

**Law As The Handmaid of Politics:
The Case of Paraguay
by
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Abstract

What is the role of law in Latin America? And, what is the role of culture? The recent history of the Republic of Paraguay serves as a useful case study to address these questions.

The historical facts are beyond dispute. Paraguay has had three different Constitutions over the past seventy years but one fundamental question remains unresolved. To what extent is a paternalistic-nationalistic form of executive power, ranging from the “inorganic” (Rousseauian) character to the heavy influence of the “caudillista” style influence the legal system? Professor Ramos-Reyes, an expert in Latin American politics, explores how political needs and cultural aspirations have influenced the shape of the diverse legal forms of the executive power, mainly but not exclusively on the Paraguayan experience since the 1930s. What were the ideas behind the periodic changes of constitutions? Does it follow then that constitutions may be changed for the sake of political expediency to support and legitimize non-democratic values? The current realities of Paraguay in particular and Latin America in general, seem to support the author’s thesis.

“What confuses the spirit even more is the use that [people] make of these words: democracy, democratic institutions, democratic government. If we do not define them clearly, and understand these definitions, we will live in a confusion of inextricable ideas, benefiting all demagogues and despots.” *Alexis de Tocqueville*¹

A. Introduction: Problems and Questions

On the eve of November 3, 2005, hundreds of supporters of General Alfredo Stroessner, former president of Paraguay, gathered in a central location in the capital Asunción, to celebrate the ninety-third birthday of the dictator exiled to Brazil since his overthrow in 1989. Fifteen years after the end of an almost thirty-five year regime that ruled with an iron hand, this celebratory gesture, more than a demonstration of a nostalgic memory, reflects a constant and stubborn skepticism towards representative democracy in certain Latin American countries where the case of Paraguay is, in this sense, more than relevant.

Distrust in democratic values in Paraguay is notable, but it is not the only country that finds itself in this situation, as the “credibility and confidence crisis that dominates in contemporary Latin American society has resulted in a decrease of global importance provoking a diminution of public authority.”² The transition process—that has been ongoing for a generation, if we hold ourselves to the fifteen years suggested by Ortega—has not been assimilated into the culture of the country.³ Even when “each generation, that is to say, the group of people between the periods defined by the time of a dated zone, can change the world,”⁴ the Paraguayan case seems to defy this historical claim. The belief in democratic institutions has not been able to penetrate into many segments of civil society; whereas, in the political class, this belief has remained at abstract, formal, and ideological levels, in which legality is a mere ritual, an empty gesture without consequences for the civic energies of the nation.⁵ This mistrust has only increased even more during the first half of the present year since President Nicanor Duarte Frutos (also known as *tendotá*, word from the Guaraní language that means strong leader) hinted at his wish to convene a Constitutional Convention with the end of reforming the 1992 constitution and remaining in power for, at least, one more period.⁶ The political project Nicanor 2008-13 seems to have begun, strengthened by the triumph of the official sector in the internal elections of the Colorado party on February 19 where the president himself, contrary to what is provided in Article 237 of the Constitution, launched his candidacy for president of the Colorado party, violating the fundamental law with the endorsement of the Supreme Court. But Paraguay is not alone in this appetite for personalism and continuity. In November of last year, at the Summit of the Americas in Mar de Plata, Venezuelan President Hugo Chavez did not hide his desire for leadership over the Bolivarian continent, a leadership possible in the continuity of power. Thus, last March, Chavez reiterated this desire in the face of the possibility of not having any opposition candidates in Venezuela’s December presidential

elections, promoting a constitutional reform that would authorize his successive and limitless reelection.⁷ Finally, the possibility of re-electing Colombian President Alvaro Uribe for another term prior to a constitutional amendment raises a debate on the role of the executive power in shaping democratic institutions in Latin America. Thus, everything seems to indicate that, amid instability and uncertainty, the political tradition recurs to the ancient “inorganic” practice of democracy, as referred to by historian José Luis Romero, which adapts the legal and constitutional systems to the unique qualities of the leader of the moment.

My thesis is that the tradition of historicism and positivism, whether sociological or normative, has facilitated this practice, creating more obstacles rather than contributing to the construction of a democratic process. Paraphrasing the noble scholastic expression that philosophy is the handmaid of theology, in Paraguay, the law is arguably considered the servant to politics. This suggests three fundamental questions for discussion. First of all, wouldn't it then be that executive representation is a reality that is not derived exclusively from elections but from the cultural expectation of a man who cannot be substituted at a determined moment, a strong man, a caudillo, whose destiny is to lead a nation? This question will be analyzed from a historic perspective, balancing the facts that indicate an affirmative response in demonstrating that the constant in Latin America has not only been the election of an irreplaceable man, but also his desire to remain in power. If this is the case, a second question arises almost spontaneously: What would then be the function of a legal order and fundamental law, within this model? This question requires a philosophical analysis as it refers to the problem of legal historicism and positivism. Finally, if the hyperpresidential or *caudillesca* tradition reverts to legal formalism as a mere liturgy to legitimize an authoritarian system that is the cause of greater worry with respect to democracy, what would be the appropriate cure, the alternative to instability? This takes us to the political sphere, indicating that, paradoxically, the problem of democracy or its lack thereof, is not legal but extra-legal.

The history of political and legal ideas in Paraguay would appear to be a classic case for the study of these questions. The events are significant: Paraguay has had three different constitutions in the last 70 years—1940, 1967, and 1992. If the first two were clearly made to fit the strong leaders of the moment, that of 1940 for General José Félix Estigarribia and that of 1967 for General Stroessner, the 1992 Constitution was institutional, but it has given rise to a period in which an outbreak of crises has led to the same flaw: legalization of consummated political actions, the election of President Juan Carlos Wasmosy in 1993 and the crisis that broke out in an coup attempt led by General Oviedo in 1996-98. The fundamental institutional-democratic question remains unresolved: to what extent has the political order been shaped by the constitutional-legal order? Or, on the contrary, has the constitutional/legal order been just a mere servant of political power? Everything then seems to indicate, as pointed out by Judge Pedro P. Samaniego during the Febrerista Revolution of 1936 that would interrupt the then six decade-old constitutional order, that the law is not but a means of justifying—ex-post facto—the historic-political events of the moment. Naked, brutal politics would have primacy. The historic reality of contemporary Paraguay seems to be in agreement with this thesis.

B. Historic Perspective: Of Caudillos and Continuity

The elections and reelections because of the *caudillesco* charisma have been the dominant gene (more than the recessive one) in the history of Latin America. From individual power to triumvirates, and from these to the *juntas*, executive hegemony over deliberative bodies has been the constitutional tonic. It is that “the European and American idea of a separation of powers had been accepted, but a separation of powers that tended to favor the head of state for his/her participation in the powers of political orientation.”⁸ The odd syncretism among a revolutionary Napoleonism, the memory of the Spanish Constitution of 1812 and the American Constitution, served as inspiration for the new republics. The case is that the social fragmentation at the beginning of the nineteenth century that followed the vacuum left by the centralism of the Spanish colonial power was underlined by the first constitutions, which, from the outset, emphasized “the preeminence of the executive power, further strengthened by the military *caudillismo* of the first presidents.”¹³ The need for a strong presidentialism could thus be affirmed without much risk; it

was the original sin that prostrated *abinitio* the institutionalization of our republics. This was the historic reason why “charismatic leaders have had prominent roles in the history of the Spanish-speaking Americas, and which political missionaries have pursued through a wide range of goals: collective redemption, national salvation, social justice, etc.”¹⁰ The assumed truth was the constitutional establishment of charisma, conferring power as a sort of gift of divine grace. But if strong presidentialism was the constitutional mask to confront instability, the “need” for permanence as a response to uncertainty required another characteristic: that of continuity. An elected power, like that of presidents, that was also temporary and possibly for a short time, was not a clear demonstration of continuity.¹¹ The new president-caudillos knew that the affirmation of their republics over the time was vital. They were no longer monarchies that could expect this to happen automatically, but they were republics or pseudo-monarchies, which led them to appeal to a series of measures in order to affirm the lasting of the new system. The forms of “continuity,” it should be noted, were many and varied as Sanchez Agesta notes, all with the clear desire to guarantee permanence, but also the legitimacy of power, since the fundamental problem laid in the possibility of a separation of both: the legitimacy of the caudillo derived from his personal prestige on one hand, and that of the institution of the presidency on the other. It is interesting to emphasize that already, in the nineteenth century, the phenomenon of continuity as a political form constituted what Peter Smith would call the “effort to construct constitutions as a way of legalizing dictators rather than implanting democracies. Additionally, the acceptance of the political order has depended solely on the moral quality of its leaders. An inferior leader betrayed an inferior constitution which, as the product of fallible humans, should be overthrown.”¹² Since the end of the wars of independence, San Martín and Simon Bolívar assumed extraordinary powers. This was the beginning of “democratic Caesarism”¹¹ which would be followed by, among others, José Gaspar Rodríguez de Francia (Paraguay), José de Iturbide (Mexico), Juan Manuel Rosas (Argentina), Rafael Carreras (Guatemala), and Porfirio Díaz (Mexico), all with the self-proclaimed aim of becoming national saviors. Nor has the twentieth century been low on examples of allegedly prophetic men, invested with constitutional powers, reelected time and time again for, according to the most frequently used justification, face critical historic moments. From the Somoza dynasty in Nicaragua to that of Perón in Argentina or Rojas Pinilla in Colombia or Stroessner in Paraguay, the reasons were quite similar. In this context, the example of Cuban General Gerardo Machado y Morales is more than meaningful. Machado was elected president in 1924, as an alternate candidate against the inclination to stay in power of the president at the time, José Miguel Gómez, because according to the General, “a liberal cannot be reelected.” But the same Machado suddenly changed his beliefs once in power, decidedly influencing the constituent assembly that would later propose the constitutional amendment that would allow him to remain in power since, as this body said without hesitancy, “the constituent assembly doesn’t waver in reaffirming that General Gerardo Machado y Morales, for the obligations he entered into and for his role as founder of the Republic, is inevitably forced to accept a new constitutional period. Once the constitutional obstacle was “resolved,” General Machado became candidate for “three political parties in the 1928 elections, and was elected without opposition to succeed himself.”¹⁴ In that way, continuity became regular practice, it became part of the political culture. It was the method that opened the door to the possibility of “continuing in the administration of power through the process of constitutional amendments, or a new provision (article) in a new constitution, that exempted the current president or perhaps some other previous elected official and frequent prohibition against two terms in the presidency.”¹⁵ The executive power of the president was then a means to express the personality of the one who exercised that power, but said power should be perceived as legitimate. The sociologist Gino Germani advanced the hypothesis that Latin American political development included six phases: the revolutionary period, the period of anarchy and *caudillismo*, the period of unifying and centralistic autocracies, the period of “restricted” liberal democracies or oligarchies, the period of inclusive democracies or with greater participation, and finally, representative democracies with broad popular support. Based on this reading and facing chronological time, at the beginnings of the twenty-first century, we would find ourselves in this final period. But since history does not necessarily move towards an advancement of liberties, regressive tendencies occur, it is still possible in many cases to speak of a restricted democracy, or in the best cases, of an inclusive democracy. The critical point would then be—taking into account this historic process—the discernment of the “democratic” that

would take us back, in turn—as we warned earlier—to the issue of legitimacy. Historically, the examples show that the representative character of the executive is a reality that is not derived exclusively from elections but from the cultural expectation of a man that cannot be substituted at a determined moment, that is elected and self-elected because his destiny is to represent the nation. It is the epitome of political fatalism. If this is the case, what would then be the function of the legal order and fundamental law? What is the legitimacy personalism referred to in Latin America in general, and in Paraguay in particular with the regime of Duarte Frutos as an example? Is it the temptation to convert the will of the majority into the sole means of legitimacy, minimizing the respect for political institutions and the law that, at first glance, as this historical narrative appears to suggest? Taking up these terms obliges us, in philosophical terms, to confront legal historicism and positivism.

C. **Philosophical Perspective: the Question of Law and Legitimacy**

The reality of executive representation in the constitutional history of Paraguay reinforces the thesis that it is an institution that arises merely from the political strength of the exceptional man, a fact particularly evident in the last sixty years. Since 1936, with the beginning of the so-called Febrerista Revolution (the name Febrerista came from February- “febrero” in Spanish- because the uprising took place on the 17 of that month), this reality became more evident. The words of the then insurrectional leader and later president Colonel Rafael Franco are revealing: "We have understood," Franco said then, "that the political and social problem presented to the men of government, consists of a change of structure of the liberal state. [...] We will not copy any of the current constitutions, but we will take advantage of the expressions of all of them, and we will give to the new national organization, and to the spirit of the times, the inner substance of our people and our race [...] the new constitution will respect, in the first term, these realities and will give them the adequate political shape."¹⁶ Franco was not in power long enough to deliver what he had promised. He was deposed by another military coup in 1937, but his perspective, that of legal historicism, has become part of the legal culture, for which facts turn into law as a result of historical needs. This gave rise, in our time, to an almost exclusively positivistic conception of law. As such, the Constitution of General José Félix Estigarribia in 1940 and later that of Stroessner in 1967 and its 1977 reforms, will emphasize this way of thinking, justifying the primacy of the executive as a means to legitimize authoritarian qualities of the providential man of the moment. The powers conferred on the executive, which in many constitutions do not vary significantly, were the power to dissolve the legislature, the privileged power to issue law-decrees, the power to create nonelected deliberative bodies like the Council of State, and the power to declare the state of exception. In any event, these were the forms the law granted to the executive power according to its authoritarian wishes. This deepened the crisis of the democratic system as a political regime in such a way that legitimate and legal became equivalent. Why was this search for legality so important? There are two main reasons: the first was to obtain the approval of the citizenry, and the second was to gain respect on the part of the international community. In the context of the Constitution of 1992, the reality of historicism becomes even more formal because of the needs of that time. The comings and the goings of President Duarte Frutos to put in motion his possible reelection campaign is the most palpable example of this; the recent violation of an explicit constitutional norm that does not allow the president to become a party candidate, as aforementioned, was “legally” endorsed by the Supreme Court. Would this be a sort of invocation of that legal realism of Holmes according to which law is what judges say it is? The truth is that if this gives rise to the possibility of an impeachment, this will only take place with a 2/3 majority in the Chamber of Deputies. This takes us back, once again, to the reality of the strong man; the test of the “numbers,” that of client-voters, a requisite that, given the capacity of maneuver and ductility of the current *tendotó88*, will not be too difficult to attain. In any case, the judicial reasoning and the fidelity to formalities are combined in order to justify the fact that the *tendotó99* is only interested in maintaining them as a mere mask of power. This is pure historicism which, contrary to the rigid liberal rationalism represented by the Liberal era in Paraguay (1870-1936), tried to reconcile the legality of political maneuvering with the dynamism of history. There are no nonnaturalistic or metaphysical assumptions that measure up to a genuine spirit of these occurrences. “Law is,” as Gregorio Peces Barba indicates, “a historical reality of variable illegal systems that change over the time by impulse of the sovereign power which will assume,

progressively, a monopoly over normative production.”¹⁷ The law should be circumscribed to the particular, the moment, or the concrete. No longer the remittance to a fundamental or extrahuman reality, God, or a Supreme legislator is seen as necessary. The only requirement is the test of the “popular sovereign and the rule of majorities.”¹⁸

The law is a cultural product and as such, it is historic. What then, gives value and efficacy to the law? It is just the fact of power. Legal positivism, derived in a certain way from historicism, in the nineteenth and twentieth centuries, shares the aversion toward metaphysics of historicism, but theorizes on what the law would be as such. For the positivists—beyond the distinction that can be made between the sociological and the formal, the law is assumed by the State, a general postulate of modernity. And if, at the same time, law, in the tradition of legal formalism, is defined by coactivity in an exclusive manner, identifying itself with positive law makes it so that the power relationship will be intimate and necessary. Therefore, power and law belong to one and the same thing. It is the power that determines the possibility of law. That is what Kelsen expresses¹⁹, for example, making validity and efficacy—different concepts—appear related in such a way that the first, the validation of a norm, determines the second, efficacy, since this one is based on power as a guarantor. Thus, law is described as a changing and historic reality that is explained by its imposition from power. Power is its basis. The law is understood as a fact and a historical event. But if this is so, the criticism waged so many times against it is unharmed; what would therefore distinguish law from power? If there is no existing legal relationship beyond coercion and power as a basis; how do we make sure that not everything is reduced to the power of the caudillo or to his demagoguery to persuade the citizenry to modify the constitution and re-elect him?

D. Conclusion: Democracy and Utopia

The tragic reality of the last sixty years of Paraguayan history is characterized by the fact that the political needs of the chief executive or any other relevant historic event has forced legal situations in order to give a legitimate foundation, keeping the forms and disregarding institutions. It is interesting to note how, this way of thinking—which has become an acceptable culture as we indicated at the outset—is reflected even in critics of the re-election project we referred to. As such, in its March 5, 2006 editorial, the newspaper *última Hora de Asunción*, said that “*The presidential pretension [of Duarte Frutos’ re-election] would be legitimate if the country were moving towards better days, but the debt is far from being paid off.*” It should be noted that the editorial does not say that reelection per se is a bad idea—which is a reasonable proposition—but that reelection is conditioned by the fact that Duarte Frutos is not a good candidate because he “did not pay off the debts.” Had he done so, perhaps the editorial’s judgment would have been different. It is the historical act, ideologically considered—not an institutional principle—that counts and provides justification. This conclusion is at a minimum problematic. And it is so for a fundamental reason: it suggests, without wanting to, that what gives legitimacy to change would be subject to a sort of unavoidable test: that of an allegedly not fully-fledged democratic political regime. But wouldn’t this just be a utopian vision of democracy? What aspect of those “better days” would justify a change: social stability, economic growth, or possibly, the achievement of social justice? This way of thinking, more than a contribution as an alternative to the crisis, has aggravated the problem of a political regime like democracy that is, for this reason more than any other, looked upon with skepticism, with an ideological reality that is rejected. The problem is that democracy is viewed as a sort of final political stage where everything takes place. This demonstrates the lack of comprehension of said political reality, democracy, forgetting that more than one version of such exists. A version of democracy—that has become part of Paraguay’s political reality (and across much of Latin America)—is that of Rousseau. It is a “downward” statist-idealist-egalitarian democracy.²⁰ Here, democracy refers to a regime that carries with it the consensus of the majority that is legitimized in the coactive power of the state. The will of the majority as general will, real or inducted, is a source of legitimacy. As it was mentioned, José Luis Romero speaks to us of the inorganic democratic tradition where the constitutional changes conform to the will of the persuasive caudillo-president. The legal-constitutional order recognizes rights, allowing for supra-legal norms and objectives that value the individual as a source of natural rights. It is the downwards democracy of the state-law-positive-ideological-of the caudillo. Not in vain, Duarte Frutos played with the phrase “I am the state” months before. Another

democratic tradition stems from the citizens, from the bottom-up. It is the democracy of the individual and the people as historic subjects. It is the democracy that Tocqueville, the French nobleman, experimented in the U.S. during the nineteenth century, where the desire for liberty was the motivating and binding force. The Rousseauian sense of statist equality/egalitarianism does not exist; instead, it is all the opposite—love for the game of liberty as a constitutive factor in a system where the state recognizes the pre-existing values of the citizenry. It is not the state's ideology that forms and guarantees the happiness of each citizen, but instead the reverse; the state is the instrument that facilitates, not guarantees, the search for the happiness of its citizens.

Rousseau's brand of democracy, democracy as ideology, as a diffuse criterion is insufficient. Democratic ideology founded on the principle of unlimited popular sovereignty runs the normative risks we warned of earlier—to be appropriated by *caudillista* systems as eschatological mark. Democracy should not be understood as a solution for all of the ills of society, nor should it presume uniformity-egalitarianism-democratization in all spheres of human life—that which Ortega termed morbid democracy. In any event, the “possible perfection of democracy refers to its limitation, to its restriction to the sphere of realities for which democracy was conceived, to the recovery of its original scope and of its more precise meaning.”²¹ Democracy is fundamentally a medium and form that is delineated by human limitation and political imperfections, not as something in itself overwhelming, due to the integral departure point of human liberty. Democracy requires, finally, a rule of law that limits power which uses it as an instrument to achieve the well being of individuals that live under its rule.

This philosophical and political excursus demonstrates that the disillusion with democracy, as well as the supposedly redeeming factors of certain hyper-presidential positions, does not have a legal solution, but an extra-legal one instead. It is the idea of a democratic regime, open to the individual. This takes us to another central theme of this paper which is the question of whether the fact that law has become a servant of politics means closing the doors to any possibility of adapting the fundamental law to social realities? Not a chance. It is without a doubt that historic achievements should be incorporated into the constitutional system. The social is regulated by the law, but prudence should be taken into account when establishing the criterion or criteria to decide whether to incorporate these achievements into the constitutional corpus (body). The stability of the constitutions indicates the vision of its founders and, at the same time, it explains the stability of its institutions. Even so, this accomplishment could not obstruct a series of adjustments as the moral and social conscience deepens, progresses, over the time. Institutions mature and grow. The example of the amendments to the American constitution is evidence of this. The fundamental law, taking an example from Hervada, resembles an orthopedic shoe that shapes the individual's foot, adapting it to the shoe little by little, sometimes even painfully. The law should regulate social reality giving it a certain shape. Much like the orthopedic shoe molds the foot, the law should give shape to the regulated society.”²² The challenge is to recognize the model of the shoe, that is, the appropriate model of democracy and not the will of the *caudillo*, acknowledging the essence of the individual. Otherwise, we will continue to live, in the words of Tocqueville, “in a jumble of inextricable ideas, in benefit of the demagogues and the despots.”²³ And we have had more than enough of that.

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