

LAD CASE STUDY

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BUKELE V. THE RULE OF LAW

Getting Results by Skirting the Law

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Introduction.....	3
Country Political Background.....	5
Background on Bukele’s Undermining Checks and Balances Early On.....	9
Constitutional Rules.....	11
Constitutionality of the Attack on the Judicial Branch.....	11
Avenues for Judicial Resistance.....	13
Executive Branch.....	14
Option Set.....	15

Introduction

On May 1, 2021, alarm bells were set off when Claudia Ortiz, a newly elected member of El Salvador's Legislative Assembly, was barred from the preparatory meeting to initiate the new Assembly. President Nayib Bukele's recent and increasing overreach of executive power and his disregard for checks and balances were already causing concern when his party, Nuevas Ideas (New Ideas), secured a supermajority in the new Assembly with 64 out of 84 seats. His power grab followed a series of clashes with the previous Assembly and the Constitutional Chamber, reflecting authoritarian tendencies by Bukele and party affiliates.

Ortiz and nineteen other opposition members were excluded from negotiations and the process of agenda-setting for the subsequent plenary session. When the session began, and the opposition's microphones were disabled, Nuevas Ideas representatives dominated the plenary session.

Fears of authoritarianism intensified as the judicial branch, which had shown commitment to upholding constitutional limits on power, came under direct attack by Bukele and his allies. 64 out of 84 legislators voted to approve the removal of all five Supreme Court magistrates of the Constitutional Chamber, along with the Attorney General.

Only two years before the end of his presidential term, Bukele's removal of magistrates who enforced checks on presidential power was creating an opening for future erosion of the rule of law.

The constitution permits elected presidents a five-year term with a strict prohibition on consecutive re-election but does not limit the number of non-consecutive times an individual may be elected.¹ The attack on the judicial branch and the weakening of the separation of powers weakens constitutional limitations on the presidency. Bukele has now established a cohesive alliance across all three branches of government, particularly among those who interpret constitutional limitations.

As a leader of the opposition, Ortiz confronts challenges in navigating the situation to ensure constitutional limits on presidential power will remain in place, despite the Bukele regime's control of the executive and legislative branches.

The constitutionality of the Legislative Assembly's removal of the Constitutional

¹ outlined in Articles 154 and 152, respectively

Chamber's magistrates is highly questionable, given a series of conflicts between Bukele and the previous Chamber. In 2020, the Chamber ruled Bukele's COVID-19 policies to be an unconstitutional overreach of executive power.²

In response to criticisms of his dictatorial behavior, Bukele defended his strong-handed approach to the pandemic, declaring that if he were a dictator, he "would have had them all shot. You save a thousand lives in exchange for five."³ This statement, needless to say, did not alleviate concerns about his authoritarian tendencies.

The Constitutional Chamber's resistance to Bukele's overreach in 2020 demonstrated a commitment to checks and balances. However, their removal eliminates this commitment. Moreover, the subsequent selection process for their replacements again violated constitutional procedures, establishing a pattern of unchecked, unconstitutional actions within the government. The Legislative Assembly failed to define "specific causes previously established by law" for the removal of the magistrates, and the candidates were not selected from a list provided by the National Council of the Judicature, as constitutionally required. Instead, during the plenary session, Nuevas Ideas deputy Christian Guevara read the names of the five new Supreme Court magistrates without providing any background information or justification for their selection. There was no discussion of alternative candidates, and they were approved by a vote of the party's supermajority.

The events leading to the removal of the magistrates and their replacement thus violated several constitutional laws governing the election or removal of Constitutional Chamber magistrates. Bukele responded to criticism by the opposition by challenging any questioning of his government's legitimacy. On social media platform X, Bukele stated:

"To our friends in the international community: We want to work with you, do business, travel, get to know each other, and help out when we can. Our doors are open wider than ever, but with all due respect: We're cleaning out our house...and that is none of your business."⁴

With only two years remaining in his presidential term, lawmakers and democracy advocates like Claudia Ortiz feared further erosion of constitutional limitations on

² Summary of the proceedings to determine unconstitutionality of Bukele's COVID policies: "21-2020/23-2020/24-2020/25-2020 Inconstitucionalidad." Corte Supreme de Justicia El Salvador, March 2020. https://www.jurisprudencia.gob.sv/pdf/I_21-2020.pdf.

³ Jimmy Alvarado, Roxana Lazo, and Sergio Arauz, "Bukele's Legislative Assembly Ousts Supreme Court Magistrates and Attorney General." El Faro, San Jose, Costa Rica, May 2, 2021. https://elfaro.net/en/202105/el_salvador/25452/New-Legislative-Assembly-Ousts-Supreme-Court-Magistrates-and-Attorney-General.htm

⁴ Nayib Bukele. "A Nuestros Amigos de La Comunidad Internacional..." Social media. X (blog). Accessed November 28, 2024. <https://x.com/nayibbukele/status/1388705685689540615>.

Bukele's power.

Should Ortiz prioritize domestic mobilization, stressing threats to the constitution engendered by his attack on the judiciary? Or might seeking international pressure prove to be more effective in preserving democracy? With strong support for Bukele across the government branches and within civil society, Ortiz found herself isolated in the opposition.

Country Political Background

El Salvador's constitution defines the country as a republican, democratic, and representative state with a pluralistic political system expressed through political parties.⁵ After gaining independence in 1839, political parties were run by the oligarchy and military, with high barriers to political participation and authoritarian rule until the revolutionary civil war of 1980-1992.

After twelve years of devastating civil war, mass migration, and the loss of 75,000 civilian lives, the Chapultepec Peace Accords were signed in 1992 between the right-wing Nationalist Republican Alliance (ARENA) and the guerrilla group Farabundo Martí National Liberation Front (FMLN). This allowed the latter to transform itself into a legitimate political party and promised a transition to a more open and representative democracy.

The Peace Accords moderated the interests and activities of these previously extremist parties. The FMLN had first emerged as a militant guerrilla group inspired by Marxist-Leninist ideology and liberation theology. However, to achieve a successful outcome to the peace negotiations and broaden support in the post-war period, the FMLN adopted democratic socialism.

ARENA represented the legacy of oligarchic interests. Founded by army general Major Roberto D'Aubuisson, who was responsible for multiple civilian massacres during the war, ARENA was deeply committed to the status quo that kept the military and economic elite in power. In the post-war period, the party continued to prioritize conservative business interests.

For about three decades following the war, the FMLN and ARENA dominated the political sphere, overshadowing other minority parties.

Until 2009, presidential power remained in the hands of the ARENA party. This happened despite a period of massive social change, which weakened elite interests

⁵ Constitution Article 85

represented by the party. ARENA could maintain its political power because, before 2009, residential voting systems were only accessible in urban areas where most of the wealth was concentrated. This disenfranchisement of rural voters gave greater representation to elite interests aligned with ARENA's conservative economic policies for the first twenty years of the post-war period.

Plan Voto Residencial was implemented nationwide in 2009, investing in residential voting systems in rural areas. This increased the rural vote share, leading to the first presidential win for the FMLN party.

This is an example of the slow process of democratization that took place in El Salvador, which ultimately failed to adequately address the root grievances of the war. These included drastic inequality in land and wealth distribution, and allowed for the persistence of widespread economic and territorial marginalization. The country struggled to recover materially with little investment in civil infrastructure, leading to a massive informal economy, corruption, and the emergence of gang violence.

Gang violence emerged from a combination of transnational factors related to the civil war. Taking place at the end of the Cold War, the U.S. intervened heavily in El Salvador's civil conflict as part of its foreign policy to combat communism. Between 1980 and 1991, the U.S. sent over \$1 billion in military aid and training,⁶ in addition to over \$4 billion in economic aid,⁷ to El Salvador's regime. This was one of the biggest and most costly U.S. interventions in Latin America, which used counter-insurgency tactics to suppress the threat of the communist guerrilla movement for land and political equality.

Despite U.S. intentions to promote democracy and human rights, a post-war evaluation by the UN Truth Commission confirmed that Salvadoran armed forces and death squads, branches of the Salvadoran military trained by the U.S. at the School of the Americas, were responsible for most of the atrocities committed during the war. The Truth Commission reported that 85% of "cases denounced to the Truth Commission involved state agents, paramilitary groups, or death squads allied with official forces," while 5% were attributed to the FMLN.⁸

⁶ Edward M. Kennedy. "EL SALVADOR: Military Assistance Has Helped Counter but Not Overcome the Insurgency." United States General Accounting Office, National Security and International Affairs Division, April 23, 1991.

⁷ Adán Quan. "Through the Looking Glass: U.S. Aid to El Salvador and the Politics of National Identity." *American Ethnologist* 32, no. 2 (May 2005): 276–93.

⁸ United Nations Truth Commission. "EL SALVADOR ACCOUNTABILITY AND HUMAN RIGHTS: THE REPORT OF THE UNITED NATIONS COMMISSION ON THE TRUTH FOR EL SALVADOR." El Salvador: United Nations, August 10, 1993. <https://www.hrw.org/reports/pdfs/e/elsalvdr/elsalv938.pdf>.

The war led to the recruitment of boys as young as 12 years old and even younger. Wartime migrants were young boys and men fleeing recruitment as child soldiers; others were young men who had deserted their ranks from either side in the war. Experiencing marginalization and insecurity as undocumented individuals, coupled with their backgrounds in a violent environment, many gravitated towards the existing gang culture of Latino communities, particularly in Los Angeles.⁹

The U.S. only approved asylum applications for 2% of half a million Salvadorans attempting to flee during wartime.¹⁰ Harsh U.S. deportation laws in the mid-1990s¹¹ targeted individuals involved in gang activity and lacking documentation, triggering a massive wave of deportations back to El Salvador. The Salvadoran state was still struggling to recover from the war and could not handle this influx of criminals. This contributed to negative perceptions of foreign intervention among many Salvadorans.

Poor civil infrastructure and struggles to consolidate democracy contributed to the escalation of gang membership to 70,000 individuals in the post-war period. Ultimately, the post-war period saw similar levels of violence to those seen during the war. In 2015, El Salvador reached a homicide rate of 103 per 100,000 inhabitants, earning the title of the deadliest country in the world.

For comparison, the other four deadliest countries in Latin America at the time were Venezuela with 90 homicides per 100,000 inhabitants, followed by Honduras with 57 per 100,000, Jamaica with 45 per 100,000, and Guatemala with 30 per 100,000. The average death toll during the Salvadoran civil war was around 150 per 100,000; comparably, Colombia's peak in violence during armed conflict in 2009 was 110 per 100,000. El Salvador's homicide rate was significantly higher than its neighbors in this period, which is particularly significant for being outside of wartime.¹²

Throughout the 2000s and 2010s, El Salvador's politics were marked by corruption scandals and negotiations between politicians and gangs. This eroded support for both political parties, ARENA and the FMLN, and for democracy as a whole. Citizens began to associate democracy with a weak state that allowed gang violence to ravage the nation.

Bukele entered the political sphere as a young new face proposing drastic political change after decades of stagnation. He began his political career with the FMLN but

⁹ Roberto Lovato. *Unforgetting: A Memoir of Family, Migration, Gangs, and Revolution in the Americas*. New York, NY: HarperCollins, 2020.

¹⁰ Cecilia Menjivar and Andrea Gómez Cervantes. "El Salvador: Civil War, Natural Disasters, and Gang Violence Drive Migration." *Migration Policy*, August 29, 2018. <https://www.migrationpolicy.org/article/el-salvador-civil-war-natural-disasters-and-gang-violence-drive-migration>.

¹¹ The Violent Crime Control and Law Enforcement Act of 1994 and the Illegal Immigration Reform and Immigration Responsibility Act 1996

¹² David Gagne. "InSight Crime's 2015 Homicide Round-Up." *InSight Crime*, January 14, 2016. <https://insightcrime.org/news/analysis/insight-crime-homicide-round-up-2015-latin-america-caribbean/>.

was expelled in 2017 for allegedly throwing something at a woman in the party during a dispute. Bukele then created Nuevas Ideas, which challenged the political landscape in El Salvador. He introduced the new party as the “third way,” promoting anti-corruption, citizen security, and progressive social programs.

2017 also saw the official registration of VAMOS, a centrist party. Claudia Ortiz quickly became the face of the party and the opposition to Bukele. As the first female-led political party, VAMOS’s platform included a focus on social values such as family, gender equity, the environment, freedom of the press, the working class, Indigenous peoples, and upholding constitutional norms and democratic protections. Ortiz’s background as a lawyer, with political science education, and civil servant experience starkly contrasted with Bukele’s background as a publicist and businessman.

In 2019, when Bukele ran for president, Nuevas Ideas had not legally registered in time, so he ran as a member of the Grand Alliance for National Unity (GANU), a center-right party made up of many former ARENA party members. He used Nuevas Ideas branding throughout the election and his presidency, however, and established a strong alliance with GANU, which has allowed him to maintain that party’s support to the present day.

In 2019, Bukele won the presidential election with 53% of the vote, while the runner-up ARENA received 31% and FMLN 14%. Bukele became the first democratically elected candidate outside of those two formerly dominant political parties. His position as a third-party option, campaigning on an anti-corruption and modernization platform, was an appealing option for citizens tired of stagnation and violence.

As these oppositional parties emerge, develop, and consolidate, they compete to win support in a political system in which many have lost faith. This loss was due primarily to the perceived link between the Salvadoran democracy and gang violence. While Bukele's actions in his first few years of presidency undermined democratic norms and constraints on power, his uprooting of a system that had allowed for gang violence was welcomed. Many were willing to support his strongman actions after a series of weak leaders.

However, the recent abuses of executive power alarmed political party leaders like Ortiz, who draw connections between Bukele’s authoritarianism and the decades of authoritarian rule that led to 12 years of civil war. For her, the war highlighted the importance of democratic consolidation and the separation of powers. Ortiz’s experience as a lawyer and position in the Legislative Assembly underpinned her capacity to navigate legal avenues to address the constitutional legitimacy of the new government.

The nation's historical experience with foreign intervention suggests that international pressure is not a welcome avenue for Salvadorans to preserve a political system that has already failed them. Indeed, Bukele invokes rhetoric that rejects international input in domestic affairs, claiming that the constitutional chamber's 'house cleaning' is no other country's business.

Background on Bukele's Undermining Checks and Balances Early On

Early in his presidency, Bukele signaled a disregard for any limitations to his authority in a performative retaliation against a decision made by the legislative assembly. Bukele's request to approve a large \$109 million loan from the United States for security policies to control violence was denied by the Assembly. The loan was to strengthen the police, to fund police vehicles, uniforms, video surveillance equipment, and a helicopter as part of his Territorial Control Plan to quell gang violence.

The Territorial Control Plan is likened to past administrations' Mano Dura policies, implemented throughout the 21st century. These policies typically involved heavier policing and tougher sentences for accused gang members, but also included arbitrary criteria for gang membership and infringements on due process. Mano Dura policies were often poorly implemented and ineffective, frequently increasing civil unrest. The Supreme Court repeatedly declared Mano Dura policies unconstitutional for their infringements on civil rights and inability to uphold due process requirements.

On February 9, 2020, frustrated with the blockage of his plans, President Bukele responded by bringing 40 fully armed soldiers into the Legislative Assembly. Calling an emergency assembly at 3:00 pm on a Sunday, Bukele stated that legislative deputies not in attendance would be breaking constitutional law, thus permitting the right to invoke Article 87: the right to an insurrection.

Article 87 states that the right to an insurrection:

“is recognized, for the sole object of reestablishing constitutional order altered by the transgression of the norms relative to the form of government or the political system established, or for serious violations of the rights consecrated in this Constitution.”

Given that the legislature's decision not to approve a massive new budget did not represent the failure of constitutional order that needed to be reestablished, or a serious violation of rights consecrated in the constitution, the invocation of this article

was not necessarily applicable.

Bukele entered the chamber, calmly taking the seat of Mario Ponce, legislative president, and began to pray silently. At the end of his prayer, he claimed, “God said to [him], ‘Patience.’” Bukele left the chamber under military escort, giving the legislature a week to approve the loan, and threatened to remove opposition lawmakers.¹³

Many feared the spectacle to be a coup d'état. The image of fully armed soldiers in the Legislative Assembly invoked memories of the traumatic wartime period, still fresh in the minds of many. Only months later, Bukele continued to insist on his use of executive power. Attempting to establish firm control over the COVID-19 pandemic, Bukele implemented policies that the Constitutional Chamber interpreted as unconstitutional. Among other decrees, the Constitutional Chamber challenged Bukele's Legislative Decree 594 (of March 15, 2020), containing the *Law for the Temporary Restriction of Specific Constitutional Rights to Address the COVID-19 Pandemic* for constituting “the most intense limitation of fundamental rights” and unreasonable measures given the severity of the COVID-19 situation at that time.

The decree was a strong-handed policy that enforced strict measures under which only one family member was permitted to be outside the home, with very few exceptions. There was no report of a single positive diagnosis of COVID in El Salvador at the time of its announcement, yet before its official publication, police had detained 70 people. These individuals were detained in police stations as violators of the executive ruling, not because they were confirmed to have COVID.

Between March 21 to April 11, 2020, the Attorney General's Office received 343 complaints about human rights violations, including 78 related to the right to health, 102 complaints related to freedom and integrity, and 46 complaints related to the right to water, food, and non-discrimination.

On March 26, the Constitutional Chamber found the enforcement of this policy to be abusive of human rights and an overstepping of executive power. The Chamber claimed that these detentions could not be constitutionally authorized by executive decree, and that “under no circumstance should police stations be used for detention, not even for a short period.”¹⁴

On April 16, 2020, Bukele rejected the rulings of the court, in a post on X: “5 people are not going to decide the death of thousands of Salvadorans. No matter how much ink

¹³ Goodfriend, Hilary. “El Bukelazo: Shades of Dictatorship in El Salvador.” *NACLA*, February 19, 2020. <https://nacla.org/news/2020/02/19/el-bukelazo-shades-dictatorship-el-salvador>.

¹⁴ Human Rights Watch. “El Salvador: President Defies Supreme Court OAS Should Address Disregard for Rights Rulings, Constitution.” Human Rights Watch, April 17, 2020. <https://www.hrw.org/news/2020/04/17/el-salvador-president-defies-supreme-court>.

and stamps they have."

The Constitutional Chamber considered their ruling to be a "manifestation of the separation and independence of public powers ... a fundamental component of the rule of law [and] an essential element of representative democracy."

The rejection by Bukele undermined the essential democratic characteristic of the separation of powers, leading to numerous accusations of dictatorial behavior. The president claimed these actions were necessary for public health, declaring in a national broadcast that if he were a dictator, he "would have had them all shot... You save a thousand lives in exchange for five."¹⁵

In this striking statement, Bukele justified his extreme behavior as necessary for the security of the nation. At the same time, he dismissed accusations of dictatorship with the idea that 'it could be worse.' These moves suggested that if Bukele did not get what he wanted through bureaucratic means, he would take matters into his own hands and would not respond to pressure to obey international norms. He suggested that he knew what was best for the country and would act on these ideas even if they contradicted the constitution. Given that the constitution is the strongest form of law in the nation and "shall prevail over all laws and regulations" (Article 246, Constitution), a better understanding of the limitations it places on his power may expose the illegitimacy of his overextensions of power.

Constitutional Rules

The current Salvadoran Constitution was developed in 1983, three years post-civil war, and amended last in 2003, eleven years after the war's end. The following sections outline the articles of the constitution that are most essential in understanding the constitutionality or unconstitutionality of Bukele's power consolidation, specifically concerning the removal of the magistrates and the potential for consolidation of power in the presidency. This also allows for understanding avenues for legislative deputy and lawmaker Claudia Ortiz to protest these moves and protect democracy through the constitution.

Constitutionality of the Attack on the Judicial Branch

El Salvador's Supreme Court of Justice consists of 15 individuals. Five are magistrates designated as the Constitutional Division, making up the Constitutional Chamber of the Supreme Court. One of the five members of the Constitutional Chamber serves as the

¹⁵ Alvarado, Jimmy, Roxana Lazo, and Sergio Arauz. "Bukele Usa a La Nueva Asamblea Para Tomar Control de La Sala de Lo Constitucional y La Fiscalía." *El Faro*, May 2, 2021. 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.

President of the Supreme Court. The rest of the Supreme Court is made up of three magistrates of the Civil Chamber, three magistrates of the Criminal Chamber, and four magistrates of the Administrative Chamber.

Regarding the general power held by the magistrates of the Constitutional Chamber, Article 174 states that they form the “Constitutional Division,” meaning they have the power to interpret and apply the Constitution, declare the unconstitutionality of laws and decisions made by both the executive and legislative branches, and settle disputes between the two. Article 183 declares the Supreme Court, through the Constitutional Division, as the sole interpreter of constitutionality, though it may do so on the petition of any citizen.

Article 186 of the Constitution outlines the process of how magistrates of the Constitutional Chamber are elected by the Legislative Assembly for terms of nine years, which may be renewed in thirds every three years. The magistrates who were removed in May of 2021 were only in their third year of service. Their replacements would remain in position until 2030.

Magistrates are initially elected by a two-thirds vote and must also be removed by the same. The Assembly must vote from a list formed by the National Council of the Judicature.

Under these rules, it is difficult to discern the constitutionality of the Supreme Court Magistrates' removal on May 1, 2021. While the Legislative Assembly does have the power to remove the magistrates, their decision lacked transparency in defining the “specific causes previously established by law” that motivated the removal.

Furthermore, the same article of the constitution ensures that all magistrates and those in judicial positions “shall enjoy stability in their posts” and that they may exercise their functions with “complete freedom, impartially, and without any influence.” The removal of all five magistrates at once, without explanation or opportunity for the magistrates to defend themselves, undermined this stability.

Ultimately, the only constitutional element of the magistrates' removal was that it was approved by the Legislative Assembly with over two-thirds approval.

Moving forward, the replacement of the magistrates was likewise unconstitutional. There was no list of candidates, and the names of the new Supreme Court magistrates were read out without any background information. There was no justification given for why these individuals had been selected to replace the removed magistrates.

However, given that the Supreme Court's Constitutional Chamber is the sole interpreter of constitutionality, its turnover undermines any capacity to legitimately declare the maneuver as unconstitutional. The new magistrates themselves are unlikely to oppose their own appointment.

Not only does this process violate El Salvador's constitution, but it also violates international human rights law, which protects judges from removal simply because the administration disapproves of their decisions.

The removal of the magistrates is based on an alleged unconstitutionality in their rulings regarding the Right to Health in 2020. Bukele engaged in drastic executive decisions during the COVID-19 pandemic, which the court found to be an unjust and excessive infringement on rights.

The removal of Attorney General Raúl Melara, on the other hand, is based on claims of partisan affiliation with the ARENA party.¹⁶ Before his dismissal, Melara was conducting an investigation that found evidence of negotiations between Bukele and gangs and the removal of hard drives and logbooks documenting evidence from the investigation.

To undermine and eliminate any threat to Bukele's image, Melara is replaced with organized crime prosecutor Rodolfo Delgado. This move established unwavering support in the judiciary, foreshadowing the potential for impunity.

This replacement set the stage for Bukele's Territorial Control Plan to prosecute on a massive scale and to incarcerate in a renewed Mano Dura plan. Delgado's appointment as Attorney General opened the door for impunity and the absence of prosecution of Bukele's allies, while facilitating the prosecution of his opposition.

Avenues for Judicial Resistance

Bukele's intervention in the judiciary left the remaining Supreme Court Justices of the Criminal, Civil, and Administrative Chambers with the ability to refuse to recognize the establishment of a new constitutional chamber. Legal options included public reactions and statements, invoking the Code of Judicial Ethics, and refusal to form the plenary that included the unconstitutionally appointed individuals. This would be possible on the invocation of Article 50, paragraphs 1 and 51, subsection 8 of the Organic Law of the Judiciary governing the quorum to form the Plenary, requiring the chief justice and at least seven justices to participate. Despite options for resistance, all judges remaining in the court granted permission for Bukele's administration to maintain firm control over the judiciary. After his removal as Attorney General, the Supreme court magistrates, Melara, and four magistrates submitted letters of resignation, most referencing their families' well-being as the reason for stepping down. In the statement, Melara made clear his disagreement with the verdict of his removal.

¹⁶ Alvarado, Jimmy, Roxana Lazo, and Sergio Arauz. "Bukele Usa a La Nueva Asamblea Para Tomar Control de La Sala de Lo Constitucional y La Fiscalía." *El Faro*, May 2, 2021. 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.

Among civil society organizations, however, there was pushback. 71 organizations that oversee public functions moved to condemn the implementation of new magistrates as undemocratic and undermining the separation of powers. Claudia Ortiz chose to submit commissions to the Legislative Assembly to question the constitutionality of Bukele's actions as her main strategy in applying pressure on his supporters and the opposition to realize the potential dangers of democratic dismantling.

Months later, Ortiz submitted an evaluation proposal in August 2021, arguing that the removal of the Supreme Court judges was based on grounds that were not previously established by law. With the support of the VAMOS party, the evaluation proposal outlined why the methodology used for the election of judges does not conform to constitutional requirements.

Executive Branch

With a long history of authoritarian rule over a highly militarized society, followed by a short-lived democracy, constitutional limitations on executive power are extremely important, and their maintenance is critical to democratic survival.

The following articles (88, 152, 154) of El Salvador's constitution express explicit limitations on the possible duration of time one may remain in the presidency.

Limitations on presidential terms are included in Article 88:

“The principle that a President cannot succeed himself (alternabilidad) is indispensable for the maintenance of the established form of government and political system. Violation of this norm makes insurrection an obligation.”

“Alternabilidad” refers to the required alternation, or transfer, of individuals who hold power, meaning no one president can serve consecutive terms. This is an unwavering element of the established political system. The Constitution even invokes insurrection as necessary should any individual refuse the transfer of power. It should be noted that the transfer of power only refers to the individual and not to political parties.

Later, in Article 152, the constitution again re-emphasizes the unconstitutionality of serving consecutive terms, with a more explicit ruling on the timeline:

“He who has filled the Presidency of the Republic for more than six months, consecutive or not, during the period immediately prior to or within the last six

Article 154 places limitations on term length to a maximum of five years.

“The presidential period shall be of five years, and shall begin and end on the first of June, without the person who exercised the Presidency being able to continue in his functions one day more.”

In these three articles of the constitution are the explicit limitations on a presidential term and explicit prohibitions of the running for consecutive reelection, meaning no president may serve two Presidential terms in a row. However, there is no explicit constitutional limitation on the number of times an individual can serve as the president. Thus, it is understood that one may serve the presidency, hand over power for the following term, and then, in the following term after they have not held the presidency, they may run again for reelection.

Option Set

Bukele's administration's re-establishment of the Supreme Court's constitutional chamber imposes power over all branches of government and dangerously establishes a capacity for impunity at the highest level. Given this level of control, how is Ortiz meant to reconcile unconstitutionality with control over constitutional interpretation? Indeed, it will come down not to amending the constitution but to alternative ways of its interpretation that may permit Bukele to stay in power.

The new Supreme Court itself is unconstitutional. Ortiz can submit petitions to reconsider the constitutionality of this turnover. However, given that those who would review it are those who directly benefit from it, it is unlikely they will be on her side. Furthermore, the supermajority of the Legislative Assembly belonging to Bukele's party makes a legislative change an unlikely avenue.

Should Ortiz try to mobilize the rest of the Supreme Court to reject this establishment? This could also place their positions at risk, and even if they were willing, they could easily be replaced with alliances with the regime.

Given the extreme support for Bukele's consolidation of power and support within the government, should Ortiz seek support from outside the nation? Given El Salvador's history with international intervention and the current administration's rhetorical rejection of the exterior, this option will also not likely be popularly supported.

With the overwhelming amount of support and alliance for Bukele in the three branches of government, the only space that may permit intervention would be in Salvadoran civil society. Should Ortiz mobilize the education of the public on the unconstitutionality of the removal of the Supreme Court magistrates and the subsequent decisions that will be made? With a concentration of power and a clear display of intentions to suspend civil rights and expand militarization, and El Salvador's history of civilian repression, civil society may also be uninterested in civil disobedience.

How should Ortiz proceed in her effort to maintain democratic restrictions on power and prevent Bukele from overriding constitutional limitations to his stay in power for a second consecutive term?

