

Main attacks on judicial independence in El Salvador 2021-2023

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Context:

In El Salvador, the president's party representatives won the vast majority of seats of the Salvadoran Congress in the March 2021 elections, 56 out of 84¹, that with their closes political ally, GANA, sum up 61. This allows the president's party to enact any law or approve measures, even some that undermine democracy or that are questioned by the opposition, by civil society, by the international community, or which are clearly unconstitutional. However, this large majority has given them a sense of populist entitlement. Whenever they are questioned, either the president as well as members of his party in congress they respond by saying that they have the power to do so because they speak on behalf of "the people", they are the people.²

Previous, but recent Latin American experience has shown us that in order to accumulate power; populist presidents need to have absolute control over 2 main institutions: In first place, the military, because this gives them the possibility to subdue the population, political opponents, dissidents, and it also prevents them from being overthrown. The military and the police help them to create fear amongst the population. El Salvador is a truly clear example of this maneuver. Bukele has constantly increased the military's budget and the number of active members³, even though our country has more pressing needs related, for example, to education and poverty reduction⁴. Lately, there have been massive protests against this and other unpopular and anti-democratic measures approved by the President and his representatives in Congress⁵. **In second place, populist presidents need to control judges and courts, and especially the Supreme Court. Populist presidents want to get away with anything and everything.**

¹ Martinez, L. (2021). "¿Quiénes son los diputados de la nueva Asamblea Legislativa de El Salvador?", El Salvador.com, 05.05.2021, available at <https://www.elsalvador.com/noticias/nacional/asamblea-legislativa/834750/2021/> (Verified on 10.20.2021).

² Congressman from Nuevas Ideas, Caleb Navarro Twitter's account <https://twitter.com/CalebNNavarro/status/1450960142049193984> or the Salvadoran Congress Vice-president, Suecy Callejas Twitter's reaction to the may 1st removal of 5 justices of the Supreme Court, <https://twitter.com/suecallejas/status/1388678369621987328/photo/1> (Verified on 10.20.2021).

³ Bernal, D. y otros (2021) "El Ejército, el que más crece en presupuesto", en La Prensa Gráfica online, 10.02.2021, <https://www.laprensagrafica.com/elsalvador/El-Ejercito-el-que-mas-crece-en-presupuesto-20211001-0109.html> (Verified on 10.20.2021).

⁴ Redacción de Infodefensa, "El Salvador duplicará sus efectivos militares de 20.000 a 40.000 en cinco años", 07.05.2021, available at <https://www.infodefensa.com/texto-diario/mostrar/3110862/salvador-duplicara-efectivos-militares-20000-40000-cinco-anos> (Verified on 10.20.2021).

⁵ Agencia EFE (2021). "Miles de salvadoreños marchan contra Bukele cuando se acerca a su medio mandato" EFE online, 10.18.2021, available at <https://www.efe.com/efe/america/sociedad/miles-de-salvadorenos-marchan-contrabukele-cuando-se-acerca-a-su-medio-mandato/20000013-4654153> (Verified on 10.20.2021).

They want what they want, and when they cannot get it by democratic means, they are willing to force their decisions on the population⁶.

Obviously, checks and balances often stand in their way. Once they have congressional majority, the only big obstacle they face are the courts. Therefore, the dismantling of the Judicial Branch is a priority, in order to take control and increase their power grab structure. We have seen Venezuela under Hugo Chavez⁷, Bolivia and Evo Morales⁸, Nicaragua and Daniel Ortega⁹. Supreme Court rulings have legitimated their prolonged stay in power, amongst other things.

Concrete attacks on judicial independence 2021-2023

Examples of attacks on judicial independence perpetrated by president Bukele and his party members during 2021:

- 1) On May 1st of this year, during the new legislature's inaugural session, Nuevas Ideas representatives voted to remove 5 supreme court judges without any regard for due process nor without being impeached¹⁰. Their term was not due until 2027, because Supreme Court Justices in El Salvador seat at the bench for 9-year terms, according to article 186 of El Salvador's Constitution. However, these 5 justices were removed because they were an obstacle for the President's and Nuevas Idea's measures¹¹. However, when questioned, the ruling party members simply said that they did what the people elected them to do. However, the truth is that this measure violated our Constitution in many ways.

⁶ Foa, R. "Why Strongmen Win in Weak States". Journal of Democracy, vol. 32, no. 1, Jan. 2021, pp. 52-65, available at <https://www.journalofdemocracy.org/articles/why-strongmen-win-in-weak-states/> (Verified on 10.20.2021)

⁷ Sala de lo Constitucional del Tribunal Supremo de Justicia de la República Bolivariana de Venezuela, december 11, 2008, ruling reference 08-1610, available at <https://supremainjusticia.org/test/wp-content/uploads/2016/01/N%C2%B0-20-TSJ-aval%C3%B3-E2%80%9Csegundo%E2%80%9D-referendo-sobre-la-reelecci%C3%B3n-indefinida-de-Ch%C3%A1vez.pdf> (Consulte don 10.20.2021).

⁸ Sala Plena del Tribunal Constitucional Plurinacional de Bolivia, SENTENCIA CONSTITUCIONAL PLURINACIONAL 0084/2017, Sucre, 28 de noviembre de 2017, available at <https://edwinfigueroag.files.wordpress.com/2017/12/sentencia-0084-2017-tcp-bolivia-reeleccion-evo-morales.pdf> (Verified on 10.20.2021).

⁹ Sala de lo Constitucional, sentencia no.06 Corte Suprema de Justicia, Managua, 09.30.2010, available at https://www.poderjudicial.gob.ni/pjupload/rp/pdf/Sentencia_N%C3%BAmero_6_30_Sep_2010_Reelecci%C3%B3n.pdf (Verified on 10.20.2021).

¹⁰ Arauz, S. y otros (2021). "Bukele usa a la nueva Asamblea para tomar control de la Sala de lo Constitucional y la Fiscalía", at El Faro online, 05.02.2021, available at https://elfaro.net/es/202105/el_salvador/25451/Bukele-usa-a-la-nueva-Asamblea-para-tomar-control-de-la-Sala-de-lo-Constitucional-y-la-Fiscal%C3%ADa.htm (Consulte don 10.20.2021).

¹¹ DW (2020). "Supremo salvadoreño anula decreto de Bukele que rige cuarentena por COVID-19", no date, available at <https://www.dw.com/es/supremo-salvadore%C3%B1o-anula-decreto-de-bukele-que-rige-cuarentena-por-covid-19/a-53739072>, citing President Bukele's reaction on his Twitter account in this manner: ""La @SalaCnalsV (Sala de lo Constitucional) nos acaba de ordenar que, dentro de 5 días, asesinemos a decenas de miles de salvadoreños" (Consulte don 10.20.2021).

That same day, Congress appointed 5 new justices to the Supreme Court without following the rules established in our Constitution and other related legislation¹². These new justices have quickly shown that their rulings are based on the president's best interests¹³. The constitutional chamber of the Supreme Court of El Salvador lost any independence it might have had since May 1st of this year.

- 2) A new opportunity to undermine the independence of the Supreme Court of Justice presented itself less than 2 months later at the end of June. At this point, let me pause to explain that in El Salvador, there are 15 Supreme Court Justices. That they do not hold life-long-tenures but are appointed for 9 year-terms and that to avoid the renewal of the entire court at once, every 3 years, each new legislature has the constitutional power to appoint 5 new justices according to article 186 of the Constitution and the Peace Agreements of 1992. So, at the end of last June, the newly elected congress had the opportunity to appoint 5 new justices. However, during these new appointments, Nuevas Ideas' representatives did not follow the correct procedures either¹⁴. They did not conduct a proper assessment of the merits of the different candidates, the congressional majority chose the candidates less likely to be independent, as required by articles 176 and 186 of our Constitution.

To sum it up, in less than three months, the president and his party have appointed 10 out of 15 Supreme Court Justices in El Salvador. A situation that our Constitution and the Peace Agreements clearly sought to prevent, by establishing that each new legislature could only appoint 1/3 of the justices¹⁵.

As a result of these measures taken by congress between May and June of 2021, the Supreme Court is no longer an independent body and we have already seen disturbing rulings. Let's cite one very concrete example: Even though the Constitution's text forbids any president's immediate reelection, on September 3rd of this year, the newly appointed justices of the Constitutional Chamber of the Supreme Court of Justice, ruled that, that the text should be interpreted according to what the people want and if the people decide to reelect the president, then the Constitution should allow it. Because the Constitution cannot go against the will of the people (*De ahí que el giro en la redacción en nuestra Constitución actual, posibilita que sea el pueblo en el ejercicio del poder soberano quien decida, si continúa por un segundo período o el*

¹² BBC (2021). "El Salvador: la nueva Asamblea Legislativa, afín a Bukele, destituye a los jueces del Constitucional y al fiscal general", BBC online, 05.02.2021, available at <https://www.bbc.com/mundo/noticias-america-latina-56953799> (Verified on 10.20.2021).

¹³ Cáceres, M. y otro (2020). "Corte Suprema niega extradición de pandillero "Manicomio" a Estados Unidos", ElSalvador.com online, 08.25.2020, available at <https://www.elsalvador.com/noticias/nacional/corte-suprema-niega-extradicion-pandillero-manicomio-a-estados-unidos/872211/2021/> (consulte don 10.20.2021).

¹⁴ Cáceres, G. (2021). "Nuevas Ideas nombra a su Corte Suprema para nueve años", El Faro online, 06.30.2021, available at https://elfaro.net/es/202106/el_salvador/25581/Nuevas-Ideas-nombra-a-su-Corte-Suprema-para-nueve-a%C3%B1os.htm (Consulte don 10.20.2020).

¹⁵ In this matter, the leading case is the ruling from the Constitutional Chamber of the Supreme Court of El Salvador reference 19-2012 dated 06.05.2012 available at <https://www.jurisprudencia.gob.sv/DocumentosBoveda/D/1/2010-2019/2012/06/96B8B.PDF> (Verified on 10.20.2021).

mismo soberano lo elimina de la contienda, todo ello, mediante elecciones libre (...) De ahí que el destino de la sociedad debe ser decidido por todos sus integrantes. Y esta es precisamente la esencia de la Soberanía. La posibilidad de que las normas -resultado de la interpretación de los tribunales constitucionales- que obligan a la comunidad sean trazadas por la sociedad misma. Esa voluntad debe ser respetada, sea cual sea la manera en la que se exprese. Así el máximo y último interprete de la Constitución debe estar en la disposición de escuchar y atender a esa manifestación del pueblo), and let's remember that populist leaders speak for the people¹⁶.

- 3) Once the President and his party had gained control of the Supreme Court, they proceeded to gain control of a large part of the more than 700 judges there are in El Salvador. In a new attack against judicial independence, on August 31, 2021, Congress approved a law that sent more than 150 judges to early retirement. This measure violates the Constitution, because according to article 182 of our Carta Magna, the power to remove, discipline or remove justices, belongs only to the Supreme Court of Justice *en banc*. On September 27th, also of 2021, the Supreme Court appointed a group of fresh new judges and shortly after that, 70 more new judges were appointed without following the proceedings established in the Constitution, the Judicial Career Law, and the Law of the National Judicial Council. Judges have to be evaluated, interviewed, and it is the National Judicial Council's responsibility to send 3 previously evaluated candidates for each opening that exists. The 15 justices of the Supreme Court, then have to discuss and vote individually for the best candidate for each court. These proceedings were omitted as well as the proceedings to remove the judges who were sent to early retirement, based on a law that violates international standards and conventions, such as the "CONVENCIÓN INTERAMERICANA SOBRE LA PROTECCIÓN DE LOS DERECHOS HUMANOS DE LAS PERSONAS MAYORES".

This violates the Constitution for a variety of reasons, but it is again a way to control a large part of the judicial system. Some of the newly appointed judges have already overturned rulings against some of Bukele's political opponents¹⁷.

- 4) The judge of the Third Sentencing Court of San Salvador, Juan Antonio Durán, denounced at the end of 2021, that he was transferred from his court in San Salvador, the capital city, to a lower category court in a smaller district at Zacatecoluca, in the La Paz department, for being a critic of the coup to the Constitutional Chamber and for opposing the reforms of the Law of the Constitution. Judicial Career¹⁸. Other judges were also punished by transferring them to lower courts, but they preferred to stay silent for fear or worst retaliations, such as judges Samuel Lizama and Cesia Romero who were also transferred to courts away from the capital city. The

¹⁶ Final ruling reference 1-2021 from the Constitutional Chamber of the Supreme Court of Justice, regarding the loss of citizenship rights, dated 09.01.2021, available at <https://www.jurisprudencia.gob.sv/portal/apls/2021/09/1-2021PerdidaDerechosCiudadania.pdf> (Verified on 10.20.2020).

¹⁷Cornejo, I. (2021). "Magistrados sustitutos revierten arresto domiciliario para Ernesto Muyschondt", El Mundo online, 10.02.2021, available at <https://diario.elmundo.sv/magistrados-sustitutos-revierten-arresto-domiciliar-para-ernesto-muyschondt/> (Consulted on 10.20.2021).

¹⁸ Alas, L. (2021). "Juez Juan Antonio Durán denuncia traslado "en represalia por críticas" contra golpe al Judicial", El Salvador.com online, 26.09.2021 available at <https://historico.elsalvador.com/historico/883125/juez-juan-antonio-duran-denuncia-traslado-represalia-criticas-golpe-judicial.html> (Consulted on 03.01.2024).

appellate court judges were transferred to other judicial instances in the interior of the country, on Monday, September 27 2021. The change occurs after both publicly criticized Legislative Decree 144, with which the ruling New Ideas bench retired 30% of the judges of lower and higher courts of the Judiciary, violating the Constitution¹⁹.

Subsequent attacks during 2022 and 2023:

- 1) The Due Process of Law Foundation has written a detailed document on the main attacks on judicial independence in El Salvador during 2021, since it was the worst year: “Gagged Justice”, available at https://www.dplf.org/sites/default/files/resumen_ejecutivo_-_justicia_amordazada_-_captura_justicia_el_salvador.pdf At the end of 2021 the scenario for the judiciary in El Salvador was as follows, 1/3 of the judges appointed in September respond directly to the president’s interest and the rest are intimidated and fearful of retaliations. The attacks on judicial independence during 2021 have had lasting effects and have undermined the independence of most judges in the country. Most rulings tend to favor the official’s party political interests or remain undecided.
- 2) As a concrete example, we can mention the more than 3,500 habeas corpus presented before the Supreme Court of Justice of El Salvador in cases of people detained during the state or emergency without the judicial guarantees that our Constitutions establishes, that have not been decided or have been rejected one later, as of February 2023 because the Supreme Court of Justice does not rule against the Executive Branch’s policies²⁰.
- 3) The lack of judicial independence not only affect justices who have been removed, silenced or are fearful of retaliations. It has a much larger effect on the whole population, because the possibility of having a fair trial has almost been erased. Not only do the more than 3,500 unresolved habeas corpus constitute evidence of this situation, but the Judiciary is being weaponized by the Executive Branch to persecute its detractors.

As a concrete and recent example, at the end of 2023, the Inter American Press Association (IAPA) considered a million-dollar lawsuit against *El Diario de Hoy*, of El Salvador, and one of its journalists as an act of intimidation. The organization condemned the disproportionate judicial harassment that fails to comply with inter-American standards that protect freedom of the press. Businessman Yakov Fauster (The father in-law of the Peter Dumas, the Director of National Intelligence²¹) demands compensation of five million dollars from Editorial Altamirano Madriz S.A.

¹⁹ Amaya, C. (2021). “Desmantelan Cámara Ambiental que frenó daño a río Sensunapán”. 28.09.2021, Revista Factum on line, available at <https://www.revistafactum.com/desmantelan-camara-ambiental/> (Consulted on 03.01.2024).

²⁰ Swissinfo (2023). “Corte salvadoreña, sin resolver 3.518 habeas corpus en régimen de excepción”, 28.02.2023. available at https://www.swissinfo.ch/spa/el-salvador-justicia_corte-salvadore%C3%B1a--sin-resolver-3.518-habeas-corpus-en-r%C3%A9gimen-de-excepci%C3%B3n/48323478 (Consulted on 03.01.2024).

²¹ IFJ (2023). “El Salvador: empresario intenta silenciar a la prensa con millonaria demanda”, on line, 07.12.2023 available at <https://www.ifj.org/media-centre/news/detail/category/press-releases/article/el-salvador-empresario-intenta-silenciar-a-la-prensa-con-millonaria-demanda> (Consulted on 03.01.2024).

de C.V, which publishes *El Diario de Hoy*, and the same amount to one of its journalists, in reparation for alleged moral damages²².

According to a reliable source²³, this case will most likely be decided in the “Second Court of Civil and Commercial disputes of San Salvador”, whose long-time judge, Ana María Cordon²⁴, has been recently and silently transferred, in order to place a judge who will rule this case in favor of the plaintiff in order to silence the media, just as ex-president Correa of Ecuador and other non-democratic presidents have done in other countries. This will be a first for El Salvador and as I mentioned before, the attacks on judicial independence have undermined the checks and balances in El Salvador creating a system where ordinary citizens, journalists, government critics and basically anyone, cannot count on a fair trial, since the Judiciary Branch has been gagged.

- 4) Another concrete example regards the electoral jurisdiction. At the end of 2023, during the candidate’s registration process for the 2024 elections, one member of the Supreme Electoral Court, justice Julio Olivo, expressed his fear of retaliation from the Executive Branch if the electoral judges did not decide in favor of the official party, and especially in favor of president Bukele’s registration, even when it has been deemed unconstitutional by many experts²⁵. This subject matter jurisdiction is not a part of the Judicial Branch in El Salvador, it is totally independent according to our Constitution, but its’ independence has also been undermined by the Government.

Many of these cases have been brought to the attention of the Interamerican Commission of Human Rights from 2021 to 2023, by different national and international NGO’s and OSC’s. However, there have been no decisions from the IAHR and not a single case has passed on the Interamerican Court of Human Rights.

Finally, it is necessary to point out that in 2024, 5 new justices of the Supreme Court of Justice have to be appointed, according to articles 176 and 186 of the Constitution. The only 5 members not appointed by the Bukele-led Congress will finish their 9-year term on the 22 of September of this year. The new justices should be appointed by the new legislature, since on February 4th, 2024, El Salvador will hold presidential and legislative elections. If the official party obtains again the majority of seats in our Legislative Assembly, all 15 justices of the Supreme Court will have been appointed by the official party.

²² El Diario de Hoy (2023). “La SIP denuncia: demanda millonaria pretende silenciar a El Diario Hoy”, El Salvado.com online, 07.12.2023 available at <https://www.elsalvador.com/noticias/nacional/periodismo-sip-condena-demanda-edh-hostigamiento/1109055/2023/> (Consulted on 03.01.2024).

²³ Judge N.1, interviewed January 2, 2024 under anonymity clauses.

²⁴ Ana María Cordon CV available at: [file:///C:/Users/Propietario/Desktop/LIC.%20ANA%20MARIA%20CORDON%20ESCOBAR-JUEZA%20%C2%B0%20DE%20LO%20CIVIL%20Y%20MERCANTIL%20DE%20S.S.%20\(1\).pdf](file:///C:/Users/Propietario/Desktop/LIC.%20ANA%20MARIA%20CORDON%20ESCOBAR-JUEZA%20%C2%B0%20DE%20LO%20CIVIL%20Y%20MERCANTIL%20DE%20S.S.%20(1).pdf) (Consulted on 03.01.2024).

²⁵ Villaroel, G. (2023). “Hay miedo” en el TSE por la inscripción de Bukele, según magistrado Julio Olivo”, La Prensa Grafica on line, 01.11.2023, available at <https://www.laprensagrafica.com/elsalvador/Hay-miedo-en-el-TSE-por-la-inscripcion-de-Bukele-segun-magistrado-Julio-Olivo-20231031-0108.html> (Consulted on 03.01.2024).