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The Honduran ZEDEs: From National Politics to Local Democracies

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Abstract:

Special Economic Zones (SEZs) are generally lauded for their potential to increase economic growth and foster private investment by introducing business-friendly institutions such as competitive tax and regulatory frameworks. However, a new generation of special zones are also being used to introduce new democratic institutions into poorly governed countries. The economic success of Singapore, Hong Kong, and the SEZs of China and the United Arab Emirates inspired Honduran policymakers to amend the country's Constitution in 2013 to allow for the creation of special Zones for Employment and Economic Development (ZEDEs), a new political subdivision of the State of Honduras with a constitutionally granted autonomy to adopt their own governance structure and laws. In Latin America, however, special jurisdictions are bound by specific international law commitments to democratic governance and respect for human rights. This paper provides an overview of the democratic governance framework adopted by Próspera, the first Honduran ZEDE, while comparing it to the mechanisms for political participation available under the national legal system of Honduras. It further explores the ZEDE regime's potential to foster democratic change by introducing to Honduras more effective legal mechanisms for Hondurans to exercise their civil and political rights through semi-autonomous local governments.

Keywords: democratic governance, decentralization, local governments, political autonomy, democratization, special economic zones.

Resumen

Las Zonas Económicas Especiales (ZEE) son generalmente elogiadas por su potencial para incrementar el crecimiento económico y fomentar la inversión privada mediante la introducción de instituciones favorables a las empresas, como marcos regulatorios y tributarios competitivos. Sin embargo, existe una nueva generación de zonas especiales, las cuales pueden introducir nuevas instituciones democráticas en países mal gobernados. El éxito económico de Singapur, Hong Kong y



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las ZEE de China y los Emiratos Árabes Unidos inspiró a los legisladores hondureños a enmendar la Constitución del país en 2013 para permitir la creación de Zonas especiales de Empleo y Desarrollo Económico (ZEDE), una nueva subdivisión política del Estado de Honduras con autonomía constitucionalmente otorgada para adoptar su propia estructura de gobierno y leyes. En América Latina, sin embargo, las jurisdicciones especiales están sujetas a compromisos específicos del derecho internacional con la gobernabilidad democrática y el respeto de los derechos humanos. Este documento ofrece una visión general del marco de gobernanza democrática adoptado por Próspera, la primera ZEDE hondureña, al tiempo que lo compara con los mecanismos de participación política disponibles en el sistema legal nacional de Honduras. Además, explora el potencial del régimen de la ZEDE para fomentar el cambio democrático al introducir en Honduras mecanismos legales más efectivos para que los hondureños ejerzan sus derechos civiles y políticos a través de gobiernos locales semiautónomos.

Palabras clave: gobernabilidad democrática, descentralización, gobiernos locales, autonomía política, democratización, zonas económicas especiales.



1. The State of Honduran Democracy

1.1. A Brief History of Political Crises.

During the 1960s and 70s, Honduras was primarily ruled by the country's military, with brief civil governments that were interrupted by military leaders. In 1982, the country adopted a new Constitution which established periodic elections every four years and basic democratic and republican institutions, such as a representative legislative body, the National Congress; an elected head of state and government, the President of the Republic; and a Supreme Court of Justice. Nevertheless, under civil government, Honduras has consistently faced political instability and constitutional crises.

The first President elected under the 1982 Constitution, Roberto Suazo Córdova, tried to evade term limits and unlawfully extend his tenure in power. During the early 1980s, the Honduran State systematically assassinated and disappeared political dissidents thought to be linked to communist movements. In 1985, there was an electoral crisis after National Party presidential candidate, Rafael Leonardo Callejas, obtained the majority of the popular vote but electoral rules gave the victory to the Liberal Party candidate, José Simón Azcona. In the 1990s, the National Congress removed the President of the Supreme Court of Justice, triggering a national debate about judicial independence (Amnesty International, 1992; Consejo Nacional Anticorrupción, 2017; Molina Chocano, 1986; The Scotsman, 2018).

During the early 2000s, the Supreme Court of Justice ruled that binding constitutional interpretation corresponds to the Judicial Power and stated that Congress lacks the power to enact binding constitutional interpretations. However, Congress did not respond positively to the ruling and refused to have it published in the official state newspaper, *Diario Oficial "La Gaceta"*, illegally preventing the ruling from ever coming into effect (Corte Suprema de Justicia, 2003; Giron, 2007). In 2009, the National Congress, the



Supreme Court, the Public Ministry, and the Armed Forces collaborated to forcefully remove the President of the Republic, José Manuel Zelaya, because he had aligned with the socialist regime in Venezuela and attempted to enact a new Constitution for the country (García Noriega, 2013).

In 2012 the National Congress led a “*technical coup*” against the Constitutional Chamber of the Supreme Court, replacing four out of the five justices with lawyers aligned with the ruling party (Gutiérrez Navas et al., 2015). Almost three years later, in 2015, the illegally appointed judges of the Constitutional Chamber ruled in favor of *unlimited presidential reelection*, despite a 33-year-old absolute constitutional ban on presidential reelection (Albornóz, 2015).

In 2017, while taking advantage of the Supreme Court’s favorable ruling on presidential reelection, the President of the Republic successfully ran for reelection and triggered a political crisis involving strong allegations of electoral fraud which led to the Secretary-General of the Organization of American States (OAS), Luis Almagro, to call for a do-over of the general elections. Almagro claimed that the process “*was characterized by irregularities and deficiencies, with very low technical quality and lacking integrity*” (Organization of American States, 2017).

The electoral controversy led to mass lootings of private businesses and popular clashes with the military and police forces, which resulted in at least 23 people killed during the two months following the elections. The United Nations High Commissioner for Human Rights noted that “*at least 16 of the victims were shot to death by the security forces, including two women and two children, and at least 60 people were injured, half of them by live ammunitions*” (UNHCHR, 2018, p.2).

1.2. Measuring the Democratic Performance of Honduras.



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The democratic performance of a country may be understood, among other interpretations, as a measure of how far liberal democratic governments achieve in practice the values which they subscribe in principle (Foweraker & Krznaric, 2000). There are several international rankings which may shine a light on the democratic performance of Honduras, as they provide a comparative country evaluation on indicators related to the state of democracy, electoral freedom, rule of law, government accountability, the enjoyment of civil and political rights, and public perceptions of democracy.

The Electoral Freedom Index, which measures a country's Political Development, Active Suffrage, Passive Suffrage, and Electoral Empowerment, ranks Honduras in the 126th position out of 198 countries analyzed. The index considers Honduras to have the lowest level of electoral freedom in Central America, and the third lowest in Latin America, after Cuba and Venezuela. With a 148th global ranking, Honduras ranks worst in the "Passive Suffrage" sub-indicator, which measures restrictions thereof, requirements for its exercise, entry barriers, characteristics of the election campaign, the election process, and the distortion of the result (Peña, 2020).

The Economist Intelligence Unit's Democracy Index (2019), which "*provides a snapshot of the state of democracy worldwide in 165 independent states and two territories*", regards Honduras as a "hybrid regime"¹, and places the country in the 89th position worldwide with a score of 5.42. The index shows a deterioration in the state of democracy in Honduras, whose score has fallen from a 6.25 in 2006 to 5.42 in 2019 (The Economist Intelligence Unit, 2019). The World Justice Project's (2020) Rule of Law Index, which measures a country's adherence to the rule of law, ranks Honduras in the 116th position out of 128 countries

¹ A hybrid regime is defined by the EIU as a country where "Elections have substantial irregularities that often prevent them from being both free and fair. Government pressure on opposition parties and candidates may be common. Serious weaknesses are more prevalent than in flawed democracies—in political culture, functioning of government and political participation. Corruption tends to be widespread and the rule of law is weak. Civil society is weak. Typically, there is harassment of and pressure on journalists, and the judiciary is not independent"



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analyzed, with a regional Latin American ranking of 27 out of 30 countries. The country receives its worst qualitative score in the “Absence of corruption in the legislature” subcomponent, with a 0.09/1 evaluation.

The Freedom in the World Report describes Honduras as a *partly free* country with a 45/100 overall score. 19 of these points fall within the Political Rights subcomponent (maximum 40) and 26 in the Civil Rights subcomponent. This report also shows a progressive decline of freedom in Honduras, with the country score falling from 51/100 in 2013 to 45/100 in 2020 (Freedom House, 2020). From 1996 to 2019, Honduras’ percentile rank in the Voice and Accountability indicator of the World Bank’s World Governance Indicators has dropped from a 43 to a 31.03 ranking. This indicator “*captures perceptions of the extent to which a country’s citizens are able to participate in selecting their government, as well as freedom of expression, freedom of association, and a free media*” (World Bank, 2019b).

Support for democracy in Honduras, as measured by the Latinobarómetro public opinion poll, has also declined from 64% of respondents in 1999 to only 34% in 2018, a reduction of 30 percentage points in 19 years. In 2018, 41% of respondents claimed to have no preference with regards to a democratic or an authoritarian regime; 22% expressed the belief that there is no democracy in Honduras, while 43% considered Honduras as a democracy with big problems. Likewise, 73% manifested they felt unsatisfied with Honduran democracy, and 75% considered the country was being governed for the benefit of a small group of people and not the general populace. According to the poll, the least trusted democratic institutions were the political parties, the electoral authorities, and the National Congress (Latinobarómetro Corporation, 2018).



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1.3. Political Capture and the Structure of Honduran Democracy.

Formally, the Honduran State has adopted a democratic, representative, and republican form of government. The key governmental powers and institutions of the State are enumerated in Title V of the *Constitution of the Republic of Honduras* (1982), which includes the traditional Legislative, Executive², and Judicial Powers³, as well as specialized institutions, such as the Public Ministry⁴, the Defense Institutions⁵, the Superior Court of Accounts⁶, the Attorney General⁷, Decentralized Institutions⁸, and the Departmental and Municipal Regime⁹. Other key, constitutionally created institutions include the National Commissioner on Human Rights, the National Registry of Persons, the National Electoral Council, and the Court of Electoral Justice.

The *Constitution of the Republic of Honduras* (1982) provides for free, direct, secret, and universal elections at three levels of the State apparatus: The Presidency of the Republic; the National Congress, composed of 128 legislators; and the 298 Municipal Corporations across the country; all of which are elected for 4-year periods. The President is elected by a simple majority vote, with no run-off election. This has resulted in a diminished legitimacy of the Executive Power, as the President has been elected with a minority percentage of all

² Includes the President of the Republic, the Secretaries of State, and deconcentrated entities.

³ Composed of a 15-judge Supreme Court of Justice; Courts of Appeals; the Judiciary; the Judges of the Peace; and the courts with exclusive jurisdiction over zones of the country subject to special regimes created by the Constitution (i.e., ZEDEs).

⁴ Responsible for criminal prosecution at a national level. It is led by a General Attorney and an Adjunct General Attorney, both elected by Congress.

⁵ Includes the Army, the Navy, the Airforce, and the National Council of Defense and Security.

⁶ In charge of auditing the public administration and other State powers.

⁷ In charge of legally representing the State of Honduras before national and international judicial, quasi-judicial, and arbitration entities.

⁸ Decentralized Institutions include State Companies, the National University, the Central Bank, the National Commission on Banks and Insurance, among others.

⁹ Composed of the Departmental Governor, the Municipalities, and the Zones for Employment and Economic Development.



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votes in the last two general elections. The National Congress and Municipal Corporations are elected through a system of proportional representation with regards to political parties.

At the municipal level, the public votes only for candidates to the office of the mayor of their respective municipality, while the rest of the Municipal Corporation (usually 2 to 10 officials known as *regidores*) is filled by the losing candidates who unsuccessfully ran for mayor and by representatives of the contending parties (Electoral Law and of Political Organizations, 2004). The leaders of the other key public institutions of the country, including the Supreme Court, are appointed by the National Congress. The Congress also has the power to remove these leaders through a political trial (*Constitution of the Republic of Honduras*, 1982). Given this power, it can be safely stated that, under the Honduran constitutional structure, the National Congress concentrates a vast amount, if not the majority, of all political power in the country.

The National Congress, however, is viewed as one of the most corrupt and least trusted public institutions (Latinobarómetro Corporation, 2018; World Justice Project, 2020). The design of the electoral system for electing congress representatives has been pointed out as one of the root causes of congressional corruption, as it is considered to incentivize loyalty to party *caudillos* instead of to the electorate. Electoral politics in Honduras, says local political economist C. Urbizo Solís (2016), is defined by the “internal movements” of political parties. The internal movements are a unified list of candidates for all levels of government; they are created and led by the presidential candidates of each party to compete in the primary elections. These presidential candidates have direct control over candidate lists for Congress and the Municipalities in all or most of the country’s territory.

The electoral law prevents a citizen from running for public office directly, as a member of a political party. A citizen that wishes to run for office is forced by law to join the “internal movement” of a political party. All the candidates running for office in the primary elections have been previously vetted and authorized by the presidential candidates of the



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internal party movement they are running with. This results in a party loyalty scheme where elected officials are loyal to the party *caudillos* (presidential candidates) who allowed them to run in the first place (Urbizo Solís, 2016). An alternative is to create a new political party. But doing so is extremely costly.

If a citizen wants to run for office but does not want to submit to a party *caudillo*, he or she would need to form a new party movement, which requires the filing of complete candidate lists for 149 municipalities. This amounts to approximately 1,500 candidates dually identified and documented; lists for Congress in nine Departments (it can be up to 100 candidates); lists for 51% of the delegates to the party's National Convention, which may require 596 up to 1000 people; a list of 20 candidates and 20 alternates to the Central American Parliament; and a petition with signatures representing at least 2% of the total votes obtained by the corresponding political party in the last general election (Urbizo Solís, 2016).

The right of passive suffrage, as indicated by the World Electoral Freedom Index, is heavily hampered by the Honduran electoral scheme, since it is enormously costly to create an internal party movement (Peña, 2020). As a result, the barriers for entry into the political market are extremely high and the most powerful political body in the country, the National Congress, ends up under the control of a few party *caudillos* who have previously vetted and selected the candidates.

In 2008 this electoral scheme was challenged before the Supreme Court. The challengers claimed that their constitutional right to run for office is diminished because their ability to run for office does not depend on their popular support or their personal qualities or merits, but rather on the authorization of the leader of an internal party movement (C. A. Urbizo Solís et al., 2008). The Supreme Court (2010), however, ruled against the claimants and argued that the legal possibility to adhere to an internal party movement,



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to create a new one, or run as an independent candidate without a political party, was enough reason to consider their political rights were not being diminished.

The next sections of this paper will review the legal nature and origin of the Honduran ZEDE regime, and then proceed to examine the democratic institutions introduced into Honduras by Próspera ZEDE, the country's first ZEDE, while comparing them to the electoral and democratic mechanisms available under national Honduran law and institutions. Among the institutions reviewed, are those related to the delegation of sovereign power to the government, the election of the executive and legislative powers, mechanisms of direct democracy, and the legal guarantees available for enforcing democratic rules.

2. The New System of Local Governance

2.1. The Honduran ZEDE Special Regime

In 2013, the National Congress amended the Honduran Constitution and enacted the ZEDE Organic Law to enable the creation of Zones for Employment and Economic Development (ZEDEs) (“Legislative Decree No. 236-2012,” 2013). The ZEDEs are a new form of territorial subdivision of the country, alongside Municipalities and Departments. A ZEDE can be created by private developers, known as the “Promoter and Organizer”. They can be established in low-density areas authorized by Congress, through an administrative procedure before the Committee for the Adoption of Best Practices (CAMP). Alternatively, a ZEDE can be created by local communities in high-density zones, through a public referendum with a two-thirds favorable result.

The ZEDE regime allows the developers, whether a private enterprise or a local community, to create a new local government with a constitutionally granted autonomy to exert legislative and taxing powers, design its governance structure, administer public registries, authorize international ports, provide public services, and establish local police,



crime prosecution, and penitentiary system, among others. The autonomy of a ZEDE exempts it from most of the national legislation; however, the zone is obligated to operate in compliance with the Constitution, international treaties, the ZEDE Organic Law, national criminal law, and certain specific legislation, but is otherwise free to adopt its own public governance structure.

On December 29th, 2017, the CAMP authorized the incorporation of Próspera ZEDE in a low-density zone within the Honduran island of Roatán, and on December 6th, 2019, the CAMP authorized the incorporation of ZEDE Morazán (Ciudad Morazán) in a low-density zone within the mainland city of Choloma, Honduras (Morazán City, 2020; Próspera Zede, 2020). More recently, the CAMP has authorized a third ZEDE known as ZEDE Orquídea.

2.2. The Juridical Nature of a ZEDE's Autonomy.

Though substantially different in magnitude, a ZEDE's autonomy as a territorial subdivision of Honduras may be regarded as sharing the same juridical nature as the autonomy recognized to municipalities under the Honduran Constitution. The Constitution states in Article 329 that ZEDEs enjoy a “*functional and administrative autonomy which must include the functions, powers, and duties that the Constitution and the laws confer to Municipalities*” (“Decreto No. 236-2012,” 2012). Therefore, as stated in Article 298, when performing their exclusive functions, and provided they do not contravene the law, municipalities – and ZEDEs by extension – shall be independent of the Powers of the State and shall be accountable to the courts for abuses (*Constitution of the Republic of Honduras*, 1982).

Municipal independence, wrote Alexis de Toqueville (1835), is the natural consequence of the principle of the sovereignty of the people and one of the key circumstances contributing to the maintenance of a democratic republic. Municipal autonomy is an expression of popular sovereignty because, as defined by the Spanish Constitutional Court, it is the right of the local community to participate through its own organs in the government



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and administration of whichever issues concern them, in accordance with local and supralocal interests. For the exercise of such participation, said the Spanish Court, the representative organs of the local community ought to be granted with those powers without which no autonomous action is possible (*Sentencia 32/1981 [Ruling 32/1981]*, 1981).

As local autonomous subdivisions of the State of Honduras, both ZEDEs and municipalities are constitutional vehicles through which the residents of a specific territory can exert their sovereignty through a local representative government. Therefore, under Honduran constitutional law, the powers enjoyed by ZEDEs and municipalities are derived directly from the people living within their jurisdiction and not from acts of congressional delegation, which are prohibited by article 206 (*Constitution of the Republic of Honduras*, 1982).

As illustrated by legal historian Philip Hamburger (2014), traditionally, local lawmaking was not understood as a delegated exercise of the 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. Consequently, stresses Hamburger, local consent for the exercise of such powers was essential, for only by this means could the local law be binding. 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 which derives its legitimacy from local elections.

Following the same principle, the Honduran Constitution and international human rights treaties require that the residents of a subnational division with the power to tax and legislate be provided with effective mechanisms for political participation in public affairs within their jurisdiction. Consequently, the ZEDE Organic Law requires a positive referendum or plebiscite result to create a ZEDE in a high-density area, as well as to amend or repeal the regime when the population exceeds 100,000 persons. And while ZEDEs in low-



density areas are not subject to referendums or plebiscites, their governance structure is required to comply with international law by enabling its residents to exercise the civil and political rights recognized to them by the International Covenant on Civil and Political Rights, the American Convention on Human Rights, the Inter-American Democratic Charter, and other international human rights treaties (Colindres, 2018).

3. Political Representation in Próspera.

3.1. Agreements of Coexistence: Sovereign Delegation to Próspera ZEDE.

Próspera, the first Honduran ZEDE, offers a unique mechanism for Hondurans to exercise their sovereign power. For the first time in history every single Honduran will have the opportunity to expressly consent - or not – to live under the authority of a local representative civil government with a constitutionally granted autonomy to adopt its own laws, taxes, and public administration. Próspera ZEDE (PZ) offers a full-fledged application of the contract theory of government by requiring that any person wishing to become a resident expressly consents, through an Agreement of Coexistence, “*to such delegation of popular sovereignty as is necessary to sustain the power and authority held in trust by the PZ under the PZ Charter for the benefit of the Resident and all other residents*” (*Resolution Approving Natural Person Resident Agreement of Coexistence*, 2019).

Article 21 of the Universal Declaration of Human Rights states that “*The will of the people shall be the basis of the authority of government*” (United Nations General Assembly, 1948). The will of the people in this context does not mean the will of *all* the people, only that of a democratic majority expressed in periodic elections. Próspera ZEDE takes this principle further and rests all its powers and authority on the express, contractual consent of every single person governed by it. This way of delegating sovereign power to government stands in stark contrast with the previous constitutional experience of Honduras, whose people did



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not get the chance to ratify via referendum the Constitution produced in 1982, as it was theoretically assumed that the Constituent Assembly had expressed the people's will.

After several years of military rule, Honduras transitioned to a constitutional democracy in 1982. Responding to social and international pressures, the military regime drafted an electoral law, called for elections, and allowed a constituent assembly to produce, enact, and publish a new Constitution for the country. Theoretically, the Constitution represents the will of the Honduran people, who delegated their sovereign power to the Constituent Assembly. However, the constituent process has been criticized for being exclusionary, as it was convened by the military, the electoral rules were established by the military, and the people were not allowed to ratify the constitutional text after it was produced (Mejía Rivera, J.A., Fernández, V., Menjívar, O., 2009; Otero Felipe, 2015). A historically and internationally recognized standard for the constitution making process involves the activation of the process and the ratification of its product by the people, none of which were done in the 1980s (Becker, 2018; Blount, Ginsburg, & Elkins, 2008; Martínez Dalmau & Viciano Pastor, 2010; Lenowitz, 2013).

Furthermore, one of the constitutional framers elected in 1980, Enrique Paz Aguilar (2008), explains that subsequent electoral politics have been dominated by special interest groups who have subverted electoral rules in their favor to control Congress (Paz Aguilar, 2008). While the Honduran people did not enjoy the opportunity to ratify their Constitution, as required by constitution-making tradition, Próspera ZEDE gives Hondurans the opportunity exert their sovereign power by expressly consenting to a local constitutional document such as the *Charter of Próspera*, which sets out the fundamental governance structure of the Próspera jurisdiction.

The delegated sovereign power will be held in trust by Próspera ZEDE, that is, a common-law trust “*for the benefit of the Resident and all other residents*”. Therefore, residents will not only enjoy traditional political rights through which to hold public office



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holders accountable, but also all the rights and legal recourses available to the beneficiaries of a common-law trust. Próspera's governing bodies are not theoretical representatives of the residents, but rather real, contractually bound fiduciaries subject to general fiduciary duties, which are the "*highest standard of care in equity or law*" (*Resolution Approving Natural Person Resident Agreement of Coexistence*, 2019; *Resolution Approving Publication of Próspera Code of Rules and Development of Future Official Derivative Works*, 2020b).

3.2. Democratic Rights of Residents as Trust Beneficiaries.

The ZEDE Organic Law mandates that ZEDEs are to be governed through trusts for the provision of public services, management of revenues, and the acquisition and administration of assets (Article 12.3, 44: *Organic Law of the Zones for Employment and Economic Development (ZEDE)*, 2013). The *Charter of Próspera*, which is the jurisdiction's highest-ranking local norm, complies with this mandate by creating a public trust that holds the popular sovereignty of Próspera residents for the benefit of such residents. The sovereignty held in trust is a key source of legitimacy for the jurisdiction's legislative and taxation powers over residents. As required by international and constitutional law, the Charter proceeds to enumerate the "*Democratic Rights of Residents as Beneficiaries of the Public Trust*", which include the right to a) select the Technical Secretary; b) select the majority of Council Trustees; c) repeal Rules through a referendum; d) amend the Charter; and e) replace the Ombudsman (Section 2.06: *Democratic Rights of Residents as Beneficiaries of the Public Trust*, 2020c).

Through the Agreement of Coexistence and the democratic rights recognized to trust beneficiaries, Próspera seeks to ensure that residents "*take part in the conduct of public affairs, directly or through freely chosen representatives*" (United Nations Human Rights Office of the High Commissioner, 1966). The Próspera Council is the jurisdiction's



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representative rulemaking body, where all the jurisdiction's major stakeholders are represented, including the Promoter and Organizer, physical residents, and the landowners. The local rules or norms of Próspera may take the form of Statutes, which set forth the general applicable law; Regulations, which provide detail on how the Statutes are to be administered and enforced; and Ordinances, which are temporary Resolutions to ensure the efficient delivery of public services. While Próspera Council Resolutions govern the authorization, execution, and administration of the corporate affairs and procedures of the jurisdiction ("Section 3.09: Rules of Próspera," 2020d).

The Charter guarantees that residents have the right and opportunity to vote and to be elected to the Council at genuine periodic elections, which are to be held every seven years or earlier if a recall election is triggered. The Council is composed of a Technical Secretary, who is the highest-ranking executive officer of a ZEDE, analogous to the mayor of a municipal government, and eight other Council Trustees. Initially, the Promoter and Organizer elects four seats in the Council, the physical residents elect three seats, and landowners elect two seats; however, the democratic power of physical residents will increase progressively, in accordance with population growth.

When the population reaches 1,000 inhabitants, the CAMP shall appoint an Ombudsman with the power to investigate claims of unlawful acts by Próspera and file legal or equitable remedies before the competent arbitration tribunals. Residents will have the right to replace the Ombudsman through referendum. When population reaches 10,000 natural persons, all subsequent rules enacted by Próspera shall be subject to repeal by majority of votes within seven days after adoption; previously adopted rules may be repealed by a two-thirds majority referenda vote. The residents are also able to force a binding referendum on a proposed measure authorized by the Charter if the proposal is accompanied by signatures representing no more than 5% of the total persons who would be eligible to vote.



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Additionally, when the jurisdiction reaches Urban Population Density, defined as 6,000 persons per square kilometer, the physical residents will elect five of the nine Council Trustees. A referendum for residents to amend the Charter of Próspera will be held if authorized by a two-thirds vote of the Próspera Council. If such a referendum has not taken place within 35 years after adoption of the Charter, it may be triggered by the Ombudsman. The Próspera Council will enact by rule all offices and procedures that relate to voting, the delegation of voting rights, recalls, and referenda, as well as to ensure transparency, fairness, and independence in such procedures and processes.

3.3. Election of the Technical Secretary: Próspera's Chief Executive.

As stated above, the Technical Secretary is a ZEDE's highest-ranking executive officer, as well as its legal representative. The Technical Secretary is elected for a 7-year term and the ZEDE Organic Law requires that he or she be Honduran by birth. The Technical Secretary oversees the ZEDE's public administration, authorizes the ZEDE trust, promulgates the ZEDE's internal rules, enforces such rules, promotes the jurisdiction, and issues Ordinances for the efficient provision of public services ("Section II: Technical Secretary: Article 12," 2013). The *Charter of Próspera* elaborates on the position of Technical Secretary and gives it the role of chairperson in the Próspera Council. As chief executive, the Technical Secretary is responsible for enacting, amending, or revoking rules after the prior approval of the Próspera Council.

In accordance with the ZEDE Organic Law, the CAMP is responsible for appointing the Technical Secretary of each ZEDE. When a ZEDE has low population density, its Technical Secretary is appointed by the CAMP upon nomination by the Promoter and Organizer of the ZEDE; and, when a ZEDE has high-population density, its Technical Secretary is appointed by CAMP upon nomination by the residents of that ZEDE. Under



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article 329 of the Honduran Constitution and the demographic opinion issued by the National Statistics Institute, a specific zone or territory is considered to have high population density if 35 or more persons reside within one square kilometer. Because Próspera ZEDE is being developed in private land with low population density, its Promoter and Organizer nominated the jurisdiction's first Technical Secretary, Tristan M. Monterroso M., who was then appointed by the CAMP ("Legislative Decree No. 236-2012," 2013).

The Charter states that if Próspera reaches high population density by the end of the 7-year term of its first Technical Secretary, the residents of Próspera shall select a nominee for the position of Technical Secretary and his or her running mate, who shall be the nominee for the position of Vice-Technical Secretary. If no candidate receives a majority of votes casted after the initial round of voting, the two candidates who received the highest number of votes will compete in a runoff election. The candidate who receives the largest number of votes after the runoff election shall be certified as the winner.

The Próspera Council will then submit the nominees for the positions of Technical Secretary and Vice Technical Secretary to the CAMP for approval or disapproval. If the CAMP does not expressly approve or disapprove the nominees within 45 days after the day of submission, the nominees shall be deemed approved and shall assume the role of Technical Secretary and Vice-Technical Secretary.

To ensure that once elected the Technical Secretary will operate in accordance with the law, the *Charter of Próspera* states that no person can be selected as Technical Secretary without first forming a pre-appointment agreement with the Promoter and Organizer that obligates the candidate to abide by the *Charter of Próspera* and the Trust Agreement. After the appointment, the Technical Secretary shall form a definitive agreement obligating himself in a personal and official capacity to abide by the Charter and the Trust Agreement ("Section 4.03: Appointment of the Technical Secretary and Deputy Technical Secretary," 2020).



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Próspera ZEDE represents the first instance in which a two-round electoral system is introduced in Honduras. The adoption of a runoff electoral system has long been discussed in Honduras, particularly after the 2013 general elections in which the popular vote was divided into four major parties. A two-round electoral system has been promoted by the international community, opposition parties, and civil society as a necessary reform to improve the legitimacy of the presidential and municipal mayor elections (Porras Flores, 2015).

In 2013, the national Presidential vote split into four parties, and President Hernández was elected with only 36.89% of the popular vote, while the other three opposition parties obtained 62.51% of the popular vote at the presidential level (Tribunal Supremo Electoral, 2013). In the 2017 general elections, President Hernández was reelected with 42.7% of the popular vote, while the other two main opposition parties jointly collected 56.16% of the popular vote (Tribunal Supremo Electoral, 2017a). A similar phenomenon has also taken place at the municipal level, such as with San Pedro Sula, the country's key economic hub and the second-most populous city. In 2017's general elections, the mayor was elected with only 31.30% of the popular vote, while the three main opposing candidates jointly gained 51.31% of the popular vote (Tribunal Supremo Electoral, 2017b).

The introduction of a two-round electoral system by Próspera ZEDE into Honduras is an example of how special jurisdictions can be instrumented to facilitate the adoption of new democratic mechanisms into poorly governed countries. Unlike with the presidential and municipal elections, Próspera residents in Honduras will enjoy a democratic guarantee that their chief executive will be elected by a majority vote, thus providing greater democratic legitimacy to the winner, and incentivizing more accountability towards residents. Additionally, by way of the appointment agreements and the coexistence agreements, additional layers of constitutional protection have been added against executive power.



3.4. Legislative Power in Próspera ZEDE.

The Próspera Council acts as the jurisdiction's collective representative legislative body; the Council is composed of the trustees of the Próspera ZEDE trust, which holds the sovereign power that residents have voluntarily delegated to Próspera ZEDE through the coexistence agreement. Under the Charter, *“all governance, rulemaking, and executive power of Próspera shall be exercised by the Technical Secretary only with the prior approval of the Próspera Council...”* (“Section 3.01: Governance, Regulation and Executive Power of Próspera,” 2020). In accordance with article 12 of the ZEDE Organic Law, all rules enacted by the Próspera Council are subject to approval by the CAMP. Therefore, it can be stated that legislative power in Próspera rests jointly in the Próspera Council and the CAMP, which together represent all the jurisdiction's major stakeholders, including the national government.

The Próspera Council is composed of nine natural persons which include the Technical Secretary, a Council Secretary, a Treasurer, and six other council trustees. The Council Trustees serve for 7-year terms, with no limit on the number of terms they may serve, and, except for the Technical Secretary, the selection of the Council Trustees is not subject to CAMP approval. The most relevant powers of the Próspera Council require a two-thirds majority vote, such as the promulgation, amendment, or repeal of Statutes, Regulations, Ordinances, and Resolutions; the selection of the Council Secretary; the removal or suspension of Council Trustees; presenting a request to the CAMP for the removal of the Technical Secretary; authorizing a referendum through which residents may amend the Charter provisions regarding the Próspera Council; and the termination of certain contracts.

Within the Próspera Council, three classes of stakeholders are represented: a) Physical residents, who are persons residing within the Próspera jurisdiction; b) Landowners, who are persons that have acquired property within the jurisdiction or incorporated their properties into it; and c) the Promoter and Organizer, who secured initial authorization from



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the CAMP to incorporate Próspera ZEDE, and who has designed, invested, and fostered the development of the jurisdiction. After Próspera reaches Urban Population Density, physical residents will enjoy the right to select five out of nine Council Trustees. Because Council decisions generally require a two-third majority vote, all major public decisions are subject to minimum level of consensus between representatives of both the ZEDE residents and the Promoter and Organizer (*Resolution Approving Publication of Próspera Code of Rules and Development of Future Official Derivative Works*, 2020b).

However, an additional democratic check on legislative power will come into effect when Próspera's population reaches 10,000 natural person residents, as the Technical Secretary and the Próspera Council will be forced to adopt a rule automatically referring to natural person residents of majority of age any subsequently promulgated rule as a measure to be considered for repeal by a majority of the votes available for casting within seven days after adoption. Residents are also allowed to amend Charter Article III: Próspera Council (2020) through a referendum, allowing them to change the jurisdiction's electoral system for the Council. Residents can force this referendum through the Ombudsman if it has not taken place within 35 years after the adoption of the Charter.

By establishing a system of checks and balances among the jurisdiction's stakeholders and providing for a progressive increase of the residents' democratic power, the *Charter of Próspera* attempts to ensure that the Próspera ZEDE government operates under the rule of law and aligns itself with the will of the people living under its jurisdiction. Próspera's legal structure provides Hondurans with a local alternative for political participation and self-governance, where residents enjoy a majoritarian control over the jurisdiction's legislature and ultimate veto power over any of its legislative enactments, thus providing stronger guarantees for the alignment between governmental action and the will of the people, as compared with the national political system.



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Próspera's electoral system eliminates the primary restraint over passive suffrage that exists under national electoral law; that is, the requirement that any citizen wishing to run for office through a political party must be authorized to run by the leader or caudillo of one of that party's factions. As examined before, a Honduran citizen cannot run for office if he or she is not accepted by the presidential candidate of an internal party movement; alternatively, to be able to run for office through a political party, a citizen would have to start a new party movement, for which the electoral law contemplates prohibitory requirements such as presenting candidate lists for the Presidency of the Republic, the Central American Parliament, and for Congress and municipal corporations in at least half of the Departments and municipalities in the country, as well as a formal list of citizens supporting the movement which represent, at least, 2% of the total votes obtained by the corresponding political party in the last general election ("Article 166: Reception of the Bags of Electoral Material in Public Session," 2004).

In contrast, the Próspera jurisdiction lowers the barriers for entry into the political market and expands passive suffrage rights by allowing its residents to run for office with greater ease, at a lower cost, and without having to submit to a party caudillo or create a national electoral platform to run for local office. The immediate expected effects include a better alignment of interests between candidates for public office and their respective constituencies, as candidates would owe their election to the voters and not to a party caudillo. Lower barriers for entry into the political market would also foster greater political competition, which would help prevent political capture by special party or economic interests (Holcombe, 1991; Mulligan & Tsui, 2008; Springer Verlag, 1999 & Tullock, 1965).

Article 1 of the *Honduran Civil Code* (1906) defines the law as a "*declaration of the sovereign will*". However, the national legislature remains one of the least trusted institutions in the country. It is perceived as being very corrupt, and public polls show misalignment between the direction of government and what the Honduran people consider



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is best for them. Through the ZEDE regime, Hondurans have access to a local alternative for self-governance that empowers them with more effective mechanisms for political representation. Próspera ZEDE is one example, as its residents will enjoy greater passive suffrage rights and the right to repeal any legislative enactments by majority vote. Together, both mechanisms would provide for greater popular control over legislation than has ever existed before in Honduras, and thus allow for a better alignment between legislative production and the will of the people.

3.5. Direct Democracy: Referendums and Recall Elections.

The *Charter of Próspera* contains two basic mechanisms of direct democracy through which residents can participate in local policymaking: referendums and recall elections. The Charter recognizes citizen forced referendums to repeal rules, approve measures, amend the Charter, and replace the Ombudsman; additionally, it provides for recall elections as a mechanism through which the constituencies represented in the Próspera Council can replace their representatives at any time.

As previously explained, one of the key manners in which a referendum takes place in Próspera is through disapproval voting. Once Próspera's population reaches 10,000 persons, a rule will be adopted which will automatically refer to natural person residents any subsequent promulgated rule as a measure to be considered for repeal by majority vote within seven days after adoption. Therefore, Próspera's legislative production shall be subject to final review by the jurisdiction's natural person residents, who will be able to veto any legislation to their disliking through a majority vote.

Previously promulgated rules are also subject to repeal by residents and landowners through a two-thirds majority vote in a referendum. A referendum, whether to repeal a rule or adopt a measure, will be organized by the Ombudsman of Próspera if a proposed measure expressly authorized by the Charter is submitted to it that has sufficient valid signatures



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representing, at least, 5% of the total persons who would be eligible to vote in the referendum. Measures will pass by a majority of the votes available for casting of all persons eligible to vote in the referendum unless a higher threshold is specified by the Charter. If the referendum is with regards to the replacement of the Ombudsman, then it will be organized by the Próspera Council (*Resolution Approving Publication of Próspera Code of Rules and Development of Future Official Derivative Works*, 2020b).

Additionally, the *Charter of Próspera* allows the constituencies represented in the Próspera Council to force a recall election on their representatives. Through this procedure, Council Trustees, including the Technical Secretary, can be removed by the recall at any time by the classes that selected them. The recall shall be made in the same manner as in which the original selection was made unless otherwise specified by the Charter. Though not expressly stated by the Charter, as the specific details of procedures will be enacted by rule in the future, a recall election could presumably be initiated in the same way as a referendum; that is, by submitting a petition with enough valid signatures to represent, at least, 5% of the total persons who would be eligible to vote in the recall (*Resolution Approving Publication of Próspera Code of Rules and Development of Future Official Derivative Works*, 2020b).

As compared with the national system, the Próspera mechanisms for direct democracy represent a major democratic empowerment of the population. National law provides for referendums, plebiscites, and citizen initiatives. However, according to article 5 of the *Constitution of the Republic of Honduras* (1982), referendums and plebiscites can only take place if their organization has been previously approved by the National Congress, and they cannot be forced by citizens. When a proposed plebiscite or referendum concerns ordinary legislation, it has to be approved by a simple majority of Congress, but when the plebiscite or referendum is concerned with constitutional matters, it has to be approved by two-thirds of Congress.



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The Constitution states that a plebiscite or referendum can only be requested to Congress by at least 2% of citizens registered in the electoral census, by 10 lawmakers, or by the President of the Republic. Furthermore, article 213 of the Constitution states that a number of at least 3,000 citizens can introduce a legislative initiative in Congress, but citizens cannot force a popular vote on a proposed legislative measure. The Constitution states that the result of a referendum or plebiscite is binding if it achieves at least 51% of the total participation of the last general election and a favorable simple majority vote.

However, no plebiscites or referendums have ever taken place in Honduras, and all the citizen initiatives presented to Congress have been rejected. The differences between the national and the Próspera ZEDE systems of direct democracy may shine a light on why none of the Constitution's mechanisms of participatory democracy have been successfully put into practice so far.

The first fundamental difference between both systems is that, under the national system, citizens cannot force a referendum, as only the National Congress can authorize a referendum. In contrast, the *Charter of Próspera* allows residents to force a referendum on a proposed measure by presenting a petition containing the signatures of at least 5% of the persons who would have a right to vote in such a referendum. Additionally, the Charter provides for automatic referendums that will take place every time a new rule is promulgated, granting natural person residents the right to strike down a rule by majority vote within the next seven days after such rule has been promulgated.

Because the National Congress falls prey to political capture as a result of the country's national electoral system, the citizens of Honduras have not been able to directly participate in public decision-making through the mechanisms made available by the National Constitution. In Próspera ZEDE, however, even if there is a disconnect of interests between residents and the Próspera Council, residents will still be able to repeal any promulgated rule and force referendums on key issues, including the amending of the



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Charter of Próspera. Another key difference with the national system of direct democracy is that citizen forced referendums will be organized by the Ombudsman, not the Próspera Council, which serves as an additional democratic guarantee that a valid petition will effectively trigger a referendum.

On the other hand, while the citizen initiative contained in the Honduran Constitution effectively allows Hondurans to present a legislative initiative in Congress and force Congress to discuss it, so far none of the citizen initiatives presented to Congress by citizen groups have been approved. The *Charter of Próspera* ensures against such a level of ineffectiveness by providing for resident forced referendums, automatically held referendums, and recall elections. As with the runoff election, the recall election is a wholly new democratic mechanism for Honduras that has been made available to the populace through the Próspera ZEDE jurisdiction. Unlike with the national system, Próspera residents will enjoy the power to hold their representatives accountable by forcing a recall election at any time and, if the majority so decides, remove representatives from office before their term is over.

The mechanisms of direct democracy that Próspera provides to its residents represent considerable democratic empowerment of the Honduran populace, who now have access to more effective mechanisms of participatory democracy. Therefore, through citizen forced referendums, automatically held referendums, and recall elections, Hondurans living within the Próspera jurisdiction will enjoy the democratic power to secure a greater degree of compatibility between legislative production and the general will of the public.

3.6. Exit Clause: Withdrawal of Sovereign Power

Since Próspera ZEDE's powers over its resident's person and property are derived from an express, contractual, delegation of popular sovereignty, the Agreement of Coexistence



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through which such delegation is made contains a Termination Clause that allows both parties to end their relationship under certain circumstances. This allows residents not only to opt into the special ZEDE regime but also to opt-out, following the agreed-upon conditions.

A resident may terminate their Agreement of Coexistence for any reason or without cause upon at least seven days prior notice to Próspera. For Próspera to terminate the agreement, there is a probatory period, consisting of the latter of either the first year of the residency term or the period encompassed by the effective date of the contract through December 31st, 2021. During this term, Próspera can terminate an Agreement with a resident with at least sixty days prior notice for any reason. After such probatory period, Próspera can only terminate the agreement if the resident has breached any provision of the Agreement and such breach has not been cured. An additional reason is if it is incapable of being cured, within thirty days after giving notice of the breach to the resident (“Article VI: Miscellaneous Provisions. Section 1: Termination,” 2020).

Upon termination of the contract, a resident is obligated to vacate the jurisdiction, unless such resident procures an e-residency agreement, which allows him to visit and do business in Próspera. If the resident fails to vacate the jurisdiction, Próspera may, in the absence of the resident prevailing in an arbitration or court challenge to the termination of the Agreement, deny access to the jurisdiction, the resident’s real property within the jurisdiction, and all Próspera e-governance services. Additionally, Próspera may eject the resident and all the resident’s movable property, subject to distraint for unpaid fees or taxes under the law.

Twelve months after termination of the contract or thirty days after receiving a final court or arbitration decision sustaining the termination of the contract, the resident shall sell and transfer title to any real property within the jurisdiction to another physical resident or e-resident in good standing (“Article VI: Miscellaneous Provisions. Section 1: Effect of Termination,” 2020). The possibility for residents to terminate their relationship with



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Próspera ZEDE naturally implies a devolution of the sovereign power originally delegated to it. Through the ZEDE regime, Hondurans have access to multiple options of local governments through which they can exert their sovereignty and participate in key public policy decisions, without leaving the country.

Currently, Honduran residents have the option to live under the default national legal system or under that of ZEDE jurisdictions such as Próspera or Ciudad Morazán. The options do not end there, as more ZEDE jurisdictions with a differentiated legal system can be developed. This is the case for the third and newest ZEDE, Orquídea. Additionally, the Charters of both Próspera and Ciudad Morazán allow for the creation of Special Districts with governance frameworks that may differ materially from those established by their respective Charters. Traditionally, the National Congress of Honduras has dominated public policy decisions at a national level, subjecting the whole country to a single unitary legal system. If a person did not feel protected or benefitted by the national legal system, the cost of changing jurisdiction was extremely high, as that person would have had to move to a different country. The ZEDE regime provides Honduras with a legal vehicle to regain a substantial part of the popular sovereignty that was theoretically delegated to the National Constituent Assembly of 1982 and exert such sovereignty through a local autonomous government. A person can later change his mind and decide to live under the jurisdiction of a different ZEDE, a Special District, or under the default national legal system.

Because Honduran residents can now elect among a greater variety of legal systems and governments to live under without having to leave the country, a higher level of interjurisdictional competition is expected. In Honduras, the ZEDEs, Special Districts, regular municipalities, and the national government will have to compete for residents and investments. This competition is expected to incentivize public authorities to provide for those public services and policies, in quality and quantity, which they believe would attract



residents and investments to their jurisdiction (Douglass, 1993; Tiebout, 1956; Vanberg & Kerber, 1994).

4. Legal Enforcement of Democratic Rights.

4.1. Overview of the Basic Enforcement Mechanisms.

The *Charter of Próspera* provides for a series of enforcement mechanisms through which a resident can force Próspera ZEDE to abide by the fundamental norms and democratic guarantees of the jurisdiction. The Charter's text recognizes a series of Democratic Rights in Section 2.06 and a Resident Bill of Rights in Article XII. Nevertheless, as judge Antonin Scalia said, "*Every tin horn dictator in the world today, every president for life, has a Bill of Rights... that's not what makes us free*" (Greenya, 2018, p. 223).

The Honduran Constitution certainly has its own bill of rights, but the enjoyment of such rights depends not on their legal recognition but rather on a system of checks and balances that provides effective guarantees for their exercise. Under this premise, the *Charter of Próspera* provides a series of enforcement mechanisms for its provisions, several of which have already been discussed. This section examines two essential mechanisms for Próspera residents to enforce their democratic rights through a court of justice or an arbitration proceeding.

The first mechanism is the guarantee of independent dispute resolution, whereby any legal controversy between a resident and Próspera, will be resolved before the Próspera Arbitration Center (PAC) or the American Arbitration Association's (AAA) International Centre for Dispute Resolution (ICDR). The second mechanism is that of a democratically accountable Ombudsman with the power to investigate civil rights violations and, if required, sue the ZEDE government on behalf of residents for such violations.



4.2. Access to Justice and the Guarantee of Independent Dispute Resolution

The residents of Próspera enjoy the power to enforce their civil and political rights against the ZEDE government through a court of law or an arbitration proceeding. Under article 329 of the Constitution and the ZEDE Organic Law, Próspera ZEDE can subject to mandatory arbitration all property, contractual, or labor matters, including legal controversies that arise between Próspera and its residents (*Constitution of the Republic of Honduras, 1982*; “Legislative Decree No. 236-2012,” 2013). Article IX of the *Charter of Próspera* regulates the jurisdiction’s court system, as well as the establishment of a default arbitration service provider that will resolve all causes of action involving Próspera or arising within Próspera (*Resolution Approving Publication of Próspera Code of Rules and Development of Future Official Derivative Works, 2020b*).

The special ZEDE court system is not yet operative but will come into effect once the CAMP nominates and the Supreme Court appoints the judges with exclusive jurisdiction over the ZEDEs, as per article 303 of the Constitution and article 15 of the ZEDE Organic Law. However, Article V: Dispute Resolution (2020) of the natural person resident Agreement of Coexistence states that except for matters expressly excluded from arbitration by the ZEDE Organic Law, such as those relating to criminal law and the protection of infancy and adolescence, “*the Resident and the PZ shall exclusively resort to, comply with and be subject to arbitration hereunder as the exclusive means of resolving any cause of action, dispute, controversy, or claim between or among the Resident, the PZ, the PZ Trust, the PZ General Service Provider, or any third party*”.

Any arbitration dispute initiated between Próspera and a resident will be resolved before Próspera’s Default Arbitration Service Provider, the PAC (*Default Arbitration Service Provider Resolution, 2020*). However, if a resident objects to the use of the PAC within seven days after receiving notice of the filing of an arbitration demand, then the arbitration



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proceedings will be administered by the ICDR. The arbitration will be governed by the rules of the arbitration administrator and shall be enforceable and executable as authorized by the Arbitration Statute 2019 (“Article V: Dispute Resolution,” 2020).

The PAC offers dispute resolution services with a roster of arbiters that include former judges who served in the Supreme Court of Arizona, the Arizona Court of Appeals, and the Superior Court of Maricopa County Arizona, as well as legal professionals with experience in key areas of the law from the United States, Australia, and Germany (Próspera Arbitration Center, 2020). For its part, the ICDR (2019) is a globally renowned center that, in 2019 alone, administered US\$18.4 billion in business-to-business claims and counterclaims, which included dispute resolution in the commercial, construction, labor, elections, employment, consumer, and insurance areas. This amount represents over 70% of Honduras’ Gross Domestic Product for that same year (World Bank, 2019a).

Both the PAC and the ICDR are compelling alternatives to the judicial remedies available against governmental action under the national legal system. The ability to challenge governmental decisions before an independent and impartial court of law, under due process, is recognized as a fundamental human right under article 8 of the American Convention on Human Rights. However, under the national system, Hondurans face enormous legal constraints to challenge governmental action in court, and the Judicial Power is generally regarded as slow, subject to corruption, and lacking in independence and impartiality.

In 2018, only 25% of polled Hondurans answered they had much or any sort of trust in the country’s Judicial Power (Corporación Latinobarómetro, 2018). In the 2019 Global Competitiveness Report, Honduras ranks 108/141 in judicial independence, with a 2.9/7 qualitative score (World Economic Forum, 2019). In the 2020 Rule of Law Index, Honduras receives a 0.33/1 score in the “*limits imposed on the government by the judiciary*” indicator. Likewise, it received a 0.39/1 score in the “*absence of corruption in the judiciary*” indicator, a



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0.33/1 score in “*due process of law*” indicator, and a 0.14/1 score in the “*respect of due process during regulatory enforcement*” one (World Justice Project, 2020).

To challenge governmental decisions, the national legal system provides for constitutional recourses. These include the writ of *amparo* and the *unconstitutionality challenge*. Administrative challenges ultimately end up in the courts of the Jurisdiction of Administrative Disputes. The Supreme Court has the final say in constitutional and administrative disputes. But the justices are elected by Congress. As earlier examined, this makes them subject to political capture by party interests. The Supreme Court is generally considered to be one of the most politicized courts in the country. Every single one of its justices is publicly identified as a representative of a specific political party (Centre for the Independence of Judges and Lawyers, n.d.; La Prensa, 2007, 2016; Ocampos Aguilera & Méndez González, 2020).

The party politicization surrounding the highest court of Honduras is of such magnitude that the last three elections of its justices resulted in a constitutional crisis. Two of them involved the political use of the Armed Forces to intimidate lawmakers during the selection proceedings (Center for Justice and International Law, 2016; Deutsch Welle, 2012; Deutsche Welle, 2016; El Herald, 2014; Estrada, 2019; Gutiérrez Navas et al., 2015; La Prensa, 2009, 2016b). In a diplomatic phrasing, the United Nations Special Rapporteur on the Independence of Judges and Lawyers, García-Sayán (2019), stated in 2019 that the institutional framework of Honduras, as it is, “*is not sufficient to guarantee the independence of the courts*”.

From a strictly procedural point of view, court politicization aside, the legal recourses against governmental action that are available to citizens face three main challenges against their effectiveness. Firstly, access to justice against State action is hampered by requiring that citizens undergo an inquisitorial “*previous administrative procedure*” where the public administration is both a judge and a party to the dispute (“Article 28: Legislative Decree No.



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189-87,” 1987; “Article 146: Legislative Decree No. 152-87,” 1997). The second barrier to effective access to justice is logistical, as there are 298 municipalities in Honduras but only two of them have a court with competent jurisdiction over the public administration. Any person willing to challenge a municipality or any government agency must travel either to Tegucigalpa or San Pedro Sula to be heard in court, after he or she has exhausted, of course, the previous administrative procedure. If the controversy is between a person and the national tax administration, there is only one competent court in the whole country, the Fiscal Administrative Court in the capital city of Tegucigalpa (Judicial Power of Honduras, 2020).

The third barrier impeding effective access to justice is the “*solve et repete*” rule (translated as *pay now and protest later*), a pre-constitutional principle dating back to Ancient Rome which requires a person to pay the fees or taxes demanded by the government before he or she can be heard in court. Article 39 of the Law of the Jurisdiction of Administrative Disputes establishes the *solve et repete* rule in the form of a financial guarantee. As a prerequisite for the admission of a lawsuit against the State of Honduras, the plaintiff must present a financial guarantee representing at least 20% of the claim’s economic value (*Article 4: Legislative Decree 266-2013*, 2014).

All these obstacles within the national legal system impede effective access to justice and weaken the rule of law and the enjoyment of basic human rights. Authors like Philip Hamburger (2014), Josefina Barbarán (2005), and Rodríguez Prado (2013) have argued that these obstacles are derived from an unofficial overarching rule of public administration which they refer to as the “*principle of exhaustion of the citizen*”, through which government entities drain the plaintiff’s resources in long and costly procedures before he or she can effectively hold them accountable in a court of law (Agustín Gordillo, 2013; Phillip Hamburger, 2014). Próspera ZEDE eliminates all the unconstitutional barriers that impede access to justice under the national legal system and offers Hondurans the possibility to live under a local,



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independent body of public administration, against which any legal claim will be resolved before world-class arbitration centers such as the PAC or the ICDR.

4.3. The Próspera Ombudsman and the Resident Bill of Rights.

Another key institution for the enforcement of the democratic rights of a Próspera resident is the Ombudsman. Section 9.03 of the *Charter of Próspera* states that the CAMP shall appoint a local Ombudsman once at least 1,000 natural persons establish their physical residency in Próspera. The Ombudsman will be appointed for a 12-year term and will be subject to replacement through a referendum initiated by residents or landowners. The Ombudsman, states the Charter, shall have power regarding the Resident Bill of Rights contained in Section 12.01 of the Charter, which includes the rights to life, property, freedom of thought, speech, conscience, religion, and contract, due process, privacy, and liberty (*Resolution Approving Publication of Próspera Code of Rules and Development of Future Official Derivative Works*, 2020b).

As per section 12.02(2) of the Charter, the Próspera Resident Bill of Rights furnishes for each person protected thereby as against Próspera, “*at least as much liberty as the corresponding right guaranteed to a citizen of the United States of America under the U.S. Constitution as interpreted by the Supreme Court of the United States of America as of June 30, 2019*”. The Bill of Rights, however, shall not be considered violated by the exercise of power or authority to enforce any law that Próspera is compelled to enforce under a constitutional provision or treaty governing the Republic of Honduras, provided such enforcement is no more prejudicial than is necessary to fulfill such obligations (*Resolution Approving Publication of Próspera Code of Rules and Development of Future Official Derivative Works*, 2020b).



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At the petition of ten residents, the Ombudsman has the power to investigate the facts associated with the petition and to file legal or equitable actions to remedy or negate unlawful or ultra vires acts of Próspera, through public arbitration proceedings before the PAC or the ICDR. The Ombudsman shall have access to relevant confidential information, shall produce a yearly report, and shall be funded by the Próspera Trust, by residents in no more than US\$100.00 per year. It can also be funded by third party grants, subject to Próspera Council approval. The Ombudsman is personally liable for abuse of process and frivolous actions brought against the ZEDE government.

A democratically accountable Ombudsman with the power to investigate facts and sue the ZEDE government for civil rights violations before the PAC or the ICDR, and which takes the resident Bill of Rights and the constitutional case law of the United States as its standard, represents a major strengthening of the human rights protection system of Honduras. The Honduran Constitution provides for a National Commissioner on Human Rights (the National Ombudsman), who is selected by the National Congress to serve a 6-year term. One initial difference is that the National Ombudsman is not democratically accountable to the people directly as the local Próspera Ombudsman is.

Additionally, the National Ombudsman's powers pale in comparison to that of the local Próspera Ombudsman. The National Ombudsman cannot access classified State information nor sue the government; the National Ombudsman only has symbolic powers, such as that of "*organizing seminars to create a national mystique of human rights protection*"; informing Congress about its activities; asking authorities for information about human rights violations; receiving petitions related to domestic violence and denounce them to the competent authority if deemed criminal; producing human rights reports; creating regional offices; or "*providing immediate attention and follow up to any complaint about human rights violations*" (*Ley Orgánica Del Comisionado Nacional de Los Derechos Humanos [Organic Law of the National Commissioner for Human Rights]*, 1995).



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The National Ombudsman lacks any meaningful power to effectively protect human rights and its office is not democratically accountable directly to the people. In contrast, the local Próspera Ombudsman can be democratically replaced by residents and is legally empowered to protect human rights by exerting relevant investigatory powers and, if required, suing the ZEDE government before an independent arbitration tribunal through the PAC or the ICDR. Comparatively, the local Ombudsman enjoys greater institutional capacity to provide the Honduran population with an effective human rights protection function.

5. Conclusions.

As evidenced by public opinion polls, Hondurans have little to no trust in the country's political parties, electoral authorities, Congress, and the Judicial Power, while all major international indicators measuring democracy, electoral freedom, rule of law, enjoyment of civil and political rights, judicial independence, and popular accountability of government, reflect an extremely poor democratic performance by the State of Honduras. Through the ZEDE regime, however, Próspera can provide its residents with new and more effective mechanisms for democratic participation, many of which are entirely new to Honduras and others, while not entirely new, differ considerably from those available outside of the ZEDE.

After comparing the mechanisms for political participation available under the national legal system with those available under Próspera ZEDE, this author finds that the *Charter of Próspera* represents a major democratic empowerment of the Honduran population, as it provides access to more effective legal mechanisms for residents to force an alignment between the popular will and governmental action.

Among the key democratic innovations introduced into Honduras by Próspera ZEDE, we find the *Agreements of Coexistence*. Through this Agreements, residents can expressly consent to their government and delegate sovereign power by contract. Próspera will hold this sovereign power in trust for the benefit of residents. Próspera ZEDE also introduces a



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two-round electoral system for selecting the chief executive; a greater degree of *passive suffrage rights* in the selection of the local legislature; more effective tools of direct democracy such as *citizen-forced referendums*, *automatic disapproval referendums* for new laws, and *recall elections*; and an *exit clause*. The latter allows residents to withdraw their sovereign power from the ZEDE government for any reason, or no reason at all, thus lowering the costs associated with electing a different government to live under as Hondurans will no longer have to leave the country to live under a different system of law and government.

Additionally, the *Charter of Próspera* provides more effective enforcement mechanisms for securing compliance with the rule of law and the free exercise of civil and political rights. Among these mechanisms, we find the *guarantee of access to justice and independent dispute resolution*, which allows residents to challenge the ZEDE government's actions before world-class arbitration centers, such as the PAC and the ICDR; and that of the local *Ombudsman*, who is democratically accountable to the people and who enjoys the power to access confidential information and sue the ZEDE government before the PAC or the ICDR for civil rights violations.

The institutions introduced to Honduras through Próspera ZEDE provide the country's population with an effective alternative for democratic self-governance at the local level. Hondurans can now opt to participate in public matters through a democratic local government with the autonomy to decide over fundamental issues such as legislation, taxation, public services, security, education, healthcare, regulation, dispute resolution, and international trade. Therefore, this author believes that the public governance framework adopted by Próspera ZEDE as a subnational division of the State of Honduras is a clear example of how democratic institutions can be introduced into undemocratic countries like Honduras through next generation special jurisdictions, such as the special Zones for Employment and Economic Development (ZEDE) regime.



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Given its democratic framework and solid enforcement mechanisms, if allowed to expand, Próspera ZEDE has the potential to play a fundamental role in democratizing Honduras from the bottom up and fostering an institutional transition of power from national politics to local democracies.

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