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**Democratic Compliance: A
Charter City's Obligations
Under International Law:
The Case of the Honduran
ZEDE Regime**

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Abstract

The concept of Charter Cities was first introduced in the Republic of Honduras as a means for rapidly accelerating economic growth and poverty reduction by creating a special jurisdiction. However, the concept faced multiple legal challenges on constitutional grounds. In 2014, the ZEDE regime was reviewed by a newly elected Supreme Court, which ruled favorably on the project. However, one the strongest challenges raised against the regime, that of characterizing it as undemocratic by nature, has not been properly addressed. This paper examines the challenge raised on the democratic legitimacy of ZEDes, and takes into account the non-delegation clause of the Honduran Constitution. It concludes that neither the Technical Secretary nor CAMP may legislate or levy taxes, and in order for ZEDes to exercise such powers its governance structure must provide for democratic or participatory mechanisms through which its inhabitants may exert legislative power through representation.

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I. Introduction.

Bad governance may be the defining feature of Honduran politics. After the 2009 crisis, the political climate became ripe, if not desperate, to try out new ideas in governance¹. Inspired by the success stories of Hong Kong, Singapore, Dubai, and the Chinese special economic zones, Honduran “Charter Cities”² would attract investment by offering a new set of competitive rules and institutions, thus accelerating economic growth and poverty reduction³.

In 2011, Congress amended the Honduran Constitution⁴ to allow for the establishment of Special Development Regions (RED, for its Spanish initials)⁵, an autonomous region with its own judiciary, administrative system, and laws. REDs would operate under a policy of free trade and competition, hold the power to negotiate international treaties, levy taxes, and create their own police force, crime prosecution body, and penitentiary system⁶. At first, the REDs would be ruled by a Governor and a Transparency Commission, but would then transition into a full-fledged democracy with a representative lawmaking body dubbed ‘Normative Council’, which would be elected through universal suffrage; the REDs would also count with a Constitutional Council, and Consultative Council with veto powers.

Though the REDs were rejected by the Supreme Court of Honduras in late 2012, legislation for a new version of autonomous zone was drafted in 2013. Through a Constitutional Amendment and legislative Statute the Honduran Congress created the Zones for Employment and Development of the Economy (ZEDE). While ZEDEs have many the powers previously attributed to a RED, others were cut back and/or reshuffled. Most importantly, the ZEDEs governance structure was almost completely revamped, with no required transition to democratic governance.

In this paper I analyse the nature of ZEDEs autonomy, its main features, its restraints, and some of the constitutional challenges raised against it, with special focus on their alleged lack of democratic legitimacy. The implications of adopting international treaties and the Honduran Constitution as sources of applicable law within a ZEDE are then studied, highlighting the democratic standards required by international law and the democratic duties accompanying a constitutional grant of autonomy. After interpreting the Statute’s text under the principle of *consistent interpretation*, I conclude that far from being undemocratic

¹ Soof, Suemedha. 2012. "The two sides of charter cities." *BBC*, September 7.

² Romer, Paul. 2011. A New City in Honduras. February 2. Accessed March 31, 2018. <https://paulromer.net/a-new-city-in-honduras/>

³ The Economist. 2011. Hong Kong in Honduras. *The Economist*, December 10. Accessed March 31, 2018. <https://www.economist.com/node/21541392>; Soriano, Domingo. 2014. Honduras, ¿el Dubái de Centroamérica? *Libre Mercado*, May 4. <https://www.libremercado.com/2014-04-05/honduras-el-dubai-de-centroamerica-1276515065/>.

⁴ República de Honduras. 1982. "CONSTITUCIÓN POLÍTICA DE 1982." DECRETO No 131. Edited by Centro Electrónico de Documentación e Información Judicial (CEDIJ). Tegucigalpa, M.D.C.: Diario Oficial "La Gaceta", January 20. Updated to year 2017.

⁵ República de Honduras. 2011. "Decreto Legislativo No. 283-2010." Tegucigalpa, M.D.C.: Diario Oficial 'La Gaceta', February 15. Hereinafter RED Amendment.

⁶ República de Honduras. 2011. "Decreto Legislativo No. 123-2011." *ESTATUTO CONSTITUCIONAL DE LAS REGIONES ESPECIALES DE DESARROLLO (RED)*. Tegucigalpa, M.D.C.: Diario Oficial 'La Gaceta', August 23. Hereinafter RED Statute

by nature ZEDEs are to operate under a strict regime of democratic compliance, ending the paper with some final insights on how special jurisdictions developers may design a democratic compliance regime.

II. Making Them Fit: Charter Cities and the Honduran Constitution

1. The Supreme Court's Decision on REDs

In 2012 the Constitutional Chamber of the Supreme Court ruled against the RED legislation by a majority vote, prompting the Supreme Court to strike down the REDs in plenary session, based on concerns involving territorial integrity, national sovereignty, separation of powers, and due process⁷.

With respect to territorial integrity, the Honduran Constitution (art. 107) prohibits foreign ownership and possession of land in islands, cays, and areas within a 40 km distance from the coastal surface and national boundaries but allows for the acquisition of urban real estate in these areas in accordance to a special law⁸. Given that REDs were designated as urban areas where land could be acquired by nationals and foreigners alike⁹, the Court considered the REDs modified the Honduran Constitution's regulation of property rights over the national territory, which according to the Court may not be modified by the legislator, as constitutional articles related to the national territory are not subject of legislative reform¹⁰.

The Court found that REDs violated national sovereignty in several ways. The Court considered the people's sovereignty was being circumvented because the powers delegated by the constituent assembly to the Executive, Legislative and Judicial branches were being sub delegated to a group of persons acting as RED authorities, which would be able to legislate, tax, direct the public administration, negotiate international treaties, as well as have a judiciary separate from the nation's judicial branch¹¹.

In particular, the Court was especially concerned that the people's sovereign power and their due process right was being circumvented by annulling the Supreme Court's authority over a RED's jurisdiction. The RED Statute stated REDs would have autonomous courts, and that any difference between the REDs and the national government would be solved through an arbitration procedure¹²; the Statute even authorized the temporary outsourcing of judicial functions to foreign governments¹³ (reportedly, the government of

⁷ Diario El Heraldo. 2012. "Inconstitucional decreto de "ciudades modelo"." *Diario El Heraldo*, October 17; *See also, Sentencia del Recurso de Inconstitucionalidad contra las Regiones Especiales de Desarrollo*. 2012. 769=11 (Corte Suprema de Justicia de la República de Honduras, October 17), hereinafter 'REDs Decision'.

⁸ 1990. "Decreto Legislativo No. 90-90." *LEY PARA LA ADQUISICIÓN DE BIENES URBANOS EN LAS AREAS QUE DELIMITA EL ARTÍCULO 107 DE LA CONSTITUCIÓN DE LA REPÚBLICA*. Tegucigalpa, M.D.C.: Diario Oficial 'La Gaceta', August 27.

⁹ RED Amendment, art. 329; RED Statute, art. 3

¹⁰ REDs Decision, Recital 12 (Note: Articles 373 and 374 of the Honduran Constitution prohibit any amendment of constitutional articles which regulate the national territory, prohibit presidential reelection, and establish the form of government.)

¹¹ REDs Decision, Recital 13, 14, 16, 17, 19

¹² RED Statute, art.22

¹³ RED Statute, art.19

Mauritania had agreed to allow its judiciary to know appellate cases coming from a RED's jurisdiction¹⁴). Thus, effectively excluding REDs from the Supreme Court's authority, and prompting that same court to conclude REDs violated due process and equal protection under the law because its inhabitants would be subtracted from the judicial jurisdiction established by the constituent assembly and forced into a different one¹⁵.

Additionally, the Court concluded a person's right to circulation and freely choose a residence would be contravened, because inhabitants would be forcefully subjected to a RED's jurisdiction and would live under norms and procedures different from those established in the Constitution and the laws, something the Court considered to be arbitrary¹⁶.

2. The Legislative Response: Creating the ZEDE Regime

In December 2012, Congress swapped the magistrates of the Supreme Court's Constitutional Chamber after a political battle which was unrelated to Charter Cities, though admittedly quite convenient for the project¹⁷. In 2013, Congress approved a new Amendment¹⁸ affecting articles 294, 303 and 329 of the Honduran Constitution, and enacted a legislative Statute (Organic Law) to create the Zones for Employment and Development of the Economy (ZEDE) regime, an adapted version of the RED legislation¹⁹.

The Honduran Constitution, under amended article 294, states that "the National Congress can create zones subject to special regimes according to article 329 of this Constitution". Article 329 defines ZEDes as "zones in the country subject to special regimes which have legal personhood, are subject to a special fiscal regime, may contract obligations as long as the State is not required to be a co-signer, sign contracts until the fulfillment of their objectives through several governments, and enjoy functional and administrative autonomy that must include the functions, powers and duties that the Constitution and the laws grant to the municipalities."²⁰

National sovereignty concerns were addressed by requiring a ZEDE be created through a two-thirds vote by Congress and "the execution of a referendum or plebiscite within the persons that inhabit the zone subject to the special regime when its population is above one hundred thousand inhabitants." By demanding a popular vote for the creation of a ZEDE in a high-density zone, it could not be said the people's sovereignty was being circumvented, as they would have to agree to subject themselves to the

¹⁴ Bowcott, Owen, and Maya Wolfe-Robinson. 2012. Honduras may appeal to London courts. *The Guardian*, July 22. Accessed April 7, 2018. <https://www.theguardian.com/law/2012/jul/22/honduras-london-courts>.

¹⁵ REDs Decision, Recital 13, 14, 17, 19

¹⁶ REDs Decision, Recital 14,

¹⁷ Constantini, Cristina. 2012. Honduran President Fears Coup, Four Supreme Court Judges Fired. *ABCNEWS*, December 12. Accessed March 31, 2018. http://abcnews.go.com/ABC_Univision/News/honduran-congress-fires-supreme-court-judges/story?id=17944425.

¹⁸ República de Honduras. 2013. "Decreto Legislativo No. 237-2012." Tegucigalpa, M.D.C.: Diario Oficial 'La Gaceta', January 24. Herein after ZEDE Amendment.

¹⁹ República de Honduras. 2013. «Decreto Legislativo No. 120-2013.» *LEY ORGÁNICA DE LAS ZONAS DE EMPLEO Y DESARROLLO ECONÓMICO (ZEDE)*. Tegucigalpa, M.D.C.: Diario Oficial 'La Gaceta', September 6. Herein after ZEDE Statute.

²⁰ ZEDE Statute, art. 18

Constitution's special regime and its internal norms. However, no referendum is needed in areas with lower population density.

The Court's due process concerns were addressed by incorporating the ZEDE's judiciary into the structure of the nation's Judicial branch, Congress reformed constitutional article 303 which now states that "The Judiciary is integrated by a Supreme Court of Justice, by the courts of appeals, the courts and by tribunals with exclusive jurisdiction in zones of the country subject to special regimes created by Constitution of the Republic and other units referenced by the law". Instead of having two separate judicial bodies in Honduran territory, the ZEDE's judiciary is unified with the nation's judicial branch and will operate under the hierarchy of the Supreme Court.

3. The Supreme Court's Decision on ZEDEs

In 2014, the new constitutional magistrates of the Supreme Court ruled favorably on the constitutionality of the ZEDE regime²¹. On the subject of territorial integrity, the new Court determined that neither the Amendment nor the Statute implied a reform of the constitutional articles related to the national territory because the Amendment expressly states such articles will have full effect within a ZEDE, while the Statute states ZEDEs "*are an inalienable part of the State of Honduras, subject to the Constitution and the national government on issues related to sovereignty, application of justice, territory, national defense, foreign affairs, electoral issues, issuance of identity cards, and passports*"²².

However, the Court did not elaborate on whether the ZEDE Statute was compatible with the restrictions article 107 of the Constitution imposes on foreign ownership of land. Although ZEDEs are not designated as "urban territories" as REDs were, the ZEDE Statute expressly states that both nationals and foreigners may own lands within a ZEDE's jurisdiction; thus, implying that under the ZEDE special regime, foreigners may be allowed to own and possess land even if within an island or a 40km distance from coasts or national boundaries.

With respect to the delegation of the power to tax, which articles 206 and 351 of the Honduran Constitution prohibit, the Court concluded that the Amendment and Statute is "sufficiently clear with respect to the fiscal and financial regime ruling these special zones, situation which is not contrary to our fundamental law, as we understand that such special fiscal regime is conceded by the derived power that the people have deposited in the Republic's National Congress, more than enough reason to consider that no unconstitutionality is produced"²³. The Court failed to address the Constitution's non-delegation clause and the legality principle of taxes, a challenge which thus needs to be further addressed.

On national sovereignty, the Court concluded that the people had created the Constitution of the Republic and deposited the power to legislate and amend the Constitution in Congress; thus, given Congress has exercised its constitutional powers when enacting the ZEDE Amendment and Statute, the Court finds no

²¹ Certificación de la sentencia recaída en el recurso de inconstitucionalidad No. 0030-2014 de fecha 26 de mayo de 2014. 2014. 0030-2014 (Sala de lo Constitucional de la Corte Suprema de Justicia de la República de Honduras, May 26), hereinafter 'ZEDE Decision'.

²² ZEDE Decision, Recital 11

²³ ZEDE Decision, Recital 12

violation of national sovereignty. Again, the Court fails to address the non-delegation clause which is also related to national sovereignty in the sense that, by commandment of the constituent assembly, the power to legislate and tax cannot be delegated²⁴.

Finally, the Court concluded that the form of government and the rights to equality, free circulation, and worker's rights are safeguarded because the Statute recognizes the Honduran Constitution and International Treaties at the top of the normative hierarchy within a ZEDE's jurisdiction²⁵.

III. Powers and Responsibilities of a ZEDE

The ZEDE Amendment's recital clarifies the nature of the ZEDE regime as a grant of autonomy much like the one recognized to federated territories, but with specified requirements of economic policy, a result of recognizing the impact special jurisdictions have had on spurring progress and welfare across the globe²⁶.

Consequently, the Amendment orders ZEDE authorities to "adopt national and international best practices for guaranteeing the existence and permanence of the social, economic, and legal environment to remain internationally competitive", while the Statute states ZEDes may be created to develop Financial or Logistics Centers, Autonomous Cities, International Commercial Courts, Special Investment Districts, Special Economic Zones, Areas subject to a Special Legal System, or any other arrangement or combination not specified by the Statute.

To achieve their purpose ZEDes are granted a wide range of powers and features, however, as will be further explored, under Honduran Constitutional Law such grants of autonomy are conditioned upon them being exercised democratically, especially so when the grants of autonomy include law making power.

1. Governance Framework in the ZEDE Statute

The Statute creates the Committee for the Adoption of Best Practices (CAMP) and the Technical Secretary as the governing bodies of a ZEDE.

The Technical Secretary, who must be Honduran by birth, is the highest executive official within a ZEDE and serves as its legal representative for a 7-year period. Appointed by CAMP upon nomination by the ZEDE developers, when developed on a low population density zone, and by the zone's inhabitants when developed on a high-density zone, the Technical Secretary is responsible for signing stability contracts with investors; establishing trusts for administering tax revenues and public services; directing the ZEDE

²⁴ ZEDE Decision, Recital 13

²⁵ ZEDE Decision, Recital 14 and 15

²⁶ ZEDE Amendment, Recital 3; (The recital states, "Whereas: In the recent history of mankind, some societies as poor or more so than ours, have built the conditions to grow rapidly, transforming themselves into developed, more equitable societies by adopting public governance models based on granting high degrees of autonomy to certain zones of the country, without diminishing its sovereignty.")

administration; promulgate the ZEDE's legal norms and dispatch them to CAMP for approval or rejection; execute the ZEDE's internal legislation; and perform all other duties delegated by CAMP²⁷.

CAMP is a 21-member oversight committee comprised of foreign and national persons with prestige in academia, public service and business, they are selected by the President of the Republic and hold the powers to appoint and remove the Technical Secretary; establish general policy and transparency guidelines; approve or reject the norms approved by the Technical Secretary; fill their own vacancies; nominate candidates for judicial office within the ZEDE's special jurisdiction; and hire the services of a prestigious firm to audit ZEDEs' resources²⁸.

In 2013, all of the powers held by CAMP and the Technical Secretary were transferred to the President of the Republic's "ZEDE Establishment Program"²⁹, which will hold these powers until the first Technical Secretary and at least twelve CAMP members have been appointed³⁰. In 2014 all CAMP members were appointed³¹, however, the body's membership has undergone several changes since³².

2. Legal Institutions

The ZEDE regime introduces a series of legal institutions in Honduras, among the highlights of which we find the creation of an exclusive special jurisdiction for ZEDE³³; allowing foreigners to assume judicial office³⁴; introduction of the common law and the stare decisis principle; courts of equity³⁵; trial by jury on criminal cases³⁶; incorporation of foreign jurisprudence³⁷; mandatory arbitration for civil and commercial disputes³⁸; and the power for ZEDE's to enact their own internal legislation³⁹, provided it complies with the Honduran Constitution, International Treaties, and the ZEDE Statute⁴⁰.

²⁷ ZEDE Statute, art. 12

²⁸ ZEDE Statute, art. 11

²⁹ República de Honduras. 2013. "Decreto Legislativo No. 153-2013." CRÉASE EL PROGRAMA PARA EL ESTABLECIMIENTO DE LAS ZONAS DE EMPLEO Y DESARROLLO ECONÓMICO (ZEDE). Tegucigalpa, M.D.C.: Diario Oficial "La Gaceta", August 5. Note: The ZEDE Establishment Program is comprised of the personnel selected by the President of the Republic.

³⁰ República de Honduras. 2016. "Decreto Ejecutivo No. PCM-060-2016." Tegucigalpa, M.D.C.: Diario Oficial 'La Gaceta', July 25. Note: Through this Executive Decree, the President of the Republic authorized for the 2016 period, a transfer of NINETEEN MILLION LEMPIRAS (L. 19,000,000.00) – approximately EIGHT HUNDRED THOUSAND US DOLLARS (US\$ 800,000.00) by today's exchange rate – from the National Agricultural Development Bank (BANADESA) to the "ZEDE's office", which I understand to mean the ZEDE Establishment Program, in order to support the establishment of the first ZEDE.

³¹ República de Honduras. 2014. "Decreto Legislativo No. 368-2013." Tegucigalpa, M.D.C.: Diario Oficial "La Gaceta", February 11.

³² The Economist. 2017. "Honduras experiments with charter cities." *The Economist*, August 12.

³³ ZEDE Statute, arts. 14, 15, 19

³⁴ ZEDE Statute, art. 17

³⁵ ZEDE Statute, art. 18

³⁶ Ibid.

³⁷ ZEDE Statute, art. 14

³⁸ Ibid.

³⁹ ZEDE Statute, art. 1, 5; ZEDE Amendment, art. 329

⁴⁰ ZEDE Statute, art. 8

The ZEDEs are to establish their own internal security system, including a police force, a criminal prosecution office, and penitentiary facilities⁴¹; however, the Statute also creates a Tribunal for the Protection of Individual Rights which will guarantee residents' fundamental rights under the standards of International Human Rights Law, and mandates ZEDE governments to comply with the recommendations, cautionary measures, and rulings of the regional human rights protection system⁴².

As for legal certainty, a ZEDE may sign stability agreements with investors⁴³, and though the Statute authorizes the Technical Secretary to sign them, internal norms detailing procedures and restraints for formalizing stability contracts would have to be enacted. Investors are also protected against political risks from the Central Government, as any reform or repeal of the ZEDE Statute requires a two-thirds vote in Congress and ratification by ZEDE residents through a referendum. If the repeal of the Statute does take place, its provisions shall remain in effect for the period convened in the stability contract, with a minimum transition period of 10 years⁴⁴.

3. Economic Policy: Low Taxes, Free Trade and Competition

The ZEDEs are legally required to operate under a policy of low taxes⁴⁵, free trade, and competition, guaranteeing the free flow of goods, intangible assets, and capital⁴⁶. They may adopt their own monetary policy, but currency exchange controls are prohibited, while currency, gold, futures, and commodity markets may exist freely within its jurisdiction⁴⁷.

ZEDEs have an independent fiscal regime but are obligated to achieve a fiscal equilibrium, avoid deficits, and maintain their budget in accordance to their economic growth⁴⁸. They may levy and collect their own taxes under certain limits, income taxes are capped to 12% for natural persons and 16% for corporations, while value added taxes are capped at 5%; a property tax, and a flat tax may be freely levied⁴⁹. Of their total tax revenue, 12% must be transferred in equal parts to the Municipalities, the Armed Forces, and the Judicial, Legislative, and Executive Powers⁵⁰.

⁴¹ ZEDE Statute, art. 22

⁴² ZEDE Statute, art.16

⁴³ ZEDE Statute, art. 12.2

⁴⁴ ZEDE Statute, art. 45

⁴⁵ ZEDE Statute, art. 29

⁴⁶ ZEDE Statute, art. 31

⁴⁷ ZEDE Statute, art. 30

⁴⁸ ZEDE Statute, art. 23

⁴⁹ ZEDE Statute, art. 29

⁵⁰ ZEDE Statute, art.44

All public services, including education, healthcare, and infrastructure may be provided by the ZEDE authorities and must be administered through trusts⁵¹. Fees may be charged but only in a reasonable manner, in accordance to the cost of the service, and only to whom receives it⁵².

The ZEDes are considered an offshore fiscal and customs zone, different from the national territory⁵³, where the free entry of aerial and maritime ships is guaranteed; they may regulate their airspace and maritime navigation, as well as manage their ports⁵⁴. All imports carried out under its jurisdiction are exempt from taxes, tariffs, and consular fees related with import-export activities, for which only a unique Customs Declaration Form is required⁵⁵.

IV. Constitutional Restraints on a ZEDE's Autonomy

Though enjoying a wide range of powers, ZEDes are bound by the normative hierarchy set in the Statute, which places the Honduran Constitution and International Treaties at the top, followed by the Statute itself and the national laws there specified.

Through the Amendment, ZEDes are granted a functional and administrative autonomy that "must include the functions, powers and *duties* the Constitution and the laws confer to municipalities"; thus, the Honduran Municipalities Law is granted a normative authority over ZEDes, imposing on them the same obligations held by Municipal Corporations⁵⁶. Additionally, a whole other web of restrictions is imposed on ZEDes by the Honduran State's "*constitutional block*", which is comprised of the Honduran Constitution, International Human Rights Treaties, and the jurisprudence of both the Constitutional Chamber of the Supreme Court and the Inter-American Court of Human Rights⁵⁷.

When designing a ZEDE's governance structure, developers must keep in mind the Honduran State is bound to adapt, interpret and execute its internal legislation in a harmonious fashion with its *constitutional block*. Compatibility with the *constitutional block* is a prerequisite for the Statute and a ZEDE's internal norms to be legally binding⁵⁸. Just like with private corporations, compliance with legal

⁵¹ ZEDE Statute, arts. 4, 12.3

⁵² ZEDE Statute, art. 29

⁵³ ZEDE Statute, art. 32

⁵⁴ ZEDE Statute, art. 31

⁵⁵ ZEDE Statute, art. 32

⁵⁶ República de Honduras. 1990. "Decreto Legislativo No. 134-90." LEY DE MUNICIPALIDADES. Tegucigalpa, M.D.C.: Diario Oficial "La Gaceta", November 19.

⁵⁷ Góngora Mera, Manuel Eduardo. 2014. "LA DIFUSIÓN DEL BLOQUE DE CONSTITUCIONALIDAD EN LA JURISPRUDENCIA LATINOAMERICANA Y SU POTENCIAL EN LA CONSTRUCCIÓN DEL *IUS CONSTITUTIONALE COMMUNE* LATINOAMERICANO." In *Ius constitutionale commune en América Latina. Rasgos, potencialidades y desafíos*, by Héctor Fix Fierro, Armin von Bogdandy and Mariela Morales Antoniazzi, 301-327. México, D.F.: Instituto de Investigaciones Jurídicas. See also Sala de lo Constitucional de la Corte Suprema de Justicia de la República de Honduras. 2014. Conferencia iberoamericana de justicia constitucional. March. Accessed March 31, 2018.

<http://www.cijc.org/miembros/Honduras/Documents/Honduras%20-%20Sala%20de%20lo%20Constitucional.pdf>

⁵⁸ CONSTITUCIÓN POLÍTICA DE 1982, arts. 15, 18, 320; Organization of American States. 1969. "AMERICAN CONVENTION ON HUMAN RIGHTS." Pact of San José, Costa Rica (B-32). San José, Costa Rica, November 22, arts. 2, 62; Ferrer MacGregor, Eduardo, and Carlos Pelayo Moller. 2014. "Artículo 2. Deber a Adoptar Disposiciones de

obligations will boost a ZEDE's chances to successfully navigate through future political, legal, and public relations challenges.

1. Democratic Deficit: Constitutional Criticism Against the ZEDE Statute

As previously examined, Honduran Charter Cities have faced multiple legal challenges on constitutional grounds. The challenges come from a variety of sources, including academia⁵⁹, news media⁶⁰, and twice before the Supreme Court⁶¹. The ZEDE regime has come through these challenges successfully and continues to receive political support⁶² and interest from private sector investors⁶³.

However, a stronger constitutional criticism which has not been properly addressed is that of characterizing ZEDes as undemocratic by nature. The ZEDE Statute has been criticised for lacking provisions detailing how residents may exert a "democratic control" over the ZEDE administration. At first glance, the Technical Secretary seems to concentrate both executive and legislative power, requiring approval only from the unelected and self-perpetuating CAMP body to govern⁶⁴.

After investigating the issue, the National Lawyers Guild (2014) concluded the ZEDE Statute contravenes international human rights law because it lacks democratic processes within its provisions, limiting the ability of residents to participate in public affairs, and thus undermining their right to self-determination.

Derecho Interno." In *Convención Americana Sobre Derechos. Comentario*, by Konrad Adenauer Stiftung, 69-98. Konrad Adenauer Stiftung.

⁵⁹ Castle Miller, Michael R. 2014. «THE CIUDADES MODELO PROJECT: TESTING THE LEGALITY OF PAUL ROMER'S CHARTER CITIES CONCEPT BY ANALYZING THE CONSTITUTIONALITY OF THE HONDURAN ZONES FOR EMPLOYMENT AND ECONOMIC DEVELOPMENT.» *Willamette Journal of International Law and Dispute Resolution* 271-312.

⁶⁰ Rodríguez, Dardo Justino. 2015. "ZEDE, la solución de Honduras al empleo y desarrollo". *Estrategia & Negocios*, January 29. Accessed March 31, 2018. <http://www.estrategiaynegocios.net/lasclavesdeldia/789990-330/zede-la-soluci%C3%B3n-de-honduras-al-empleo-y-desarrollo>. See also, Panting, Cesar. 2013. "Ley Orgánica de las ciudades modelo es inconstitucional". *Diario La Prensa*, August 15. Accessed March 31, 2018. <http://www.laprensa.hn/honduras/tegucigalpa/333249-98/ley-org%C3%A1nica-de-las-ciudades-modelos-es-inconstitucional>.

⁶¹ Certificación de la sentencia recaída en el recurso de inconstitucionalidad No. 0030-2014 de fecha 26 de mayo de 2014. 2014. 0030-2014 (Sala de lo Constitucional de la Corte Suprema de Justicia de la República de Honduras, May 26); and Certificación de la sentencia recaída en el I 681=12 en fecha diecinueve de febrero del año dos mil catorce. 2012. I 681=12 (Corte Suprema de Justicia de la República de Honduras, February 19).

⁶² EL PAÍS. 2017. "Juan Orlando Hernández promete una Zona Especial de Empleo en Olancho". *El País*, October 23. Accessed March 31, 2018. <http://www.elpais.hn/2017/10/23/juan-orlando-hernandez-promete-una-zona-especial-empleo-olancho/>.

⁶³ Bustillo, Yonu. 2017. "Honduras: Diez empresas tienen interés en construir las ZEDE". *Diario El Heraldo*, October 24. Accessed March 31, 2018. <http://www.elheraldo.hn/pais/1119546-466/honduras-diez-empresas-tienen-interés-en-construir-las-zede>. See also, Republic of Honduras. 2017. Honduran Employment Zones Draw Interest From International Businesses. October 26. Accessed March 31, 2018. <https://www.prnewswire.com/news-releases/honduran-employment-zones-draw-interest-from-international-businesses-300544566.html>.

⁶⁴ Alford-Jones, Kelsey, Lauren Carasik, and Karen Spring. 2017. "Memo_Concern_IDB_Honduran_ZEDE_Project." Center for International Environmental Law. August 25. Accessed March 31, 2018. http://www.ciel.org/wp-content/uploads/2017/11/Memo_Concern_IDB_Honduran_ZEDE_Project.pdf. See also, Kroth, Maya. 2014. Under New Management. *Foreign Policy*, September 1. Accessed March 31, 2018. <http://foreignpolicy.com/2014/09/01/under-new-management/>.

Their report on the subject concludes that “Legislation, taxation, law enforcement, criminal prosecution, and executive department decision making are integral ‘public affairs’ by any standard, and yet inhabitants of the ZEDES have no opportunity to participate in these matters either directly or through elected representatives. Indeed, they have no opportunity to elect representatives at all. This is a facial violation of Honduras’s treaty obligations under the [American Convention on Human Rights], the [International Covenant on Civil and Political Rights], and the [International Covenant on Economic, Social and Cultural Rights]”⁶⁵.

Testing the constitutionality of the Honduran ZEDES, special jurisdictions consultant Michael Castle Miller (2015) stated “the ZEDE Statute possibly violates the Honduran Constitution’s understanding of popular sovereignty because it fails to provide for democratic control of the ZEDE governments”. Miller also raises concerns over the compatibility between article 206 of the Honduran Constitution, which bars Congress from delegating their legislative power (non-delegation doctrine), and the ZEDE’s power to establish its own tax regime and enact its internal legislation⁶⁶.

In any case, the Statute’s failure to detail democratic processes does not mean lack of applicable law, nor does it mean unlawfulness for not detailing a how a specific right may be exercised. The silence and ambiguity of any statute ought to be dealt with by relying on the Honduran set of constitutional law to fill in the gaps and provide guidance through the text’s interpretation.

2. Democratic Compliance: Minimum Standards for ZEDES

Though lacking express regulation of participation mechanisms, ZEDE authorities are bound to the Honduran Constitution, where as a general principle governing the exercise of sovereignty, all legislative power must be carried out through popular participation or representation⁶⁷. Additionally, Honduran Municipalities hold a series of democratic duties which ZEDES must also comply with. Finally, the international treaties ratified by the State of Honduras bind not only the national government, but all State entities, including the Technical Secretary and CAMP.

a. Duties Imposed by Municipal Law

Under Honduran Law, Municipalities are not, and cannot be the subject of legislative delegation by the National Congress; rather, they enjoy a constitutionally granted autonomy under the premise it will allow

⁶⁵ National Lawyers Guild. 2014. "Report of the National Lawyers Guild Delegation Investigation of Zones for Economic Development and Employment in Honduras." National Lawyers Guild, 22. September 14.

http://www.nlginternational.org/report/Final_NLG_ZEDE_Report.pdf

⁶⁶ Castle Miller, Michael R. 2014. «THE CIUDADES MODELO PROJECT: TESTING THE LEGALITY OF PAUL ROMER’S CHARTER CITIES CONCEPT BY ANALYZING THE CONSTITUTIONALITY OF THE HONDURAN ZONES FOR EMPLOYMENT AND ECONOMIC DEVELOPMENT.» Willamette Journal of International Law and Dispute Resolution 271-312.

⁶⁷ CONSTITUCIÓN POLÍTICA DE 1982, arts. 2, 5, 15, 45

for self-regulation and the effective participation of communities on their local public affairs⁶⁸. In a similar fashion, ZEDEs do not enjoy congressional delegation, but a grant of “functional and administrative autonomy” which must include the duties held by Municipalities.

Among the democratic duties accompanying Municipal autonomy, which ZEDEs are obliged to comply with, we find those of allowing residents to opt for public office, and to participate in public decision making⁶⁹, the formulation of investment projects and programs, the election of local authorities⁷⁰, and in the management of local affairs⁷¹; they must also host at least five town hall meetings annually⁷², and summon all residents to binding plebiscites for matters of high relevance⁷³.

b. Duties Imposed by International Human Rights Law

Most human rights treaties contain provisions securing a minimum of “political rights” which member States must guarantee for their inhabitants. Under the Vienna Convention on the Law of Treaties (Articles 26 and 27), the State of Honduras is not allowed to confer its internal entities any exemption from complying with its international obligations (*pacta sunt servanda*)⁷⁴; therefore, the special regime provision of the ZEDE Amendment cannot be construed as excluding the exercise of political rights with respect to the ZEDE government.

The Honduran State has internationally compelled itself to complying with the democratic provisions contained in articles 20 of the American Declaration of the Rights and Duties of Man⁷⁵; 21 of the Universal Declaration of Human Rights⁷⁶; 1 and 25 of the International Covenant on Civil and Political Rights⁷⁷; and 23 of the American Convention on Human Rights⁷⁸; all of which bind ZEDE authorities to guaranteeing their residents’ political rights to “self-determination”⁷⁹ and to “participate in government”⁸⁰.

⁶⁸ LEY DE MUNICIPALIDADES, Recital 3; CONSTITUCIÓN POLÍTICA DE 1982, art. 294

⁶⁹ LEY DE MUNICIPALIDADES, art. 12.A.

⁷⁰ LEY DE MUNICIPALIDADES, arts. 12.A.1., 14

⁷¹ LEY DE MUNICIPALIDADES, art. 24

⁷² LEY DE MUNICIPALIDADES, Arts. 25.9, 32.B

⁷³ LEY DE MUNICIPALIDADES, Art. 25.10

⁷⁴ United Nations. 1969. "No. 18232." *VIENNA CONVENTION ON THE LAW OF TREATIES*. Vienna, May 23.

⁷⁵ Inter-American Commission on Human Rights. 1948. "*AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN*." Bogota Declaration.

⁷⁶ United Nations. 1948. "Resolution 217-A." *UNIVERSAL DECLARATION OF HUMAN RIGHTS*. December 10.

⁷⁷ United Nations. 1966. "Resolution 2200A." *INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS*. December 16.

⁷⁸ *AMERICAN CONVENTION ON HUMAN RIGHTS*, art. 23

⁷⁹ *INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS*, art. 1

⁸⁰ *AMERICAN CONVENTION ON HUMAN RIGHTS*, art. 23; Aguilar, Asdrubal. 2012. *JURISPRUDENCIA DE LA CORTE INTERAMERICANA DE DERECHOS HUMANOS SOBRE LA DEMOCRACIA*. Buenos Aires/Caracas: Observatorio Iberoamericano de la Democracia.

The Inter-American Democratic Charter, for its part, states “governments have an obligation to promote [democracy] and defend it”⁸¹; it proclaims “access to power” and “the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people”⁸² as essential elements of a representative democracy; most importantly, the Charter recognizes “It is the right and responsibility of all citizens to participate in decisions relating to their own development. This is also a necessary condition for the full and effective exercise of democracy. Promoting and fostering diverse forms of participation strengthens democracy.”⁸³

Thus, minimum democratic standards set by international law require a ZEDE’s governance structure provide mechanisms for their residents to: a) “take part in the conduct of public affairs, directly or through freely chosen representatives”; b) “vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors”; and c) “have access, on general terms of equality, to public service”; additionally, d) the aforementioned rights are to be regulated “only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings”⁸⁴.

3. The Technical Secretary: Chief Executive and Legislator?

a. Constitutional Foundations of Local Lawmaking

The Honduran Constitution does not allow for the delegation of legislative power onto administrative agencies or local governments, Article 206 states that “The functions of the legislative branch are not delegable”⁸⁵. Under this premise, a ZEDE’s power to enact its internal legislation cannot be understood as a congressional delegation of legislative powers, but rather as a recognition of “functional and administrative autonomy” similar to the one enjoyed by Municipalities⁸⁶.

On the subject, legal historian Philip Hamburger (2014) explains that local lawmaking is understood “not as a delegated exercise of state’s general legislative power, but rather as a distinctly local sort of representative legislation – authorized and limited by the state but arising from the local populace”. Therefore, for a ZEDE’s law making power to be constitutionally permissible, “local consent [is] essential, for only through this means [can] the local law be binding”.

Traditionally, Hamburg explains, “although a state could establish local governments, including their boundaries, it generally was taken for granted that where a state authorized local legislative power, it had to leave this local legislation in a local representative body... Rather than a delegated portion of legislative power [local lawmaking] is a distinctively local sort of legislative power, which must be authorized by the

⁸¹ Organization of American States. 2001. INTER-AMERICAN DEMOCRATIC CHARTER. Lima, Perú, September 11, art. 1

⁸² INTER-AMERICAN DEMOCRATIC CHARTER, art. 3

⁸³ INTER-AMERICAN DEMOCRATIC CHARTER, art 6

⁸⁴ INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, art. 25;

⁸⁵ CONSTITUCIÓN POLÍTICA DE 1982, art. 206

⁸⁶ ZEDE Amendment, art. 329

state, but which is located in a representative body, and which thus derives its legitimacy from local elections”⁸⁷.

Following the same line of constitutional thought, the Honduran Constitution authorizes autonomous municipalities provided they are “administered by corporations elected by the people, according to law”. Thus, the Law of Municipalities states that municipal autonomy “can only be realized through democratic exercise”⁸⁸, and that it is founded on the “free election of its authorities through secret and direct suffrage, in accordance to law”⁸⁹. Considering the law’s objective is that of “expanding upon the constitutional principles pertaining to the ... Municipal regime”⁹⁰, we may conclude that under Honduran constitutional law the concept of an autonomy which contains the same obligations as Municipalities, implies it may only be exercised upon a democratic basis.

Though Municipalities hold only a quasi-legislative power, ZEDE authorities are clearly granted a limited, though very transcendental, legislative power within its jurisdiction⁹¹. Considering the historical and theoretical foundations upon which Honduran Constitutional Law regulates the autonomy of local governments, it is fair to conclude that the lawmaking power conferred to ZEDEs can only be exercised through a local representative body that channels residents’ will onto the legislative process.

b. Who Legislates? Interpreting the ZEDE Statute

When examining the ZEDE Statute in accordance to the principle of *consistent interpretation*, a legal method of interpretation through which national law is construed in conformity to public international law, we must conclude that contrary to the general understanding of the Statute, the Technical Secretary does not and cannot possess law making power⁹².

Under Statute Article 12.6 the Technical Secretary is authorized to *promulgate* the ZEDE’s legislation, just as the President of the Republic promulgates the laws decreed by Congress. To promulgate means to “formally proclaim or declare a new statutory ... law as in effect after it receives final approval. It means

⁸⁷ Hamburger, Philip. 2014. «State "Delegation" to Municipalities» In *Is Administrative Law Unlawful?*, by Philip Hamburger, 388-389. Chicago: The University Chicago Press.

⁸⁸ LEY DE MUNICIPALIDADES, Third recital

⁸⁹ LEY DE MUNICIPALIDADES, art. 1, 12.A.1

⁹⁰ LEY DE MUNICIPALIDADES, art. 1

⁹¹ ZEDE Amendment, art. 329; ZEDE Statute, arts. 1, 5

⁹² Betlem, Gerrit, and André Nollkaemper. 2003. "Giving Effect to Public International Law before Domestic Courts. A Comparative Analysis of the Practice of Consistent Interpretation." *European Journal of International Law* 569-589; *See also*, Ferrer Mac-Gregor, Eduardo. 2011. "Interpretación conforme y control difuso de convencionalidad. El nuevo paradigma para el juez mexicano." *Estudios Constitucionales* (Centro de Estudios Constitucionales de Chile Universidad de Talca) 531-622; *and*, República de Honduras. 2004. "Decreto Legislativo No. 244-2013." *Ley Sobre Justicia Constitucional*. Tegucigalpa, M.D.C.: Diario Oficial "La Gaceta", August 30, art. 2

to make known, announce, or declare officially”⁹³; it means only “To publish; to announce officially; to make public as important or obligatory”⁹⁴. It does not mean lawmaking power.

Statute Chapter III, which regulates CAMP and the Technical Secretary, is titled “Administrative Structure”, suggesting both bodies hold only administrative, not legislative power. Though Statute Article 11.5 does state CAMP will “approve or disapprove the norms approved by the Technical Secretary”, the *approval* of norms by the Technical Secretary is more properly understood as that of a Chief Executive who *sanctions* a law, which implies a conferral of *veto power*, both of which are traditional functions of the executive⁹⁵.

In any case, nowhere in the Statute or the Amendment is it established that the Technical Secretary or CAMP hold the power to “create, decree, interpret, amend, [or] repeal”⁹⁶ internal ZEDE legislation; thus, lacking an express grant of legislative power, we must conclude that a ZEDE’s power to enact laws can only reside, and does reside, within its residents. Consequently, CAMP’s authority to establish general guidelines or reject internal legislation would be limited to that of an institutional check against rules that deviate from the policy criteria established by the Statute⁹⁷.

V. Conclusions and Recommendations

1. A ZEDE’s Administrative Structure Cannot Legislate

By interpreting the ZEDE Statute through the lens of the Honduran State’s *constitutional block* we find that the Technical Secretary possesses only traditional executive powers, such as the direction of the public administration, the prerogative to sanction or veto a law, and the duty to promulgate laws once

⁹³ USLEGAL. n.d. USLEGAL. Accessed March 31, 2018. <https://definitions.uslegal.com/p/promulgate/>.

⁹⁴ Black's Law Dictionary. n.d. What is PROMULGATE? Accessed March 31, 2018. <https://thelawdictionary.org/>. See also, Cabanellas de Torres, Guillermo. 1993. DICCIONARIO JURÍDICO ELEMENTAL. Editorial Heliasta, S. de R.L. (Definition of PROMULGATION: “Solemn publication of something. Public notice. Divulgation, propagation. By antonomasy, the formal authorization of a law or another general provision by the head of State, for its total acknowledgment and compliance”; in Spanish: “PROMULGACION. Solemne publicación de una cosa. Pública notificación. Divulgación, propagación. Por antonomasia, la autorización formal de una ley u otra disposición general por el jefe del Estado, para su total conocimiento y cumplimiento”); (Definition of TO PROMULGATE: To solemnly publish something. To make a fact or provision generally known. Divulgate, propagate. Solemnly publish a law or proceed to its promulgation.”; in Spanish, “PROMULGAR. Publicar solemnemente algo. Llevar a conocimiento general un hecho o disposición. Divulgar, propagar. Publicar solemnemente la ley o proceder a su promulgación”).

⁹⁵ Cabanellas de Torres, Guillermo. 1993. DICCIONARIO JURÍDICO ELEMENTAL. Editorial Heliasta, S. de R.L. Note: The words ‘approve’ and ‘sanction’ can be used interchangeably when referring to the authorization of law by the Chief Executive. In a Presidential Republic’s legislative process, to sanction a law means the formal act through which the Executive *approves* a congressionally decreed law and desists from exercising his veto power. (Definition of SANCTION: “In general, law, regulation, statute. Solemn confirmation of a legal provision by the head of a State, or whoever exercises his functions. Approval. Authorization.”; In Spanish, “SANCION: En general, ley, reglamento, estatuto. Solemne confirmación de una disposición legal por el jefe de un Estado, o quien ejerce sus funciones. Aprobación. Autorización”).

⁹⁶ CONSTITUCIÓN POLÍTICA DE 1982, Art. 205.1

⁹⁷ ZEDE Statute, arts. 29 and 39 (The ZEDE Statute states ZEDE’s ought to be guided by a policy of low taxes (art. 29) and operate under a policy of free trade and competition (art. 39).)

they have been perfected; while CAMP ought to act merely as an institutional check against rules that deviate from the Statute's policy of economic freedom.

The power to tax and legislate cannot be delegated by Congress to administrative structures comprised of unelected officials that cannot be democratically removed from office; doing so would contravene the Constitution's non-delegation clause, and at least six international human rights treaties, conventions and charters, not to mention the democratic duties imposed by the Municipalities Law.

An unlawful implementation of the ZEDE regime, where the Technical Secretary and CAMP act as sole legislators within its jurisdiction, ought to be judicially reviewed by the ZEDE's special jurisdiction and the Supreme Court; policy guidelines, regulations, trust deeds, and coexistence agreements would all be subject to judicial review, through which independent courts are to guarantee compliance with the minimum democratic standards required by international law.

2. Law-Making Requires a Representative Body

Though the Statute fails to expand upon the exercise of political rights within a ZEDE, the Honduran Constitution, international law, and municipal duties are expressly incorporated as applicable law within a ZEDE's jurisdiction; and after these have been taken into account, it is clear that far from being undemocratic by nature, ZEDE governments are to operate under a strict regime of democratic compliance.

Once the democratic foundations of ZEDEs have been brought to light, their exercise of legislative power cannot be said to contravene the Constitution's non-delegation clause, as they derive their lawmaking power not from congressional delegation, but rather from a constitutionally granted autonomy that allows its residents to exercise legislative power through their local ZEDE government.

Therefore, if a ZEDE wishes to exercise its law-making powers, its governance structure is bound to provide for the creation of a representative body; and due to the lack of electoral provisions within the Statute, ZEDEs enjoy the freedom to develop their own mechanisms for residents to participate in public decision making⁹⁸. For instance, Chapman University professor Tom W. Bell (2013) has proposed 'Equity Sharing in a Co-Op City'⁹⁹ and 'Corrective Democracy'¹⁰⁰ as alternatives to more traditional schemes of representation. Both systems proposed by Bell could be perfectly implemented within a ZEDE, provided they are adapted to comply with the minimum democratic standards required by international law.

3. Exercising Constituent Power: Drafting a ZEDE's Social Contract

⁹⁸ Considering ZEDEs are subject to national legislation on electoral matters, Congress ought to reform the Honduran Electoral Law and expressly grant ZEDEs the authority to set up their own electoral systems; in the meantime, electoral procedures within a ZEDE may be convened upon and included in its Social Contract (Citizen Coexistence Agreement).

⁹⁹ Bell, Tom W. 2013. *Want to Own a City?* *Foundation for Economic Education*, August 14. Accessed March 31, 2018. <https://fee.org/articles/want-to-own-a-city/>.

¹⁰⁰ Bell, Tom W. 2013. *Can We Correct Democracy?* *Foundation for Economic Education*, June 4. Accessed March 31, 2018. <https://fee.org/articles/can-we-correct-democracy/>.

The procedures through which ZEDE inhabitants will exercise their right to participate in government and self-determine their political and economic condition must be convened upon when setting up a ZEDE's governance structure; for such a task, it is convenient to rely upon the contract theory of government, the doctrine of constituent power, and the history of constituent procedures across the globe¹⁰¹.

Given that ZEDEs ought to sign a *Citizen Coexistence Agreement*¹⁰² with the persons residing under its jurisdiction, the enactment of such document represents a major opportunity for residents to exercise their constituent power and turn such agreement into their foundational law, a *Social Contract* if you may; one which could be agreed upon through direct contractual negotiations, when population density is low, and through town hall meetings or even constituent assemblies, when population density is high.

When drafting the *Social Contract*, communities adhering to ZEDE would have to detail the workings of their governance system; create a representative body or participatory mechanism through which local laws may be enacted and stability contracts approved; impose limits, define restraints and establish procedures for state action; establish minimum terms and conditions for the trust deeds; set a dispute resolution clause; and organize a ZEDE's powers in such form as may seem best for them, in accordance to the applicable law¹⁰³. The procedures through which consent to the final contract will be given and how it may be amended should be emphasized.

If a ZEDE starts with few residents, but plans on expanding, their initial agreement may be revised and adapted into a standard form contract (contract of adhesion) to be subscribed by all those who would join the community. In this case, standard clauses within the ZEDE's *Social Contract* must be designed to achieve full compliance with the democratic duties imposed by the Constitution and international human rights law. Empowering the community through a democratic compliance regime and the adoption constituent procedures will bolster a ZEDE's legitimacy and strengthen its defenses against political risks, cronyism, bad press and unfavorable rulings from national and international courts.

¹⁰¹ Billias, George Athan. 2009. "American Constitutionalism Defined: Six Seminal Documents." In *American Constitutionalism Heard Round the World, 1776-1989*, by George Athan Billias, 15-50. New York University Press: New York and London; *See also*, Buchanan, James M. 2001. "Boundaries on Social Contract." In *Choice, Contract, and Constitutions*, by James M. Buchanan, 87-100. Indianapolis, IN: LIBERTY FUND, INC.; and, Buchanan, James M. 2001. *Constitutional Design and Construction*, 101-110

¹⁰² ZEDE Statute, art. 10.1

¹⁰³ El-Hage, Javier. 2006. "Límites jurídicos de la Asamblea Constituyente." In *Límites de derecho internacional para la Asamblea Constituyente*, by Javier El-Hage, 39-92. Santa Cruz de la Sierra: Fundación Nova.