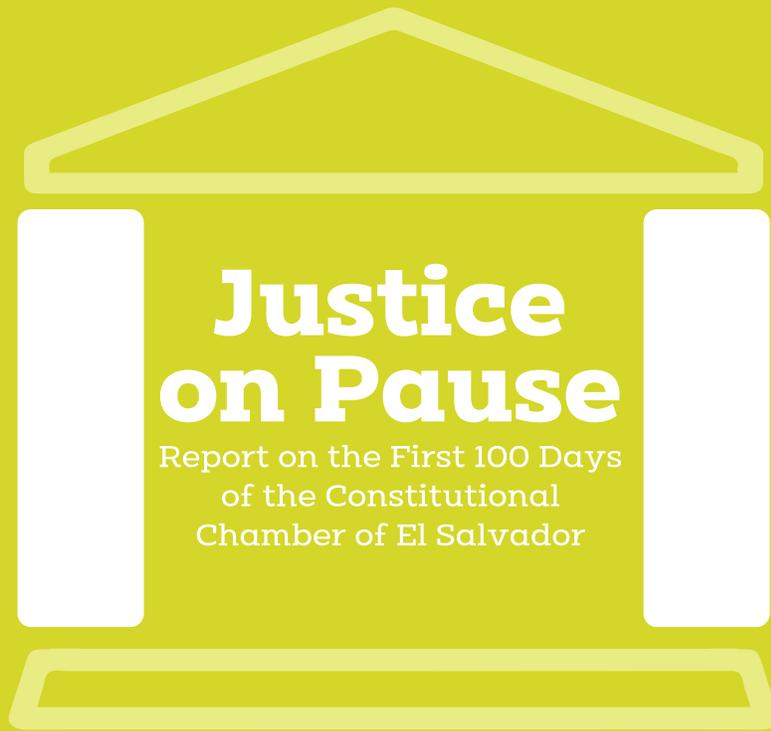


Justice on Pause

Report on the First 100 Days
of the Constitutional
Chamber of El Salvador

EXECUTIVE SUMMARY



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This report summarizes the actions of the first 100 days of operation of the Constitutional Chamber of El Salvador, after the changes initiated on May 1, 2021 by the Legislative Assembly in which all of its regular and alternate judges were suddenly and irregularly removed.

The objective of this research was to detect continuities, setbacks, and initial advances in the already consolidated jurisprudential criteria of the Chamber, but also investigate the administrative measures in its management and the internal organization of the Chamber that had a real or potential impact on the protection of the rights and freedoms of Salvadorans and their right to access to justice.

With respect to the internal management and organization of the Chamber, the following was detected:

- In the first 100 days, there were 10 transfers of officials who worked in the Chamber to other units or offices of the judicial body, but only one of them has been made public. Two of these transfers, that of the Secretary of the Chamber and the Coordinator of the Unconstitutionality Area, are very important.
- The Chamber continues to meet regularly (3 times a week) but, despite this frequency, the backlog has not been reduced. There is evidence that a strictly chronological criterion is not being followed to review and resolve cases.
- The 2021 accountability report **has not yet been published**.
- In terms of the number of **cases admitted** to the Chamber, statistics show a **drastic and anomalous reduction compared to previous years**. According to the projections based on the admissions made during the first 100 days of the Chamber, there is a 50% drop in unconstitutionality, 15% in amparos, 44% in habeas corpus, compared to 2020.
- **This decrease in number of cases admitted contrasts sharply with the trend in discharges (termination of proceedings), which show a significant increase.** In unconstitutionality, the projected trend suggests that 2021 would end with a 212% increase in discharges compared to 2020, but **most of them are liminal rejections**. In amparos, the increase would be 115% and in habeas corpus 41%, both compared to 2020.
- **In terms of transparency and accountability, publicity of the rulings has deteriorated greatly.** Unlike its previous compositions, the current Chamber does not regularly publish rulings on its social networks (*Twitter*), nor does it publish an accompanying communiqué summarizing their main arguments, as was done under previous Chambers. The rulings issued by the Chamber are published, albeit belatedly, in the Judicial Documentation Center. In the period investigated, the Chamber only used its Twitter account to publish 4 sentences, or to give generic and not broken-down statistics on its productivity. The website is outdated, and empty tabs appear with no content.

With respect to jurisprudence issued in the first 100 days, this report details that there has been:

A. SEVERE SETBACKS

Setbacks are pronouncements that show a deterioration in the quality of the jurisprudence, either because (i) they establish more rigorous requirements to access the jurisdiction, (ii) they weaken the control of constitutionality, (iii) they reduce the content of fundamental rights or their guarantees, or (iv) they hinder or block the challenge of public acts for violations to the Constitution. Researchers used constitutional jurisprudence prior to May 1, 2021 as a parameter of comparison.

The main setbacks detected included:

1. **Unreasonable evidentiary burdens are imposed on citizens.** Specifically, in unconstitutionality 41-2021 and 43-2021, the Chamber ruled that when a citizen alleges violations to the process of approval of laws (for example, for the misuse of the *waiver of formalities*), he/she must present probative evidence in his/her lawsuit, which *demonstrates* such violations. Under previous case law, the citizen alleged the irregularity, and it was then the Legislative Assembly carried the burden of proving that such violations had not occurred.
2. **The Chamber refuses to exercise its powers of control over the designation of officials by the Legislative Assembly,** arguing that this would imply substituting the assessment of the deputies, making a “judgment of perfectibility”, or that it is the Chamber that must verify whether or not a person meets the requirements to be elected.

Thus, in unconstitutionality 37-2021 and 38-2021 the Chamber abandons the previous jurisprudence. Said jurisprudence established that when the Constitution requires the legislator to verify certain conditions or facts in order to exercise its powers (for example, to verify that a person is *suitable* or has the appropriate qualifications before appointing him/her to a high position), the legislator must *document* that it has complied with those conditions, and that it has taken them into account to adopt a *reasonable* decision, and not an arbitrary or capricious one.

The consequence of this change in jurisprudence is serious since the Constitutional Chamber will no longer require the Legislative Assembly to demonstrate and justify the reasonableness of the appointments it makes to high public positions.

3. The Chamber established that the removal of officials by the Legislative Assembly, such as those that took place on May 1, 2021, constitutes a “control-free zone”, that is, a decision that cannot be judicially questioned. In unconstitutionality cases 36-2021 and 37-2021, the Chamber abandons a consolidated jurisprudence at least since 1993, which, in the line of democratic constitutionalism, does not admit that there are acts of public power that cannot be challenged when they do not comply with the Constitution. The Chamber thus disregards the basic principle of the Constitutional Rule of Law which recognizes the Constitution as a legal rule, and that any action that violates the Constitution may be challenged and rendered ineffective by the courts.

4. The Chamber violated the principle of impartiality. This principle, set forth in Article 186, paragraph 5 of the Constitution, requires judges to resolve cases without any bias, prejudice, or interest. If there is an interest in the resolution of a case, a judge must step aside, and may be recused by the parties.

The report has detected at least seven cases in which magistrates have participated in decisions, despite there being serious and well-founded reasons to withdraw, given that they had a link with the defendant authorities, or a direct interest in the matter being resolved. An exemplary case is the writ of amparo 295-2020, where presiding judge Óscar López Jerez participated even though he was part of the Civil Chamber that signed the resolution that is precisely being challenged in the abovementioned writ of amparo.

5. The Chamber imposed barriers for the protection of the right to health. In writ of amparo 374-2020, healthcare personnel filed a claim against the Ministry of Health to provide protective material to healthcare personnel to prevent them from being infected with the COVID-19 virus. The Chamber demanded superfluous details from the plaintiffs in the text of their claim, delaying the jurisdictional response, despite the fact that there was already a similar precedent (writ of amparo 219-2020) in which the Chamber had admitted the claim and ordered a precautionary measure.

On the other hand, in writ of amparo 313-2019, the Chamber rejected the claim filed by a patient with kidney failure, indicating that his claim had no constitutional significance, even though there are precedents where the Chamber has granted protection and ordered precautionary measures in this type of case (writ of amparo 74-2021).

6. The Chamber rejected claims of unconstitutionality without clearly stating the reasons for its rejection or for errors that could be remedied. Prior to May 1, 2021, the Chamber was transparent in transcribing the grounds of unconstitutionality

that were presented to it, and its responses to each of them. Thus, when they were rejected, the parties and the citizenry could understand the reasons for the decision and verify that the Chamber resolved the case in a congruent manner. In unconstitutionality 8-2020 and 39-2021, the Chamber abandons this practice, and rejects claims “for not complying with the requirements to be admitted”.

Likewise, in unconstitutionality 11-2017, the Chamber rejected the claim due to a formal error in the denomination of the type of unconstitutionality alleged. This type of error, in the previous jurisprudence, could be corrected.

- 7. The Chamber enabled successive presidential reelection**, despite the existence of express and reiterated prohibitions in the constitutional text itself. By means of the judgment issued in the process of loss of citizenship rights 1-2021, the Chamber used an isolated and whimsical interpretation of Article 152.1 of the Constitution, stating that the prohibition to register a candidacy for the presidency was not applicable to the incumbent president, trying to show a “guaranteeing” reading of said norm.

In doing so, the Chamber enabled immediate presidential reelection, despite the fact that this possibility is repeatedly prohibited in the constitutional text. The Chamber refused a joint and systematic reading of all the relevant constitutional articles (arts. 75.3, 88, 131.16, 154, 248, 174.1, 182.7), ignoring that such prohibition constitutes a consolidated tradition in all the constitutional texts that have existed in the more than 200 years of democratic life in El Salvador.

B. CONTINUITIES

The report have also documented continuities with previous jurisprudence. Thus, in various resolutions issued in unconstitutionality¹ proceedings, it **has maintained the criterion of the exclusive and excluding competence of the Supreme Court of Justice in law initiatives on matters within its competence**, which was established and consolidated in previous case law (unconstitutionality 6-2016)².

Likewise, the Chamber **has continued to use the equality test to analyze the constitutionality of differentiations contained in legal norms**. Thus, in unconstitutionality 5-2016, which questioned art. 24 of the Law of the National Council of the Judiciary, and which prevented the councilor elected by the judicial body from having access to the presidency of the CNJ, the

¹ Unconstitutionality 2-2020, 3-2020, 79-2019, 80-2019, 139-2019, 140-2019, 142-2020, 143-2020 and 144-2020.

² Established in Unconstitutionality 6-2016.

Chamber applied the parameters already established in previous jurisprudence (unconstitutionality 5-2016) and declared that this differentiation violated the principle of equality.

The Chamber has also maintained previous criteria when analyzing the constitutionality of municipal acts that regulate fees for the use of land and subsoil (unconstitutionality 97-2015), and when reviewing whether the cases of inapplicability of rules established by judges in the exercise of diffuse control, meet the criterion of *relevance* that merits the initiation of an unconstitutionality proceeding to render them ineffective with general effects.³

It is also important to mention that there are cases in which the Chamber has shown **continuity in the substitution of procedural errors by the plaintiffs or the accommodation of the processes in the correct procedural channels** (for example, amparo 510-2020), as well as in the integration of the procedural law when gaps are detected in the law of constitutional⁴ procedures.

C. ADVANCES

The report has detected progress in one ruling of the Constitutional Chamber in which a more expeditious protection of the constitutional contents has been generated. This is unconstitutionality 11-2019, in which the Chamber **shortens the procedural procedure to declare the unconstitutionality of norms prior to the Constitution**, when the contradiction is manifest and therefore, totally identifiable.

³ Unconstitutionality 55-2019, 66-2019, 68-2019 and 70-2019.

⁴ Habeas Corpus 246-2021, Habeas Corpus 307-2019, Unconstitutionality 100-2018, Amparo 224-2021, Amparo 424-2017

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