive might order in the future.

Appropriate appeals were lodged against the verdict, but the judicial system reacted as might be expected, confirming the absurd legal reasoning which the verdict in question contained. The challenges rejected, the verdict, despite being nonsense, had to be obeyed.

Exceptionally, judicial communications were sent to all the institutions to ensure that they would not participate in the ballot question, advising them that if they did so, they would be punished with the full force of the law. Among them [the institutions] was the Armed Forces.

The final Decree (Number PCM-019-2009), dated the 26th of May 2009, was published on the 25th of June.

One day prior, the 24th, the President dismissed the Chief of Staff because this person told him that while a judicial order existed suspending the ballot question, they couldn't participate in the carrying out of the same because it was against the law to avoid complying with a judicial order. Thereupon, the resignation of the Minister of National Defense was accepted and the resignations of the Commanders of the Air Force, Naval Force, and Army were proposed.

II. THE PRESIDENTIAL IMPEACHMENT DECREE

1. The Decree

The President of the Republic was replaced on the 28th of June by the President of the National Congress in a session of this State Power and by the decision of an as-yet undetermined number of Congressmen.

The decision of the National Congress is contained in Legislative Decree No. 141-2009, which in its conclusions says:

ARTICLE 1. The National Congress in applying Articles 1, 2, 3, 4, 5, 40 number 4, 205 number 20, and 218 number 3, 242, 321, 322, and 323 of the Constitution of the Republic agrees:

1) To censure the conduct of the President of the Republic, citizen JOSE MANUEL ZELAYA ROSALES, for repeated violations of the Constitution of the Republic and the laws and failure to observe the resolutions and verdicts of the organs of legal authority, and

2) to separate citizen JOSE MANUEL ZELAYA ROSALES from the post of Constitutional President of the Republic of Honduras.

ARTICLE 2. To promote citizen ROBERTO MICHELETI BAIN, currently President of the National Congress, to the post of Constitutional President of the Republic, for the time which remains to complete the term of office and which expires on the 27th of January 2010.

ARTICLE 3. The present decree becomes effective at the end of the approval of two-thirds of the vote of members who belong to the National Congress and thereupon the execution is immediate.

This Legislative Decree does not withstand the slightest legal analysis. It contains as many violations of the Constitution as comprise the formulation. In the numbers which follow this section are identified the constitutional violations which the National Congress incurred with the issuing of this Decree.

2. Censure of the Conduct of the President

Article 205, Number 20: "To approve or censure the administrative conduct of the Executive Power, Judicial Power, Supreme Electoral Tribunal, Superior Tribunal of Auditors, Attorney General of the Republic, Attorney of the Environment, Public Minister, National Commissioner of Human Rights, National Registry of Persons, Decentralized Institutions, and the other auxiliary organs and special [branches] of the State."

The Constitution of the Republic confers on the National Congress the ability to censure the conduct of the Executive Power, Judicial Power, Supreme Electoral Tribunal, Superior Tribunal of Auditors, Attorney General of the Republic, National Commission of Human Rights, Public Minister, and other institutions.

Censure refers to the conduct of the organ, not to the conduct of the tenured head of the organ. The Congress neither may nor should censure the conduct of a particular public official.

Censure of the conduct of the President of the Republic, of a Secretary of State, of a Magistrate, of the Supreme Court of Justice, of the Electoral Tribunal or of the Court of Assessors, or the manager of a decentralized entity is not envisioned.

3. Censure of Administrative Conduct

The capacity which the Constitution does recognize is possessed by the National Congress is to approve or censure administrative behaviors, not to assess violations to the legal order.

Legislative Decree 141-2009 clearly asserts a determination that the President of the Republic committed repeated violations of the Constitution and of the laws and failure to observe the resolutions and verdicts of the organs of the legal authority. It does not deal, therefore, with simple questions of administrative conduct involving political responsibility, but rather with illicit acts, which is to say, crimes.

For the Congress there was not a shred of doubt that the President was guilty of violations of legislation and of disobedience, although no deeds or acts had been identified. The violations of the President indicated in the abstract might be characterized as crimes on the assumption that they could be individualized. The accusation in the abstract was sufficient that the National Congress might decide to declare the guilt of the President of the Republic for the commission of unspecified crimes.

Under our Constitution, only the Judicial Power holds jurisdiction to administer justice (Art. 303, first paragraph) and to apply the laws in specific cases, to judge, and to carry out the law (Art. 304). If the President had violated legislation and had disobeyed judicial resolutions, it would be up to the Judicial Power, and specifically to the penal authority, which is responsible to judge his behavior and to determine if he actually was involved in an illicit act. It would not be up to the National Congress.

In characterizing as illicit the supposed acts of the President, and by declaring him guilty of having committed them, the National Congress therefore arrogated unto itself authority exclusive to the Judicial Power. That is to say, it usurped functions which the Constitution attributes to another Power of the State.

4. The National Congress does not have the Authority to Impeach the President of the Republic

A) The organs of the Powers of the State

Article 4. The form of the government is republican, democratic, and representative. It is practiced by the three Powers: Legislative, Executive, and Judicial, [which are] complementary and independent, and without hierarchical relations.
Art. 189. The Legislative Power is exercised by a Congress of Deputies, which shall be elected by direct suffrage.

Art. 235 The tenured head of the Presidency shall exercise the Office of Executive Power on behalf of and for the benefit of the People…
Art. 303. The Judicial Power is composed of a Supreme Court of Justice….

According to our Constitution, the Honduran State is comprised of three Powers which, according to Article 4 of the Constitution "are complementary and independent, and without hierarchical relations." Everything related to these three Powers is regulated, fundamentally, in the Constitution of the Republic. The three Powers are interrelated and exercise functions which allow a balance between the three.
The Legislative Power administers the oath of office of the President of the Republic, elect the Magistrates of the Supreme Court of Justice and they administer the constitutional oath to them. The Executive Power presents the General Budget of the Republic, in which are contained the budgets of the other Powers of the State and, additionally, exercises veto power regarding the laws issued by the National Congress. The Judicial Power can, exercising its judicial discretion, deliver rulings which the functionaries of the other Powers of the State are obliged to obey; for example, to annul the administrative Acts of the Executive and some of the Legislative branch, as well as to declare unconstitutional Acts of both Powers and laws issued by the National Congress.

Each Power of the State is composed of and is exercised by the following organs: the Legislative Power by the National Congress comprised of Congressmen elected by direct suffrage; the Judicial Power, by the Supreme Court of Justice comprised of Magistrates elected by the National Congress; the Executive Power, by the President of the Republic on behalf of and for the benefit of the People who elect him for a period of four years by a simple majority of votes.

The only Power of the State which is composed of and exercised by one person is the Executive Power (Art. 235). All the remaining [Powers] are composed of and exercised by corporate organs.

B) Can the tenured heads of the Powers of the State be removed?

All the tenured heads of the Powers of the State are elected for defined periods. The congressmen and the President [are elected] for a period of four years and the Magistrates of the Supreme Court of Justice for a period of seven.

By resignation, death, or judicial disqualification (Constitutional Art. 205, Number 12) the tenured heads of these Powers may vacate their posts before the completion of their respective term.

The Constitution contains no standard by which the removal or impeachment of a President, Congressman, or Judge may be authorized. Therefore, no tenured head of a Power of the state may be removed from his post before he completes the period for which he was elected.

C) The removal of the President

Art. 238. Those who execute Acts directly proceeding to obtain by force or by extralegal means any of the following ends commit a crime against the form of government:
1)…
2) Altering the composition of any of the Powers of the State
Art. 2
...the supplanting of the sovereignty of the People and the usurpation of the constituent Powers are designated to be crimes of treason against the nation. The responsibility in these cases is inalienable and may be alleged officially or at the request of any citizen.

The removal of any of the tenured heads of a Power of the State would be contrary to the Constitution and would constitute a Crime against the Form of Government, in the sense of Article 238 of the Penal Code. If the removal were to be of all the members of one of the corporate organs which exercise Powers of the State, as is the case of the Legislative or Judicial (impeachment of all the congressmen or of all the judges) one can assert without hesitation that this is a Coup D'état, because the deed eliminates one Power of the State, i.e., it usurps a component Power.

In conclusion, the National Congress lacks the constitutional capability to impeach the President of the Republic.

The arbitrary removal of the President translates into an attempt against the Constitutional State inasmuch as it, without authority, disavows the Executive Power, whose exercise by constitutional mandate belongs to the President whose investiture emanates from the People who elect him for a period of four years.

It definitely amounts to the supplanting of popular sovereignty and the usurpation of a constituent Power, characterized in the Constitution as the crime of treason against the nation under Article 2 of our Constitution.

5. Application of Sanctions

Article 89: All people are innocent, as long a competent authority has not declared him/her guilty.
Art. 82: The right to protection [before the law] may not be abridged.

The application of sanctions in our legislation is based on the completion of requirements which may not be avoided. The most important are those recognized [explicitly] in the Constitution, i.e., respect for the presumption of innocence, the right to protection [before the law], and the right to due process.

All people have the right to be treated as innocent by the authorities, until a competent authority has declared his/her guilt.

No one may be sanctioned without being permitted to defend himself in a proceeding prescribed by the law for that purpose.

The cited Decree, in short, is infested with violations to the Constitution as follows:

a) It declares that the President committed violations and acts of disobedience without identifying them;

b) The infractions imputed to the President are constitutive of [specific] crimes (abuse of authority, disobedience, and others), but they aren't individualized;

c) It declares his guilt without having completed previously the respective trial, in which he might make use of the mechanisms which the law recognizes by which the accused may defend himself against the illicit acts which his accusers impute to him; and

d) It denies the opportunity that these [illicit acts] might be previously characterized and judged before the appropriate Judge.

III. THE DESIGNATED PRESIDENTIAL SUCCESSION

ARTICLE 242.- If the absence of the President should be unconditionally permanent, the Designated Person who the National Congress elects as a consequence shall exercise the Executive Power for the time remaining to complete the constitutional term. Should there also be a permanent lack of the three designees, however, the Executive Power shall be exercised by the President of the National Congress, and failing the latter, by the President of the Supreme Court of Justice for the period remaining to complete the constitutional term. In his temporary absences, the President shall be entitled to name one of the designees so that he may serve as a substitute.

If the election of the President and Designees were to remain undeclared one day before the 27th of January, the Executive Power will be exercised as a special exception by the Cabinet, which must convene elections of the senior leadership within fifteen days subsequent to that date. These elections shall be accomplished within a period not less than four nor greater than six months, counted from the date of the announcement. Once the elections are complete, the National Elections Council or, failing that, the National Congress or the Supreme Court of Justice, if applicable, shall make the suitable declaration of election, within twenty days following the date of the election, and the elected officials shall immediately assume their duties until completion of the appropriate constitutional period. While the newly elected senior leadership is assuming its duties, the Congressmen of the National Congress and the Magistrates of the Supreme Court of Justice shall continue in the interim the performance of their functions.

1. Occasion for the replacement of the President

The Constitution establishes two hypotheses (Art. 242) in which the President may legally be replaced, to wit: in temporary absences and in permanent absences.

Temporary absences should be understood as trips by the President outside the country, going on leave for a determined period of time, and the suspension of the duties consequent to a judicial decision. Should the voyage abroad be for more than fifteen days, it is up to the National Congress to grant permission (Art. 205, number 13).

Going on leave is envisaged for any circumstance in the President finds himself which he may be able to justify (Art. 205, number 12).

The [case of] suspension is created when a competent judge decrees a prison sentence for any crime which may deserve a greater penalty, because in this case it is envisaged in the Constitution that citizenship would be suspended (Art. 41), a status that carries with it the recognition of political rights, among which are those of electing and being electing, and conducting public duties (Art. 37). The suspension is provisional, because the definition of his/her situation shall only obtain until the respective sentence is pronounced, for which he/she might declare his/her innocence. What matters is the return to exercise of the post.

Among *permanent absences* are included all those cases in which in which the President ceases definitively the exercise of his post. Death, resignation, and judicial incapacitation are circumstances which definitively separate the President from the exercise of his/her post.

The acceptance of resignation is discretionary and [the authority] to grant it belongs to the National Congress (Art. 205, number 12).

Incapacitation, which is a penalty incidental to the penalty of imprisonment, may be special or definitive: the former is carried out in the event that the crimes are those of penalties less than five (5) years, and is applied for a particular post or political right (Art. 49, Penal Code). The latter is carried out when the crime deserves a penalty greater than five years and applies to all public posts (Art. 48, Penal Code)

2. Functionaries which may substitute for the President

The President may be substituted by a Designee to the Presidency, the President of the National Congress, or the President of the Supreme Court of Justice. In temporary absences, only Designees may substitute for him. The Designee shall be whomever the President shall decide, including for trips abroad, shorter or longer than fifteen days.

Should the President not appear at the start of the constitutional period for which he has been elected, the Designee to the Presidency elected by the National Congress shall exercise Executive Power.

In permanent absences, the Designee which the National Congress may select can substitute for him [the President]. It may happen that the Designees may be permanently absent (as in the case of death, for example). In this case, the President of the Congress might substitute for him [footnote: previously it was the Vice President. But the

Constitutional Chamber of the Supreme Court overturned the constitutional reform by which Vice-presidential Designees would be substituted]; and if there were also a permanent absence of him [the President of the Congress], the substitution would fall on the President of the Supreme Court of Justice.

The Constitution recognizes that the Cabinet can assume the exercise of Executive Power in one case: when one day prior to the 27th of January, the President of the Republic and Designees have not been declared [the winners of] the election (Art. 243).

3. Replacement of the President

The replacement is arranged by the National Congress if the conditions anticipated in constitutional norms are not met.

It was not possible to allege a temporary absence because none of the constitutional hypotheses came to arose. That included the case originating in a prison sentence, because the President was not even haled before a judge. Neither could a permanent absence be alleged, because the President had not resigned, was not dead, nor had he been removed from his capacity by judicial order.

Despite this, the National Congress designated a substitute for the President for the entire remainder of Zelaya's presidential period.
Following this reasoning, the man who poses as President of the Republic was not legally invested, because his designation was contrary to the Constitution. That is, everything was accomplished contrary to the Constitution of the Republic.

4. Succession, promotion or replacement?

A) Succession

All the organs of state, including the Supreme Court, argue, even in their written statements, that on June 28 there was a "presidential succession"

This language, strangely coinciding between all the organs of state, has a serious problem: it is not constitutional. In fact, no constitutional provision uses the term "succession" to describe the change of chief executive power in the cases studied, nor in any other case.

"Succession" is a term used in private law to refer to the transfer of property, rights or charges of a deceased person to his chosen heir. Succession, therefore is the process of the transmission of assets that occurs with death, either by will or intestate.

In public law, the term "succession" also involves transmission, but it is referred to in the sense of "succession to the throne". In this case, what is transmitted is the crown, a constitutional body representing the State and its unity. It is the word used in monarchies to designate the hereditary transmission of the crown following the death or abdication of

the king to a person determined by the line of succession recognized in the Constitution (eldest son and, failing that, those who remain in line or sequence) to have inheritance rights and guarantee the royal dynasty, as in Spain, where the mention of the Constitution to "historic dynasty" is an unambiguous reference to the House of Bourbon, so that presumably only the successors to the Royal House are linked with inheritance of Spanish Crown.

Honduras is a republic not a monarchy. From birth as an independent country, the founders excluded from their vocabulary the word "succession", precisely because they were such ardent supporters of the idea of a Republic. Consequently, the word "succession" does nor pertains to our system of government nor fit within our constitutional framework.

What our Constitution does recognize is the Alternation in the office of the Presidency as the normal means of transmitting the powers of government of a constitutional period to another and implies that general elections are carried out and declare formally elect the new President of the Republic. In this case, one could, in principle, speak of "succession" because there is no break between the periods of democratic, representative and republic Government..

Alternation will not exist, however, in the office of President if the elected President is replaced, still adhering to the Constitution, by another person before his term ends (Appointed President, Chairman of the National Congress or President of the Supreme Court of Justice) or if at the end of this period someone assumes the presidency who has not been elected in general elections by direct popular vote (as is the case of the Council of Ministers).

B) Promotion

"Promotion" is the term used in the decree which removed President Zelaya, i.e. 'in his place was promoted the President of Congress.'

This term refers to ascending to a position to which one has a right within that person's particular career (civil service, judiciary, military career, etc..). But in levels of the Senior Officials of the State, there is no protected career by law. These officials do not benefit from promotions or advancement, and their time in a position grants them only a retirement or pension. Moreover, the Constitution does not use that term to refer to the cases before us.

Furthermore, nobody, not even the authors of the decree in question, has insisted on calling a 'promotion' the act by which the President of Congress becomes the President of the Republic, which shows that even the parents themselves regret the mischief caused by having used the word incorrectly.

C) Substitution

Substitution is the term that the Constitution uses to refer to the act by which an officer

may exercise the executive power when the President vacates office before the end of the constitutional term for which he was elected (Art. 242).

Substitution does not fall within the Alternation in the office of the Presidency, because it relates to the succession of a president's term by another, prior to elections and the declaration of the election of the new President.

Substitution is operable when the President can not complete the term for which he was elected by supervening circumstances, such as when he dies, resigns or is disqualified by a court.

It refers, obviously, to an abrupt interruption of the office of President of the Republic before completing the constitutional term for which he was democratically elected, but within the constitutional framework. The expulsion of the President from office does not classify as Substitution, especially in light of the further aggravating circumstance, in this case, of expatriation.

D) Conclusion

What was carried on June 28 by the National Congress is not a succession, as recognized by all branches of government and other public bodies, nor is it a Promotion, precisely because the Decree vainly attempts to remove President Zelaya, nor is it a Replacement because the appointment of the supposed substitute was not carried out as mandated by the Constitution of the Republic.

The National Congress, therefore, violated the Constitution of the Republic. It simply removed, without the constitutional powers to do so, the President of the Republic, ignoring his appointment to the office legitimized by the direct vote of the Honduran people in democratic elections held and accepted as legal by the National Electoral Court. Therefore, the appointment of the President of Congress to exercise the executive power is the product of a violation of the Constitution of the Republic.

In conclusion, there occurred a supplanting of popular sovereignty and the usurpation of a Constituted Power because the President of the Republic was removed from office, even though the people had elected him for a term of four years, they arrogated to themselves powers which the Constitution does not grant by appointing the President of the National Congress as his replacement and he, in turn, exercises executive power with an unconstitutional investiture.

This is definitely a coup.

IV. THE CAPTURE AND EXPATRIATION OF THE PRESIDENT

1. Constitutional Law

The current Constitution of the Republic reads (Art. 102) that "no Honduran may be expatriated.

2. The capture

Ar. 293. The National Police is a professional, permanent institution of the State ... ... responsible for implementing the resolutions, rules, mandates and legal decisions of the authorities and public officials ...Article 99. ... Except for emergencies, the search of private homes can not be done from (6) in the afternoon to (6) in the morning ...

Under our Constitution, implementation of the resolutions, rules, mandates and decisions of the authorities, is reserved for the police (Section 293)

The capture of the President was made by the armed forces, not by the police. It is an act, therefore, notoriously contrary to the Constitution of the Republic.

It is alleged that a judge ordered the military to execute the arrest. But it does not remedy the violation of the Constitution to argue that a trial judge, in order to hear the case, carried out the order, because judges can order only what the law recognizes, as part of their powers. Court orders that clearly violate the Constitution are illegal and therefore flawed, in this case of absolute nullity, so that may be canceled at any time and automatically.

Finally, it is claimed by the same President Zelaya that the raid on his home was carried out before six (6) in the morning. What could be more contrary to the provisions of the Constitutional Article 99, that states that premises may not be entered between 6 pm and 6 a.m. (Art. 99, second paragraph).

This article has been repeatedly invoked by judges to declare illegal the raids on the homes of drug dealers or kidnappers, who are then hastily released, in spite of all the incriminating evidence gathered in the illegal raid. This behavior has frequently been questioned by both prosecutors and police. Evidently, drug traffickers and kidnappers receive a better legal treatment from the judicial system than that accorded to President Zelaya, in this case.

3. Justification of expatriation

The argument made to justify the deportation of the President of the Republic, and even the removal itself, is as follows: expatriation was necessary because simply bringing him before a Judge meant that a bloodbath was going to be inevitable. This is founded, according to lawyers who support the coup and the expatriation of the President of the Republic, in the "Necessity" as recognized in our penal code as a justification which exonerates criminal responsibility.

4. The State of Necessity

Under the Penal Code, anyone who "has committed an illegal act required by the need to save oneself or to save others from a danger not caused by him voluntarily or otherwise avoidable, provided that the act is proportionate to the danger " is exempted from criminal liability as justification for certain acts. However, that person "can not claim

State of Necessity if it is their duty to confront that same danger " (Article 24)

All writers on the subject as well as case law itself require that the danger to be avoided is real, imminent, immediate and unavoidable. The danger, then, needs be current, not future, possible or probable. Neither can the claim of State of Necessity be made when the danger can be avoided or can be circumvented by other means not injurious to others.

The danger should threaten an individual good that is legally protected (life, physical integrity, decency, honor, property, for example), their own or of a third party, creating a real situation of need to prevent or repel aggression in order to save it. It cannot be invoked by simply alleging, for example, that the intentions is to save the nation, but rather to save one or more concrete persons from danger.

The danger may be caused by the perpetrator, by another person or by nature. If it is caused by the perpetrator, the State of Necessity may be invoked only when it occurs involuntarily. If caused intentionally, the State of Necessity does not pertain, like when, in order to collect an insurance, a businessman decides to commit arson, but in his carelessness destroys the neighboring property.

The creation of the State of Necessity must be proportionate to the risk, i.e. the supposed legal good to be sacrificed must be equal or less than the safeguarded. In a shipwreck, no one would think to sacrifice the passengers in order to save them merchandise on board.

Finally, anyone who has the duty to face a certain danger cannot plead a State of Necessity when such a danger arises. No public official whose role is to constantly face danger, such as police, firefighters, soldiers and others like it can invoke in his favor that "cause of justification."

5. Conclusion

In the case of the removal of the President and his expatriation, we should assess the risk, the good that is legally protected, the ratio between the fact and the danger, and whether the perpetrators acted to save themselves and others from the supposed "bloodbath ".

If one accepts that the removal and the deportation was justified, going forward the alleged unconstitutional actions of the Presidents will be avoided by means of dismissal. Also, any complaints regarding the President's conduct will best be resolved by means of exile, not a trial, because bringing them to court presence involves a grave and imminent danger, something that can only be avoided by these means.

Clearly, the removal and expatriation cannot be justified on the basis of 'State of Necessity". Nobody in their right mind can accept as legal the argument that to avoid the "bloodbath that having the President brought before a judge in the course of a fair trail would of course bring about", it was necessary to depose him and take him against his will to another country and leave him on the tarmac there as if he were any old package.

Moreover, there have been discussions about the responsibility for the expatriation of the

President. It appears that this decision is the not the responsibility of one person or one institution, because what happened on the 28th was already known about by the heads of most state institutions and some trade associations and the civil society, which can be derived by the immediate, organized reactions to the same.

The great conspiracy was revealed on the 28th. The operation that was implemented that day was designed with sufficient time to ensure that nothing would be left to chance or exposed to last-minute, discretionary decisions. Immediately after the expatriation, Congress met to officially impeach the President, other state bodies felt that everything was legal, private business, religious leaders and civil society expressed satisfaction and stated that they approved of what happened because it was a "constitutional succession", and finally, the argument of "State of Necessity" to justify the deportation of the President, was made from the highest spheres of public power.

In this conspiracy was also considered the expatriation of the Chancellor Patricia Rodas, against whom, according to statements by the same authority, there existed no arrest warrant. No one has yet explained why the Chancellor was expatriated.

For this, we draw attention to the situation of fundamental rights in Honduras. If the public authorities and business organizations, religious and civil society are able to participate or accept the violation of fundamental rights of the President of the Republic and the Chancellor, why can not contravene against ordinary citizens.

Obviously, preparing the coup so well in advance did not help, since everything obviously went so wrong. The awkwardness, the absurdity and simplicity is what is most prominent in the whole operation.

Finally, it should be noted that the precedent would be disastrous not only for future Presidents of Honduras, but also to the Presidents of Latin America. Impunity in the case of Honduras, would be imposing a rule to apply in the rest of Latin America.

V. DID THE PRESIDENT VACATE AUTOMATICALLY HIS POSITION ACCORDING TO ARTICLE 239 OF THE CONSTITUTION?

1. As established in article 239 Article 239 of the constitution prohibits anyone who has already exercised the title of Executive Power to aspire to the Presidency of the Republic and punishes anyone who violates the prohibition, and anyone who "proposes its reform, as well as those who support it directly or indirectly". The penalties are: immediate cessation of the exercise of his respective responsibilities and ineligibility during 10 years for the exercise of any public function.

Article 239. The citizen who has already exercised the title of Executive Power cannot be president or designate [vice-president]. He who violates this mandate or proposes its reform, as well as those who support it directly or indirectly, will cease immediately the *exercise of his respective responsibilities and ineligibility during 10 years for the exercise of any public function*.

2. Did the President violate article 239?

It has been suggested that President Zelaya had ceased to be president since the 28th of June due to the following: with the opinion poll that was to be carried out on the 28th, the President intended to continue in power or be reelected, thus positioning himself as a passive subject of the anticipated sanctions in said legal mandate. The Decree announcing this poll, published in La Gaceta [The Gazette – official publication of the government], did not refer to continuation nor to reelection. All of [the decree's] guidelines regulate only a poll which was intended to justify a bill which would be remitted to the National Congress to regulate a fourth ballot in which eventually the people would vote about the convening of a National Constitutional Assembly.

The motive, therefore, does not exist. And the best proof of that is that the National Congress did not invoke article 239 in the Legislative Decree with which it tried vainly to remove the President from his office. In conclusion, the President did not violate article 239.

3. How is article 239 applied?

It is said that this article is automatically applied, without intervention by any authority declaring the existence of the constitutive acts of transgression, guilt and sentence. To maintain that the President had ceased to be President because article 239 stipulates that he cease his functions "immediately" is to ignore certain universally recognized, fundamental constitutional principles, apparently not well known in our country outside the forensic context. Honduras, since it became a Republic, has had in its Constitutions some provisions that have been sustained firmly and invariably, in order to avoid that the mere accusation of a crime, private or public, becomes an un-appealable verdict. Among these provisions, three stand out: the presumption of innocence, the right to a trial and due process. Article 89 of the constitution establishes that "all people are innocent until there has been a declaration of his responsibility by a competent authority". In other words, one is guilty only if one has been declared responsible by judicial sentence. "The right to a defense is inviolable", says article 82 of the constitution. This means that the accused has the right to explain his reasons, present proof and allegations in his favor, before a competent authority. Finally, the constitutional articles 90 and 94 declare that an accused person, respecting his right to a defense, should be tried before a competent judge, who, only if he is found against in the trial, will declare him guilty and sentence him, but the punishment will only apply when this acquires a firm character, that is to say, when there is no possible further legal action to be taken.

Criminal Trial Law offers the rules for application of these principles and our Criminal Trial Code brings them together. Both are studied in the existing schools of law, which are many, and also in the graduate program in Criminal Trial Law at the UNAH. There should be no student or lawyer, as a result, who does not know these principles. In conclusion, although article 239 of the constitution, employs the phrase "immediately", the penalty will not apply until the judge, upon concluding the trial, decrees it with a firm sentence. These constitutional provisions distance us from the caves, the dark ages, the medieval times and all those eras in which the most elemental rights of human beings

were not recognized. They also distance us from systems of Communism, Nazi-ism, Phalangist and Islamic Fascism, in which human beings are simply instruments of supreme will, whose fates, imminent and mysterious, are indisputable and ineludible. The attempted malicious revival of the shameless reminiscences of humanity's sinister past, with the intention of recognizing their validity, is of great concern. Also of great concern is the intent to copy dishonorable mechanisms of tyrannical systems that oppress their people and are rejected unanimously by modern societies, because of their demonstrated political and legal ignorance that harms our environment.

4. A Curious Detail

It is notable that all the Powers of the State and the rest of the public organizations, like the business and political party leaders (excepting the UD) and leaders of certain civil society organizations, agree that based on the application of article 239, Zelaya was not president on the 28th because, according to them, he planned to reform it. But they don't say anything about the congress members, of the National Party and of the UD, who, as indicated at the beginning of this article, signed the bill put forth to provide a ballot box for a vote on the same question that Zelaya aimed to ask the population, that is, whether to call for a National Constituent Assembly.

According to the heads of the various state organisms and the leaders of private business groups, the only one who should be punished is President Zelaya, even though the survey was not carried out. According to the Honduran system he is the only guilty party, even though he had not carried out the crime, even assuming it were a crime. The Congresspeople, who did complete the act because they formally presented the bill to provide a ballot box to decide on whether a National Constituent Assembly should be called to the National Congress, are outside the application of article 239.

When the high government officials collaborate with the private business elites to commit injustices like this one, it becomes clear that the problem in Honduras is not one of arbitrariness, but of culture.

If they are capable of doing this to a president what wouldn't they do to a common citizen.

Thus, we should not be shocked that in our country, justice is selectively applied.

VI
CONCLUSION

There is no doubt whatsoever that on June 28th a coup d'état was carried out, because the legitimate leader of the executive branch was not recognized as such, and was violently expatriated, thus destroying the integrity of the State itself. Through a fiction put forth in the Constitution itself (article 375), the Constitution does not lose its validity in the face of an attack by brute force or political-legal machinations; as such, it is still valid despite the coup d'état.

What is unprecedented is that the coup d'état was the product of a conspiracy of all the Powers and other organisms of State, the business leadership, the leadership of the political parties (except UD), and of some religious leaders and civil society.

This has made clear the fact that public [state] power and the powers of the establishment are one and the same, and that they are convinced they can act with impunity. For this reason we should not be surprised that they have conspired unscrupulously against the nation, against democracy, against history and against reason. They were not concerned with the crisis they could generate on a national or regional level; nor did they care about the reactions of the international community; much less did they care about the future of the country.

Their hate, intransigence, intolerance, and stubbornness were stronger; they gave in to the sense of impunity that comes from the arbitrary exercise of power. In this process, not once have intelligence, imagination or insight–all vital elements of successful conspiracies–played a role; in their place, what stands out is clumsiness, simple-mindedness, and the abundance of dilly-dallying. This is why the conspiracy has proved to be a categorical and resounding fiasco.

Because of this, any solution to this national tragedy must necessarily include a reconstruction of the country, which implies a renewal of institutionality, the construction of a new political culture, characterized by active and direct participation of the citizenry in the solution to the problems that concern them, the establishment of norms to regulate the new form of governance and to detail clearly the objectives and goals that we hope to achieve in the coming decades, and identifying, without demagoguery, the means to achieve them.

The San José Accords have exhausted their useful existence. They are ready to become history. If the obstacles to their implementation prove insurmountable, we will, unfortunately, have to dispense with them.

What is essential is national reconciliation, which requires us to forgive and forget. And what is inevitable, because the people of the nation have raised it as their flag, is the convening of the National Constituent Assembly.

A definitive solution, therefore, cannot be achieved without the convening of the National Constituent Assembly.