

# **ARE ZEDE'S UNCONSTITUTIONAL?**

**The Case of Honduran Private Cities**



**CARLOS FORTÍN LARDIZÁBAL**

**Booklet 1**

# **ARE ZEDE'S UNCONSTITUTIONAL?**

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**CARLOS ALFONSO FORTÍN LARDIZABAL**

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This is the English translation of the booklet: *¿Son Inconstitucionales las ZEDE?*  
The author tried to make it understandable for both English speakers and those who are not legal professionals.

- Editor

Translator: Barbara Pereira Ferreira

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To María Antonieta,  
for always being my inspiration

To Juan Andrés,  
for filling my life with pride and happiness

*It is not enough to tell only the truth,  
it is more convenient to show the cause of the falsehood.*

- Aristotle

## INDEX

Introduction .....	5
On Constitutional Reform in Honduras .....	10
On the Legal Instruments that created the ZEDE.....	12
Content of the Constitutional Reform that creates the ZEDE.....	13
Arguments against the Constitutional Reforms that create the ZEDE's .....	17
Argument 1: ZEDEs infringe on Sovereignty .....	20
Argument 2: ZEDEs infringe on the National Territory .....	23
Argument 3: ZEDEs violate exclusive authority of the National Congress to issue laws .....	25
Argument 4: ZEDEs violate the prerogative of the Supreme Court of Justice (Council of the Judiciary) to appoint judges.....	29
Argument 5: ZEDE can adopt legal systems or traditions from other parts of the world .....	31
Argument 6: ZEDEs have a special tax system .....	32
Argument 7: ZEDEs violate Human Rights of its residents .....	35
On the Criminalization of Creation, Compliance and Obedience of the Law .....	37
Conclusions .....	42
Bibliography .....	43

## INTRODUCTION

In recent years there has been much debate about the *constitutionality* or *legality* or *legitimacy* of the **EMPLOYMENT AND ECONOMIC DEVELOPMENT ZONES (ZEDE** for its Spanish acronym). All these terms have been used to refer to this subject, followed by *treason* and *sale of national territory*. For the purpose of this work, we will label everything as *unconstitutionality*, since this alleged unconstitutionality, if it exists, would be the encompassing of all the criticisms formulated.

I am a **Technical Secretary** of the ZEDE called **MORAZAN CITY**. However, I take personal accountability for this work and its content. In it, I will analyze the reasons others argue that the ZEDE is unconstitutional. For my part, I consider this assertion to be false. The ZEDE are constitutional and constitute an ideal mechanism to develop Honduras in a very short time. Let's dive into this.

It is truly remarkable that there are few issues on which so many sectors have agreed as on the alleged *unconstitutionality* of the ZEDE. Now, to accept that this unconstitutionality is true solely because many people have the same opinion, without examining the issue in depth, is a fallacy, a false reasoning. If generalized opinions were always true, the opinion that the earth was flat would have never changed, because the majority thought that way. In logic this fallacy is called *fallacy ad populum*<sup>1</sup>. It is not true that the voice of the people is the voice of God (*vox populi, vox Dei*). No; the majority of the people in Jerusalem called for the crucifixion of our Lord Jesus Christ. The great majority of ideas are not always true. The development of human ideas proves it.

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<sup>1</sup> The *ad populum fallacy* claims that an argument is valid because many people believe it to be so. See *Introducción a la Lógica*. Authors: Irving M. Copi and Carl Cohen; Editorial Limusa SA de CV; 2010, pages 138 and 139.

However, it is interesting to analyze the reasons for this negative majority opinion. I'd classify this opinion into four main variants:

- Some opposed the **ZEDE** because they understood their economic interests were in danger with such a project. Here I include part of the *maquila* business sector, covered under the special regime of the **Zonas Libres (ZOLI)**. It also included part of the national business sector that feared unfair competition from companies operating within the **ZEDE**, through trade with the rest of the country. All these competition issues were and still are debatable and can be regulated with relative ease, so areas of understanding can be sought out with these business sectors. Areas of understanding that did not exist in the past.
- Then, a large, vast sector of politicians opposes it. Let us remember that the **ZEDE** constitute an autonomous fiscal and administrative region, which acquires the obligation to provide the resident population with security, health, and education services, among others<sup>2</sup>. Imagine a region in which these services are provided with very few taxes, and moreover, of high quality, while the rest of the population, in the hands of traditional politicians, continues to suffer the lack of such services, despite the fact that *the Honduran government budget consumes a huge portion of the gross domestic product (GDP)*. Here enters another criticism of the **ZEDE's**, which basically states that they would constitute a "*privileged class*" in the country, because they would live better than the rest of the population. The interesting thing about this reasoning is that given the factual assumption that a region with little taxation would have better

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<sup>2</sup> Education in MORAZAN CITY was projected to be bilingual, and water was projected to be potable.

security, health and education services, the proposed solution is to eliminate the possibility that this part of the population would have access to an improvement in their standard of living. Evidently, the solution that would promote the development of the country would be to *copy the recipe* and start converting all of Honduras into a free market with minimal state burden. This brings to mind the FOROS program of TSI and HRN, which took place on August 30, 2021, for which economist Richard Rahn, a former member of **CAMP**<sup>3</sup>, was invited and was expected to speak ill of the ZEDE project. However, Mr. Rahn stated that the system implemented in the **ZEDEs**, of economic freedom and deregulation, should be implemented throughout the country, as Estonia did, with excellent results and a substantial increase in per capita income. It is true that he spoke out against the way in which the model was implemented in Honduras, but far from criticizing the private development model, he spoke out against Honduran state intervention in its management.

- We also find ideological opposition. In Honduras, as in all countries, there are people imbued with *Marxist* ideas, even at the highest level of government<sup>4</sup>. From the ideological point of view, Marxism holds that *the value* of a **commodity, of a product**, derives solely and exclusively from the work performed by the workers in the production process. Therefore, for this ideology, every *entrepreneur*, as owner of the means of production, obtains his *profits, robbing* the worker of the fruit of his labor. Thus, for these people, every businessman is a thief, as much as they affirm that he obtains his

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<sup>3</sup> Spanish acronym for *Committee for the Adoption of Best Practices*, a body responsible for overseeing the ZEDE (Translator's note).

<sup>4</sup> Christian Duarte, Vice Minister Director of the Revenue Administration Service (SAR) accepted that he is a communist in the 30/30 program dated September 17, 2023. In the discourse of many others the same ideological tendency is noticeable.



wealth by robbing the worker. For them, therefore, for a businessman, an investor, to leave the country is synonymous with getting rid of a thief. That is why they are not worried about the closing of companies.

- Finally, most people who opposed the ZEDE were deceived by one or more of the above-mentioned sectors as they began to tell lies. The most important ones were:
  - That the ZEDes were selling the national territory. First of all, I always wondered what they meant by that. In Honduras it is **legal, legitimate** and also **common** for foreign citizens to buy private real estate. So, if ZEDE intended to sell real estate to foreign citizens, it would be doing the same thing that is being done every day in this country and in any other country. If on the other hand, that phrase assumes that the territory is being sold to a *foreign power*, to another country, then they are completely **LYING**. In fact, none of the people uttering such a phrase could point out to which foreign power the national territory was being sold, simply because such an assertion was and is totally false. On the other hand, in the case of **MORAZAN CITY** it is even more false, since its business model is only leasing, not sale of real estate. We repeat that this statement is completely false, but it greatly influenced the minds of many people.
  - That the ZEDes were expropriating land from Hondurans, forcing them to hand over their properties. This assertion is also false. I know for a fact that **MORAZAN CITY** never expropriated anyone, since all the land within its *spatial area of competence* was acquired through purchase and sale contracts, negotiated by mutual agreement with its

legitimate owners. I can also state that no person was able to show documents relating to any expropriation in any of the **ZEDE**. While it is true, **Decree 120-2013**, containing the **Organic Law of Employment and Economic Development Zones (ZEDE)**, which I will hereinafter refer to simply as **ZEDE Law**, in its Articles 25 and 28 speak of *expropriation* by the State<sup>5</sup>, none of the **ZEDE** promoted any expropriation and none was carried out. One more lie.

I must clarify that this work will be limited to the content of the constitutional reform made by **Decrees 236-2012 and 9-2013**, which gave constitutional life to the **ZEDE**. I'll also analyze some provisions of the **Organic Law of Employment and Economic Development Zones (ZEDE)**, even though it was repealed by **Decree 33-2022**, so it has already been expelled from the national legislation. Of course, on this matter the obligation to the *transition period* that the same law established and the *acquired rights* of investors, protected by international agreements, are still relevant.

Having said all of the above, I must reassure you that the purpose of this paper is to determine if the constitutional reform that gave legal life to the **ZEDE** was created in contravention of the **Constitution** of the Republic itself; that is, whether its creation implied a transgression of the Constitution. Let us see.

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<sup>5</sup> The State of Honduras has that eminent right that allows it to expropriate for public utility anywhere in Honduras. The inclusion in the **ZEDE Law** was totally unnecessary and proved to be very detrimental.

## ON CONSTITUTIONAL REFORM IN HONDURAS

From the point of view of the rigidity with which their norms can be modified, Constitutions can be classified as: *flexible, rigid and set in stone*.

A constitution is considered *flexible* when it **can be modified by an ordinary law**. This is the case of the United Kingdom. A constitution is considered *rigid* when **its reform process is different from that of ordinary laws** or when it incorporates processes that make its modification difficult. This is the case of the Constitution of the United States of America. A constitution is **set in stone** when it **cannot be modified**.

In the case of Honduras, a *rigid system with some provisions set in stone* was adopted, since most of its provisions can be modified through a special procedure and a few provisions are non-reformable.

Thus, in accordance with **Article 373 of the Constitution of the Republic**, the amendment of the Constitution requires a **two-thirds (2/3) vote of the totality of its members**. The decree must indicate the article or articles to be reformed, and **must be ratified by the subsequent ordinary legislature<sup>6</sup>**, by the same number of votes, in order for it to come into effect. This procedure is considered the rigid part of the Honduran constitutional system.

Meanwhile, **Article 374 of the Constitution** states that under no circumstance can it be reformed, **the previous article<sup>7</sup>, the present article<sup>8</sup>, the legal articles**

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<sup>6</sup> By Decree 169-86 dated October 30, 1986, published in the Official Gazette No. 25,097 of December 10, 1986, the *subsequent* expression (*subsiguiente*) should be understood as *the one that immediately follows*.

<sup>7</sup> That is, Article 373.

<sup>8</sup> That is, Article 374 itself.

*that refer to the form of government<sup>9</sup> , the national territory<sup>10</sup> , the presidential term<sup>11</sup> , the prohibition to be President of the Republic again for a citizen who has served under any title<sup>12</sup> and the article referring to those who cannot be President of the Republic for a subsequent term<sup>13</sup> .*

Therefore, we have that the **articles of the Constitution of the Republic that cannot be reformed** by mandate of the Constitution itself are: 1, 2, 4, 9, 10, 11, 11, 12, 13, 14, 19, 237, 239, 240, 373 and 374. **All the others** can be reformed, as long as the procedure established in the first paragraph of article 373 of the Constitution is followed.

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<sup>9</sup> That is, articles 1, 2 and 4.

<sup>10</sup> That is, articles 9, 10, 11, 12, 13, 14, 19.

<sup>11</sup> That is, Article 237.

<sup>12</sup> That is, Article 239.

<sup>13</sup> That is, Article 240.

## ON THE LEGAL INSTRUMENTS THAT CREATED THE ZEDE

The ZEDE were created through a constitutional reform contained in the following decrees:

- 1) **Decree 236-2012, on constitutional reforms, published in La Gaceta<sup>14</sup> # 33,033 dated January 24th, 2013.**
- 2) **Decree 9-2013, ratification published in La Gaceta #33,080 dated March 20th, 2013.**

These decrees formally comply with **Article 373 of the Constitution of the Republic**, on the manner in which the Constitution must be reformed (more than 2/3 vote of the totality of its members<sup>15</sup> and ratified in the subsequent legislature).

These decrees reformed the **articles 294, 303 and 329 of the Constitution of the Republic**. Thus, at least from a formal point of view, the constitutional reforms didn't reform any of the **articles of the Constitution that cannot be reformed**. Of course, in order to establish that these reforms are constitutional, it must be reviewed whether they also do not contradict *the content of the articles of the Constitution*. Let us see.

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<sup>14</sup> Official newspaper of the government of the Republic of Honduras, where laws are officially published in order to become effective (Translator's note).

<sup>15</sup> In fact, almost all of the members of the National Congress voted in favor of its creation.

### **Content of the Constitutional Reform that creates ZEDE:**

The following is a transcription of the constitutional articles that were amended. To facilitate the identification of the changes, I write the additions or amendments in *italics*.

**Article 294.-** The national territory is divided into departments. Its creation and limits shall be decreed by the National Congress.

The departments are divided into autonomous municipalities administered by corporations elected by the people, in accordance with the law.

*Notwithstanding the provisions of the two preceding paragraphs, the National Congress may create zones subject to special regimes in accordance with Article 329 of the Constitution.*

**Article 303.-** The power to impart justice emanates from the people and is imparted free of charge in the name of the State, by independent magistrates and judges, subject only to the Constitution and the laws. The Judicial Branch is composed of a Supreme Court of Justice, the Courts of Appeals, the Courts, *courts with exclusive jurisdiction in areas of the country subject to special regimes created by the Constitution of the Republic* and other dependencies established by law.

In no trial there should be more than two instances; the judge or magistrate who has exercised jurisdiction in one of them, may not hear the other, nor in an extraordinary appeal in the same matter, without incurring in liability.

Spouses and relatives within the fourth degree of consanguinity or second degree of affinity may not judge in the same case.

**Article 329.-** The State promotes economic and social development, which must be subject to strategic planning. The Law regulates the planning system and process with the participation of the powers of the State and represents political, economic and social organizations.

*To carry out the function of promoting economic and social development, and to complement the actions of the other agents of this development, the State, with a medium and long term vision, must design, in concert with Honduran society, a plan containing the precise objectives and the means and mechanisms to achieve them.*

*Medium and long-term development plans must include strategic policies and programs that ensure continuity in their implementation from its conception and approval to its completion.*

*The National Plan, the integral development plans and the programs incorporated therein are mandatory for successive governments.*

### ***Employment and Economic Development Zones***

*The State may establish areas of the country subject to special regimes, which have legal personality, are subject to a special regime, may contract obligations as long as they do not require the endorsement or joint and several guarantee of the State, enter into contracts until the fulfillment of their objectives over time and during several governments and enjoy functional and administrative autonomy that must include the functions, powers and obligations that the Constitution and the laws confer to the municipalities.*

*The creation of a zone subject to a special regime is an exclusive attribution of the National Congress, by qualified majority, after a plebiscite approved by two thirds, in accordance with Article 5 of the Constitution. This requirement is not necessary for regimes created in areas with low population density, those where the number of permanent inhabitants per square kilometer is lower than the average for rural areas calculated by the National Institute of Statistics (INE), which must issue the corresponding opinion.*

*The National Congress, when approving the creation of zones subject to special regimes, must guarantee that the sentence issued by the International Court of Justice of The Hague on September 11th, 1992 and the provisions of articles 10, 11, 12, 13, 15 and 19 of the Constitution of the Republic regarding the territory are respected. These zones are subject to national legislation in all matters related to sovereignty, application of justice, national defense, foreign relations, electoral matters, issuance of identity documents and passports.*

*The Gulf of Fonseca must be subject to a special regime in accordance with International Law, as established in Article 10 of the Constitution and the present Article; the Honduran coasts of the Gulf and the Caribbean Sea shall be subject to the same constitutional provisions.*

*For the creation and operation of these zones, the National Congress must approve an Organic Law, which can only be modified, amended, interpreted or repealed by a two-thirds favorable vote of the members of the National Congress, and a referendum or plebiscite must be held among the inhabitants of the zone subject to the special regime when its population exceeds one hundred thousand inhabitants. The organic law must expressly establish the applicable regulations.*

*The authorities of the zones subject to special regimes have the obligation to adopt the best national and international practices to guarantee the existence and permanence of*



*the adequate social, economic and legal environment to be competitive at the international level.*

*For the solution of conflicts within the areas of the country subject to special regimes, the Judiciary through the Council of the Judiciary must create courts with exclusive and autonomous jurisdiction over them. The judges of the zones subject to special jurisdiction shall be proposed by the spatial zones before the Council of the Judiciary who shall appoint them after a competition from a list proposed by a special commission integrated in the manner indicated by the Organic Law of these regimes. The Law may establish the submission to compulsory arbitration for the solution of conflicts of natural or juridical persons living within the areas covered by these regimes for certain matters. The courts of the areas subject to a special legal regime may adopt legal systems or traditions from other parts of the world as long as they guarantee the same or better constitutional principles of protection of human rights, subject to the approval of the National Congress.*

## ARGUMENTS AGAINST THE CONSTITUTIONAL AMENDMENTS CREATING THE ZEDE

The following is a compilation of the main arguments against the **ZEDE** and, above all, about the alleged *nullity of origin* in the constitutional creation process, which many claim exists. I will emphasize those arguments, but not on whether the **ZEDE** represent good public policy , since regarding the latter question *ineffectiveness* anyone can have an opinion; but rather if the content of the constitutional reforms that give life to this design, contradict or not the provisions of the **Constitution**.

However, it's necessary to circumscribe what it means that a constitutional reform, whatever it may be, does or does not violate the constitution itself. Given the constitutional reform process set forth in Article 373 of the Constitution, if a constitutional reform is approved following said mechanism, the only way that the content of said reform could be deemed unconstitutional would be if it literally **violates or contravenes any of the articles of the Constitution set in stone**. Otherwise, we could not speak of **unconstitutionality**. This is included in what in law is called *constitutional interpretation*.

But, what is constitutional interpretation?

According to the Spanish jurist Josep Aguiló Regla<sup>16</sup> *asking about the meaning of an article of the constitution calls for an answer that falls squarely in the zone of clarity of the notion "constitutional interpretation". It has the advantage that, thus*

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<sup>16</sup> Paper "Interpretación Constitucional. Algunas Alternativas Teóricas y una Propuesta". DOXA, Cuadernos de Filosofía del Derecho, 35 (2012) ISSN 0214-8676 pp. 235-258. Specifically page 237.

*formulated, it allows to eliminate some complications: one asks for the meaning of a text (the object of the interpretation is a text) that has been well trimmed (formally well delimited), an article. Once this delimitation has been made, the interpretation can be presented as a structure correlating three different statements: a "statement to be interpreted", an "interpretative statement" and an "interpreted statement".*

Therefore, in order to denounce a *constitutional text as unconstitutional*, it would have to be demonstrated in a logical, coherent and scientific manner that *the text of the constitutional reform violates the text of an unreformable article of the Constitution*. Otherwise, we would be facing what has been called *Judicial Activism*, in the sense of applying ideology and not the law when judging.

The American jurist Antonin Scalia<sup>17</sup> defends that in the interpretation of the law and the constitution, the *interpreter* should not attribute to the constitutional text a meaning that does not derive from its text. He states that: *the philosophy of interpretation that I have described is known as textualism. In some sophisticated circles it is regarded as naive-"rigid," "unimaginative," or "prosaic." But textualism is nothing of the sort. To be a good textualist one must not be so insensitive as not to perceive the broader social purposes for which a law has been designed or could have been designed; nor so rigid as to be oblivious to the fact that new times call for new laws. It is required to maintain the belief that judges have no authority to introduce these broader purposes, nor to write new laws.*

Therefore, if a Constitutional Court were considering the possibility of declaring the constitutional reforms that give life to ZEDE unconstitutional, it would have to coherently demonstrate that *the text of the reform contradicts the text of an unreformable article*. Otherwise, we would be facing a *judicial activism*

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<sup>17</sup> "Una cuestión de Interpretación. Los Tribunales Federales y el Derecho", Palestra Editores, Lima, 2015. See page 39.

that would pretend to give *legislative powers to the constitutional court*. And it is clear that the sovereign power to create laws and modify the constitution is the prerogative of the National Congress.

We conclude then that, in order to be able to affirm that the reforms that gave life to the **ZEDE** are unconstitutional for violating articles of the Constitution, it must be demonstrated that the text of the reforms contradicts the original text of the article of the Constitution in question. For our part, we intend to demonstrate, in this paper, that this is not so, that the text of the constitutional reform that gives legal life to the **ZEDE** does not violate any constitutional article.

The following is an analysis of the main arguments against the constitutional reform that creates the **ZEDE**.

## **Argument 1: That ZEDE's infringe on sovereignty:**

According to the **Diccionario Panhispánico del Español Jurídico**<sup>18,19</sup> **Sovereignty** is understood as: 1. *Const.* supreme and unlimited power, traditionally attributed to the nation, the people or the State to establish its constitution and adopt fundamental political decisions both at the internal and international level. 2. *Int. pub.* Fundamental principle of the international status of the state, consisting in the power to freely adopt its decisions and exercise state powers. It entails the *summa potestas*<sup>20</sup>, which means that the State is not subject to any other power for the adoption of its decisions, and the *plenitudo potestatis*<sup>21</sup>, which means that it fully exercises its state powers, both domestically and internationally. In the sphere of international relations, it implies independence and equality.

In the Constitution, Articles 1 and 2 speak of **sovereignty**. **Article 1 of the Constitution** states that: *Honduras is a State of Law, **sovereign**, constituted as a free, democratic and independent republic to ensure its inhabitants the enjoyment of justice, freedom, culture and economic and social welfare.*

This constitutional provision seems to speak of **sovereignty** in the international arena, referring to the fact that it constitutes a *free, democratic, and independent republic* (as opposed to a monarchy). From this point of view, i.e. sovereignty

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<sup>18</sup> Pan-Hispanic Dictionary of Juridical Spanish (Translator's note).

<sup>19</sup> Real Academia Española, Cumbre Judicial Iberoamericana; Santillana Educación S.L., 2017.

<sup>20</sup> According to the Diccionario Panhispánico del Español Jurídico, the *Summa Potestas* is: *Int. púb.* Element of the sovereignty of the State according to which the State is not subject to any other power for the adoption of its decisions.

<sup>21</sup> According to the Diccionario Panhispánico del Español Jurídico, *Plenitudo potestatis* is: *Int. púb.* 'Totality of Power'. Element of the sovereignty of the State according to which it fully exercises the powers of the State, both internally and in its relations with other international subjects.

vis-à-vis foreign powers, the **ZEDE** does not imply cession of sovereignty, since the only state authority recognized by the **ZEDE System**<sup>22</sup> is precisely that of the State of Honduras.

In this sense, from the literalness of the constitutional reform that gives life to the **ZEDE** at no time can it be inferred that it is inclined to respond to foreign powers, but rather, at all times, recognizes the sovereignty of our republic and excludes from the competence of the **ZEDE** issues precisely related to sovereignty: '*These zones are subject to national legislation in all matters related to sovereignty, application of justice, national defense, foreign relations, electoral issues, issuance of identity documents and passports*'.

Therefore, the text of the reform under study **expressly recognizes the sovereignty of the Republic of Honduras.**

In turn, **Article 2 of the Constitution** states that: *Sovereignty corresponds to the people from whom emanate all the powers of the State which are exercised by representation. The impersonation of **popular sovereignty** and the usurpation of the constituted powers are classified as crimes of treason. Responsibility in these cases is inprescriptible and may be inferred ex officio or at the request of any citizen.*

This constitutional provision speaks of sovereignty in the internal order. It states that it lies with the people (meaning that part of the population has the right to vote, since those who cannot vote cannot decide on the authorities, the only real decision that the voter makes). It is the sovereign's decision to issue laws through its elected representatives and, of course, to constitute and repeal legal designs and special regimes such as the **ZEDE**.

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<sup>22</sup> I personally refer to the **ZEDE System** as the set of constitutional reforms, secondary laws that regulate the **ZEDE**, as well as their bodies: Technical Secretariat, CAMP and the **ZEDE** themselves.

The **ZEDE** are a product of the will of the Sovereign, through the National Congress. They were created as internal organs of the Republic of Honduras (like the Municipalities) and respond to the Republic of Honduras and for the benefit of the Honduran people.

The repeal of the **ZEDE Law** is the best example, the ultimate demonstration, that its inclusion never meant a diminution of popular sovereignty. Popular sovereignty decided to create them and created them. Popular sovereignty decided to repeal the law and repealed it. No internal or external power could prevent popular sovereignty from being exercised in both cases by the members of the National Congress.<sup>23</sup>

Thus, the best proof that the constitutional reform that gave life to the **ZEDE** did not and does not violate **popular sovereignty** lies precisely in the fact that, by exercising such sovereignty, it was able to repeal it. If the **ZEDE** had compromised the sovereignty of Honduras, it could have, or at least tried to, avoid the derogation and it did not. It could not. It did not have the means to do so.

I must point out that, when the detractors of **ZEDE** speak of it as compromising sovereignty, they do not elaborate the argument, but only state that fact as *self-evident*. Evidence, however, does not seem so when the issue is examined in depth.

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<sup>23</sup> Of course, given that the State of Honduras, also in the exercise of its sovereignty, voluntarily acquired obligations towards investors from other States, it becomes obliged to respond for such investments, within the framework of international obligations; especially in terms of respect for the **transition period** guaranteed by the **ZEDE Law** itself in the event of derogation. However, this fact does not eliminate the circumstance that, in the exercise of its sovereignty, Honduras had the power to repeal the **ZEDE Law** and did so.

## **Argument 2: ZEDE's infringe on National Territory:**

The unconstitutionality of a law must refer to whether the text of the constitutional norm, as it was drafted, compromises or not the national territory. We have already seen that precisely the constitutional norms that refer to the territory are *set in stone*.

The constitutional reform that creates the ZEDE modifies **article 329 of the Constitution** and expressly states that:

*The National Congress, when approving the creation of zones subject to special regimes, must guarantee that the sentence issued by the International Court of Justice of The Hague on September 11th, 1992 and the provisions of articles 10, 11, 12, 13, 15 and 19 of the Constitution of the Republic regarding the territory are respected. These zones are subject to national legislation in all matters related to sovereignty, application of justice, national defense, foreign relations, electoral matters, issuance of identity documents and passports.*

*The Gulf of Fonseca must be subject to a special regime in accordance with International Law, as established in Article 10 of the Constitution and the present Article; the Honduran coasts of the Gulf and the Caribbean Sea shall be subject to the same constitutional provisions.*

As can be clearly seen from the text under study, **the constitutional reform expressly establishes unrestricted respect for the articles of the Constitution that refer to the territory.**

Thus, interpreting it otherwise is to go against the very text of the reform and constitutes, not an analysis of the decree itself whose original repeal is requested, but rather an analysis outside the text subject to analysis.



The argument that **ZEDEs** are an attack on national territory has several aspects. The first can be summarized in the phrase: "*they are selling the national territory*". Here I must repeat the argument I outlined in the introduction. That a private party buys a property from another private party is commonplace in Honduras as well as in other countries of the world. Therefore, this sentence cannot refer to it at any time, at the risk of falling into incoherence and superficiality.

Another aspect is that they accuse the **ZEDE** of responding or obeying a foreign power. On this point, we can state conclusively that the recent history of the repeal of the **ZEDE Law** has shown that no foreign government has sought to intervene or has performed any act on which a claim of sovereignty can be inferred. No document can be exhibited to support that spurious thesis. That side of the argument has no support whatsoever.

Another argument put forward is that the **ZEDEs** seek to become States or pseudo-States, due to their high level of regulatory autonomy. This leads us to the following argument. For the time being, we can state conclusively that the literalness of the constitutional reforms that gave life to the legal design of the **ZEDE**, **do** not violate the constitutional rules on the territory, but order their compliance in an express manner. In fact, **Article 1 of the ZEDE Law** expressly states: *The Employment and Economic Development Zones, hereinafter referred to as ZEDE, ARE AN INALIENABLE PART OF THE STATE OF HONDURAS, subject to the Constitution of the Republic and the national government in matters related to sovereignty ...*

It couldn't be clearer.

### **Argument 3: ZEDE's violate the exclusive power of the National Congress to issue laws:**

Let's see what the **Regulatory Autonomy** of the ZEDE consists of.

According to the **amended article 329 of the Constitution**, ZEDE may create its own *regulations*, except in the following matters or subjects: *sovereignty, application of justice, national defense, foreign relations, electoral matters, issuance of identity documents and passports.*

This argument then claims that such *autonomy* violates **Article 205, paragraph 1, which is** the power of the National Congress to *create, decree, reform and repeal laws.*

Nevertheless, we must clearly make a distinction between *legal norms* and *laws*. It is a relationship of genus and species. Legal norms are the genus and laws are a species of such norms. In fact, legal norms constitute in turn a species of *norms* in the general sense (which includes as norms: customs, social conventions, technical norms, etc.).

#### **What other types of legal rules exist in our legal system?**

Legal rules may respond to different classification criteria<sup>24</sup>. For the purposes of this paper we will only list some of them:

- a) According to the *system* to which they belong: *national, foreign, uniform law.*

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<sup>24</sup> For detailed classifications, please read Chapter VI of the book '*Introducción al Estudio del Derecho*' by Eduardo García Máynez; Editorial Porrúa S.A.; Forty-fourth edition, pages 78 to 96.

- b) From the point of view of their *source*: *legislative, customary, jurisprudential*.
- c) From their *spatial scope of validity*: *general and local*.
- d) From the *point of view of their hierarchy*: *constitutional, ordinary, regulatory and individualized*.

There are other classifications that are not relevant to examine. I only wanted to show that a *legal norm* is not synonymous with *law*. What we commonly call **law**, whose prerogative corresponds to the National Congress, is what could be called in the previous classification (hierarchy), ordinary norms.

### Characteristics of the Ordinary Rules:

*Ordinary laws or regulations* have several characteristics:

- 1) They are **general**: they apply to persons within the spatial scope of competence of the State.
- 2) They are **abstract**: they apply to persons in a general or indeterminate manner, not to specific persons.
- 3) They are **mandatory**: they apply to individuals, regardless of the will of the persons to whom they are addressed.
- 4) They are **coercive**: the authority can compel compliance.

If any of the above characteristics does not correspond to any *rule*, we can affirm that it **is not ordinary**; that is to say, if a rule, for example, is not *mandatory*, we cannot call it a *law*, in the sense of ordinary law mentioned above.

In the case of the **ZEDE** rules, they lack *obligatoriness*, since their validity, is insofar as in their *scope of application*<sup>25</sup> completely *voluntary*. This is because the rules that apply the **ZEDE** must be previously adopted voluntarily by the individuals to whom they are addressed. For a rule adopted by a **ZEDE** to be applied to an individual, that individual must first voluntarily accept its application.

Therefore, the norms of a **ZEDE** do not constitute ordinary norms, they do not constitute laws, nor are they those referred to in **Article 205 numeral 1 of the Constitution**, as an attribution of the National Congress.

**Article 10 of the ZEDE Law** is clear as to the requirement of adherence of individuals to the rules of a **ZEDE**, as it establishes the need to subscribe to the *coexisting agreements* as a requirement of the *scope of validity of application* of the rules of a **ZEDE**.

Likewise, the **ZEDE** called **CIUDAD MORAZÁN**, by way of example, indicated in its *Constitutive Charter*<sup>26</sup>, in its section 3.09 (*Norms of Morazan*), the need for the consent of the residents by means of the subscription of these *agreements of citizen coexistence*.

### **So what are the ZEDE Norms?**

If the rules of a **ZEDE** are not laws (in the sense of *ordinary legal rules*), what are they?

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<sup>25</sup> I apply the term *scope of validity of application* to the circumstances under which a **ZEDE** norm may be applied to an individual.

<sup>26</sup> Consult its contents at: "<https://www.morazan.city/wp-content/uploads/2021/02/Carta-Constitutiva.pdf>"

The modern legal world has identified what English speakers have called *soft law*, which could be translated to Spanish as *derecho o normas indicativas*<sup>27</sup>.

This type of legal norms does not acquire *validity* by virtue of an authoritative promulgation, but acquire such *validity of application* by virtue of the voluntary acceptance of the persons who submit to them.

These include *technical norms, best procedural practices in arbitration, etc.*<sup>28</sup>.

In the case at hand, we could point out that the rules of a **ZEDE**, as constitutionally conceived, constitute a new kind of soft law, in the sense that they are rules of conduct that cannot bind anyone unless the party interested in adopting them expressly states its adherence to them, precisely by deciding to become part of a **ZEDE**.

Therefore, the constitutional reform that gives life to the **ZEDE** does not violate **article 205 numeral 1 of the Constitution**, since the rules that apply in the **ZEDE** are voluntarily and expressly accepted as valid and adopted by consensus by the residents of the **ZEDE**.

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<sup>27</sup> Less common are the Spanish terms *normas no vinculantes* o *legislación blanda*.

<sup>28</sup> Also called *soft law* are those rules of conduct that the governmental authorities impose on the administered parties as mandatory, without a law that obliges them to adopt such conduct, but which are considered binding by the administered parties. It is not, however, this type of rules that we are talking about as *rules adopted* by a **ZEDE**.

#### **Argument 4: ZEDEs violate the prerogative of the Supreme Court of Justice (Judicial Council) to appoint judges:**

Those who defend this argument against the ZEDEs point out that the **reformed article 329 of the Constitution** prescribes that "*for the solution of conflicts within the zones subject to special regimes, the Judicial Power through the Council of the Judiciary (Supreme Court of Justice)<sup>29</sup> must create courts with exclusive and autonomous jurisdiction over them. The judges of the zones subject to special jurisdiction must be proposed by the special zones to the Council of the Judiciary, which ought to appoint them after a competition from a list proposed by a special commission integrated in the manner indicated in the Organic Law of these regimes*".

**Article 14 of the ZEDE Law** establishes that this *special commission* would be the *Committee for the Adoption of Best Practices (CAMP for its acronym in Spanish)*.

The argument of those who claim that this is an unconstitutionality of the **reformed constitutional article 329** is that, although the appointment would be made by the Supreme Court of Justice, it would have to be made from a list provided by the ZEDE, through the **CAMP**, questioning that the selection of candidates is predetermined by a commission outside the power that makes the appointment or designation.

Under this premise, if indeed the *commissions* -whether they are called *Proposing Boards, Nominating Boards, CAMP* or otherwise- to establish the suitability of candidates, restrict the ability to appoint or elect officials, the

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<sup>29</sup> The Judiciary Council and Judicial Career Law (Decree 219-11) was declared unconstitutional and abrogated, by Ruling issued by the Supreme Court of Justice on March 14, 2016, a ruling which, in addition declares that the President of the Supreme Court of Justice again holds the powers granted to him by the Judicial Career Law and its Regulations.

Supreme Court of Justice itself would have been elected under unconstitutional parameters, given that the candidates currently occupying those positions, as well as those prior to the current ones, were elected by the National Congress from a short list provided by entities outside the Legislative Branch itself, constitutionally in charge of making the election.

Therefore, this argument lacks weight, in addition to having in its analysis the defect of not pointing out the constitutional article with which it would allegedly collide.

The final decision on the appointment of the judges that would have jurisdiction in the **ZEDE** is always subject to the Supreme Court of Justice, which may always request a new list if it considers that those nominated are not suitable to hold the position.

It is important to note that the **criminal law** applicable in the **ZEDE** is the ordinary Honduran criminal law, until other norms are adopted, *with the prior approval of the National Congress, as established in Article 41.3 of the ZEDE Law.*

Finally, I should point out that the **main means of dispute resolution for ZEDE disputes** is **arbitration**, a method that is fully provided for in the **Constitution in Article 110** which also already has a rich history at a national level.

**Argument 5: ZEDEs can adopt legal systems or traditions from other parts of the world:**

A similar claim can be made to the criticism or argument that the possibility of *adopting legal systems or traditions from other parts of the world* is unconstitutional. They simply do not point out which are the *articles* that are considered to be violated by such a provision. In these cases, they speak of *sovereignty* as if any argument could be included under that concept.

Legal traditions are a product of a country's history. However, we are used to conceiving history always as something of the past, even though today's circumstances, today's decisions are part of that history: the current history of our country. Although in the specific case of **MORAZAN CITY**, we maintained the Honduran legal tradition, with slight changes<sup>30</sup>, we believe that the adoption of legal systems other than the traditional one<sup>31</sup> cannot be considered contrary to the articles of the constitution.

Therefore, the adoption of other legal systems does not contradict any of the *articles* of the Constitution and, consequently, would not give rise to a declaration of unconstitutionality.

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<sup>30</sup> **MORAZAN CITY** implemented in its dispute resolution system the obligation of arbitral tribunals to establish in their awards what, in the *common law* system, is called *ratio decidendi*, which basically consists of expressly stating the *reason or decisive criteria* that gave rise to the decision. It was also implemented that this *ratio decidendi* should serve to standardize legal criteria in the dispute resolution system of **MORAZAN CITY**, in order to achieve the greatest contribution of the Anglo-Saxon system to the world legal world: *the predictability of legal decisions*.

<sup>31</sup> It is important to note that the *Common Law* system, prevailing in Anglo-Saxon countries, developed an enormous prestige in the administration of justice.



### **Argument 6: ZEDEs have a special tax system:**

We return to the criticism that we can make, in general, to those who attack the constitutionality of the **reformed constitutional article 329**, when they criticize a certain part without making reference to which article of the Constitution they consider to have been violated or transgressed.

In Honduras, there have been several *special tax regimes*<sup>32</sup>. Nonetheless, these special regimes do not acquire any obligation in relation to the needs of the population in general, nor to the people who work within the companies. That is to say, they have no duties to provide any type of good or service: neither education, nor health, nor security, nor infrastructure.

The novelty of the **ZEDE** is not only that they are exempted from paying the traditional tax system, but also that they can create an internal tax regime to cover, within the zone: *education, health, infrastructure and internal security*.

In **MORAZAN CITY** the only tax that has been established internally is a **5% Income Tax**. No other tax has been implemented in the zone. With these funds, the **ZEDE** called **MORAZAN CITY** was to fulfill its obligations to provide education, health, internal security and infrastructure for the benefit of its residents and, in addition, with international quality<sup>33</sup>.

In addition, the **ZEDE** must contribute to the rest of the country, allocating part of their resources to it. Twelve percent (12%) of the tax collection made by the

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<sup>32</sup> We can include, among others, *Free Zones, Tourist Free Zones, Temporary Import Regime*.

<sup>33</sup> **Morazan City** project includes: bilingual education, potable water and security in an environment of collaboration with the residents, in which the person in **Morazan City** perceives the authorities in charge of their security as cooperating in their wellbeing.

**ZEDE**, in its spatial scope of competence, must be destined to the creation of one or several trusts distributed in equal proportions and for the following purposes<sup>34</sup> :

- a) One fifth (1/5) for the strengthening of the **Judiciary**, which will include scholarships for the professional training of its staff in world-class universities, infrastructure and equipment.
- b) One-fifth (1/5) for a fund for projects at the community and departmental level in accordance with the priorities determined by the **Legislative Branch**.
- c) One fifth (1/5) for a fund for development, infrastructure, security and social projects in accordance with the priorities determined by the **Executive Branch**.
- d) One-fifth (1/5) for a municipal project development fund to be distributed among all **municipalities** in the country in accordance with their investment plans.
- e) One fifth (1/5) for the defense of national sovereignty through the strengthening of the **Honduran Armed Forces**.

Therefore, the **ZEDE** supposes not only a source of development in the spatial area of its competence, but also a contribution to the general welfare of the nation, of Honduras, of our homeland.

In another paper we will examine the socio-economic and historical justifications for the establishment of this special tax regime system in Honduras. What we consider important to establish at this point is that those who question the **ZEDE** as unconstitutional because of its fiscal regime point out that this power is detrimental to the sovereignty of Honduras, but do not

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<sup>34</sup> See **Article 44 of the ZEDE Law**.

indicate the irreformable constitutional text that was violated with such a provision.

In this regard, it seems that they include as a violation of *sovereignty* everything that bothers them about the **ZEDE system**, any trace of autonomy.

However, the autonomy provided to the **ZEDE system** is intended to empower the private sector in the development of the country, the generation of employment and as a source of economic and social welfare. They forget that the **ZEDE** are not foreign entities to Honduras. No. They are part of its constitutional structure, like the municipalities and departments. With autonomy, yes. With self-sufficiency, yes. But always and above all, as an integral part of Honduras. As part of its sovereignty, because its creation was a sovereign act of the National Congress.

**Argument 7: ZEDE's violate the human rights of their residents:**

The amended Article 329 of the Constitution of the Republic, in its final paragraph, establishes that *the courts of the areas subject to a special legal regime may adopt legal systems or traditions from other parts of the world, provided that they guarantee the same or better constitutional principles for the protection of human rights, subject to the approval of the National Congress.*

In other words, the text of the reform expressly establishes the **obligation to respect the constitutional principles of human rights protection. Therefore,** to state that human rights would not be respected within the ZEDE is to interpret precisely the opposite of the text of the constitutional reform under study.

As a development of this constitutional norm, **Article 10 of the ZEDE Law** establishes the obligation to respect *international human rights instruments*.

**Article 16 of the ZEDE Law** establishes the human rights protection mechanism by stating that:

*The Employment and Economic Development Zones (ZEDE) will have a Court for the Protection of Individual Rights. The same will protect people within the Employment and Economic Development Zones (ZEDE) against violations of their Fundamental Rights and will be composed of as many people as the Committee for the Adoption of Best Practices decides.*

*In order for one or more affected parties to be able to resort to international courts for protection against violations of their human rights, a final judgment issued by said Court shall be sufficient, or if, in accordance with international standards for the protection of human rights, a reasonable period of time has elapsed without the appeal being resolved.*

*The Employment and Economic Development Zones (ZEDE) individually considered are responsible for paying any compensation to which the State of Honduras may be condemned for violations occurring within their spatial sphere of competence, as well as for complying with the recommendations, precautionary measures or provisions issued by international human rights organizations.*

Thus, the **ZEDE Law** not only establishes the mechanism for the protection of the human rights of residents, but also establishes compliance with international judgments issued by international courts in this area and also designates the **ZEDE** itself as the party responsible for the violations of human rights that occur within the ZEDE.

We conclude that the **amended Article 329 of the Constitution of the Republic** and the **ZEDE Law** establish in their texts the protection of fundamental rights; that is to say, the human rights of the residents of the **ZEDE**. Any interpretation in a different sense is contrary to the text of the above-mentioned norms.

**ON THE CRIMINALIZATION OF THE CREATION, ENFORCEMENT  
AND OBEDIENCE TO LAW**

It is my firm conviction, and I have expressed it in these pages, that the constitutional reform that gave life to the **ZEDE** does not violate any of the unreformable articles of the Constitution of the Republic. Furthermore, since its approval complied with the formal requirements established in **Article 373 of the Constitution**, it could not be declared unconstitutional.

Of course, the Honduran State, as sovereign over the entire national territory, can change its mind about the convenience of **ZEDE** and still enjoy the prerogative to expel it from the constitutional text, following the same procedure established in the Constitution<sup>35</sup>.

However, it is no less true that, in this context, the State of Honduras has already acquired some obligations:

- 1) To respect the **acquired rights of residents and investors**, through the *legal stability contracts* that have been signed in each **ZEDE**<sup>36</sup>.
- 2) To respect the *transition period referred to in Article 45 of the ZEDE Law*, which shall not be less than 10 years, according to the text of said legal provision, as it includes the time established in the legal stability agreements, which is **50 years**, in accordance with **Article 16 of the "Agreement between the Government of the State of Kuwait and the**

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<sup>35</sup> It should be noted that the current legislature repealed Decree 120-2013. However, if the **ZEDE** is not expelled as a constitutional design, there would be no obstacle for the approval of a new law, which would be the product of national consensus.

<sup>36</sup> As prescribed in **Article 45 of the ZEDE Law**.

*Government of the Republic of Honduras for the Promotion and Reciprocal Protection of Investments*<sup>37</sup>.

These are, in addition, international obligations acquired by Honduras in relation to foreign investors, whose compliance may be demanded in international arbitration forums.

However, I have heard some opinions that state that the **ZEDE** design is not only unconstitutional, but also unconstitutional *in origin*, that all the acts derived from it are null and void and that they entail liability:

- a) The Deputies who voted for its approval, both in terms of the constitutional reform and its organic law.
- b) Judges who issued rulings declaring the constitutionality of the **ZEDE**.
- c) The officials who acted in applying it.
- d) All those who acted in *obedience* to the **ZEDE Law** and its constitutional reform.

In other words, some of the people who advocate the repeal of the **ZEDE** system or declare its unconstitutionality also intend to punish all those who applied or obeyed the law. They also argue that the magistrates who at a historical moment had a legal opinion different from theirs should be punished.

Such an opinion signifies the end of the **rule of law** in Honduras. It would suppose politics as a substitute for the rule of law in the country. Let us see.

We previously established that, through **Legislative Decree 236-2012**, published in *La Gaceta*, Official Gazette of the Republic of Honduras number 33,033 dated January 24th, 2013 and ratified through **Legislative Decree 9-2013**,

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<sup>37</sup> Applicable to all **ZEDE**, in accordance with **Article 32 of the ZEDE Law**.

published in *La Gaceta* number 33,080 dated March 20th, 2013, **Articles 294, 303 and 329 of the Constitution of the Republic** were **amended**, creating the regime of **Employment and Economic Development Zones (ZEDE)**. This constitutional reform process complies with the formal requirements prescribed by **Article 373 of the Constitution**.

**Article 329, as amended, of the Constitution** establishes that for the *creation and operation* of these zones, the **National Congress** must approve an **Organic Law**, which may only be modified, amended, interpreted or repealed by a **two-thirds favorable vote of the members of the National Congress**. It also establishes the obligation to establish a referendum or plebiscite for the inhabitants of the zone subject to the special regime when its population exceeds one hundred thousand inhabitants.

**Legislative Decree 120-2013** created, with the approval of more than two thirds of the members of the **National Congress**, the *Organic Law of Employment and Economic Development Zones (ZEDE)*.

The **Supreme Court of Justice**, through the **Constitutional Chamber**, ruled on three **UNCONSTITUTIONALITY APPEALS** that were filed against the constitutional amendments and against the **Organic Law**, by means of the following rulings:

- 1) Judgment dated April twenty-ninth (29), two thousand fourteen (2014), in **Case SCO-0424-2014**, in which the **Unconstitutionality Action** filed was **declared inadmissible**.
- 2) Judgment dated May twenty-six (26), two thousand fourteen (2014), in **Case SCO-0030-2014**, in which the **Unconstitutionality Action** filed against **Decreets 236-2012** and **120-2013** was **DECLARED NOT SUSTAINABLE**.



- 3) Judgment dated June ten (10), two thousand fourteen (2014), in **Case SCO-0179-2014**, in which the **Unconstitutionality Action was OVERRULED**, because the Supreme Court had ruled in the judgment handed down in **Case SCO-0030-2014**.

Therefore, anyone could *legitimately* believe that the **ZEDE** and the legislative acts that gave rise to it were valid and legitimate, as is still my conviction today.

Now, to repeal or declare the constitutional reform unconstitutional and then attempt to **criminalize**: **(i)** the legislative acts that created that reform, **(ii)** the judicial acts that declared its constitutionality; **(iii)** the acts of officials that applied that law in force in the country and **(iv)** the acts of citizens and investors in **obedience or subjection to the law**, would be a clear example of *judicial activism* -in the sense of judging by applying ideology instead of the law-, which would expel legal certainty from our country. I will now demonstrate this.

**Article 96 of the Constitution of the Republic** clearly states that *the law does not have retroactive effect, except in criminal matters when the new law favors the offender or defendant.*

Thus, in Honduras, the retroactive application of a law is constitutionally prohibited. Consequently, **a legislative repeal cannot have *ex tunc* effects**; that is to say, towards the past.

**Article 84 of the Constitution of the Republic** states that *no one may be arrested or detained except by virtue of a written order from a competent authority, issued in accordance with legal formalities and for a reason previously established by law.*

Evidently, no penal body in Honduras establishes as a crime the setting of a special and autonomous zone in the country. In fact, there are other special zones that have existed legitimately. What is happening now is that those who handle these thesis, configure the *autonomy of a zone* as a *violation of sovereignty*. However, this is a meaning or, better said, a conception that is being imposed only now, without a single document, legal article or precedent that supports this theory.

I repeat, Honduras has the right, as a sovereign State, to expel the **ZEDE** from its legal system. However, it must: **(i)** respect the acquired rights within the zones; **(ii)** respect the legally established transition periods; **(iii)** respect the non-retroactivity of the law.

From the point of view of **Human Rights**, the **American Convention on Human Rights, in its Article 9, Principle of Legality and Retroactivity** establishes: *No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense under the applicable law at the time it was committed.*

It is clear, therefore, that the **criminal prosecution** of the creation, application or compliance with the **ZEDE is contrary to the very text of the** above-mentioned **constitutional principles** and violates the American human rights system.

## CONCLUSIONS

In summary, we can conclude the following:

- 1) The National Congress followed the constitutionally prescribed procedure for the approval of the reform that gave rise to the **ZEDE**.
- 2) The Constitutional Chamber of the Supreme Court of Justice issued two rulings declaring the constitutionality of the **ZEDE**.
- 3) The State of Honduras applied, through its officials, both the constitutional reform that gave life to the **ZEDE** and its own organic law.
- 4) The investors acted in good faith under the belief that they were acting under a legitimate law. The officials and citizens who complied with the law acted under the same premise.
- 5) There is no legitimacy to argue *the nullity of the origin* of the **ZEDE**.
- 6) The constitutionally reformed text that gave rise to the **ZEDE** concept does not contradict any of the provisions of the Constitution of the Republic.
- 7) It is neither legitimate nor logically and scientifically sustainable that the *autonomy* of the **ZEDE** implies a diminution of the *sovereignty* of Honduras. The term *sovereignty* has a very specific meaning that at no time was harmed by the legal design of the **ZEDE**.

Therefore, to the question: are **ZEDEs** unconstitutional, we can answer:

No, **ZEDEs do** not contravene the Constitution of the Republic  
of Honduras.

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