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Justice at last?

by **Michael Mansfield & David Renton**

PLUS: Privatisation Legal observers Colombia Spain Paraguay and more

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‘There is no coup here, no institutional breakdown. It is a legal situation permitted by the constitution and the laws of my country to make a change when the situation becomes unviable.’

by **Michael
Freitas
Mohallem**

With those words Federico Franco justified his ascension to the Presidency of Paraguay following the ousting of Fernando Lugo by the vote of the Paraguayan Congress in June 2012. Mr Franco's declaration set the basis for the dispute over the legality of the Congress's action and brings a new dimension to the issue of political transitions in a region familiar with military rather than parliamentary coups d'état.

Labelling a coup-like controversial political decision such as the removal of a democratically elected president as 'legal' or 'constitutional' may have diverted immediate criticism from law-abiding individuals and rule-of-law oriented states. Even after most of the facts surrounding Mr Lugo's ousting became public, there is plenty of confusion regarding the limits of congressional power in presidential democracies such as Paraguay. The purpose of this brief article is to raise awareness of the many illegalities that transformed a potentially legitimate constitutional procedure into a congressional coup d'état.

Fast-track congressional deliberation

The impeachment procedure was set a few days after the death of 17 people and dozens of others injured in a conflict between the police and landless peasants resisting a forced eviction from a privately-owned farm. The Paraguayan Chamber of Deputies, on 21st June 2012, formally accused Mr Lugo of having: (a) authorised a political meeting in a public office back in 2009; (b) instigated land occupations by peasants in the region of Ñacunday; (c) neglected crimes in Campos Morombi; (d) signed an additional protocol to a multilateral treaty (USHUAIA II protocol); and (e) general responsibility for the 'expanding criminality' in the country. The removal procedure was based on a single article of the constitution establishing the possibility of 'political judgment' for high-ranking public authorities.

On the same day of the receipt of the Chamber's accusation and establishment of the impeachment, the Senate passed an act defining the procedures for political trials such as the one before them – 'Resolución nº 878 del 21.06.2012'. At the same session, the Senate voted the act convoking a special session in the Senate 'constituted as tribunal' for the following day. President Fernando Lugo was summoned to 'formulate his defence and offer evidences' on the following day, 22nd June 2012, at noon ('Resolución nº 879 del 21.06.2012').

The Supreme Court of Paraguay

Having received the notification from the Senate, one day before his trial, Mr Lugo filed a lawsuit questioning the constitutionality of the resolution defining the procedures. Not only was he given the limit of two hours to present his defence, but also there was no written evidence in the accusation. In fact, the Chamber of Deputies saw no need to bring legal arguments or proofs sustaining its claims. The indictment simply stated that since all the mentioned facts are public, 'there is no need [for the accusation] to prove them'. Despite the inversion of the burden of proof, the Paraguayan *Corte Suprema de Justicia* dismissed the claim of a violation of due process. In a rather contradictory decision, the court reasoned that an impeachment trial 'judges political actions' and 'given that this

procedure is technically not jurisdictional, the guarantees under the judicial process, although applicable, are not absolutely but rather partially applicable for the purpose of guaranteeing the accused due process and the right to defend himself' (A.I. nº 1533 del 25.06.2012).

The Supreme Court will have a second opportunity to assess the case in a further action brought against the impeachment by Lugo's lawyers. Nevertheless, a different conclusion nullifying the Senate's deliberation is unlikely as no further elements seem to have arisen. Deciding against an overwhelming parliamentary majority is a difficult task for any court in the world and an impossible one to those lacking institutional independence.

International law and the international community

Paraguayan institutions entrusted with the responsibility to enforce the constitution ignored procedural rights such as the prohibition of sanctions based on laws dated subsequent to the impugned facts (article 17(3)) and the guarantee of reasonable time to prepare a defence (article 17(7)). International law was also infringed. Paraguay accepts all ratified international treaties as domestic law and is party to the American Convention on Human Rights and to the International Covenant on Civil and Political Rights. Both instruments explicitly protect the right to a fair trial, articles 8(1) and 14 (3) respectively.

The public statement of the Inter-American Commission on Human Rights which considered the swift impeachment 'unacceptable' signals that the case may be taken to the Inter-American Court of Human Rights. However, by the time all the domestic remedies are exhausted, a new elected Government should be in office rendering an eventual pro-Lugo decision ineffective.

The international community is divided in relation to the Congress's manoeuvring. While

the governments in neighbouring countries promptly criticised the ousting of Mr Lugo, the Secretary General of the Organisation of American States (OAS), José Miguel Insulza, issued a compromising statement against any sanctions as the 'OAS suspension would entail high economic implications for the country'. Despite this, the Union of South American Nations (Unasur) and the Southern Common Market (Mercosur) have both suspended Paraguay until next year's election scheduled for April 2013 based on the democracy clauses of regional treaties.

Presidential democracy and the limits of congressional power

Most supporters of this 'express impeachment' rely on the constitutional provision allowing for the removal of the president. They claim the act was legitimate since it received the vote of 73 out of 80 deputies and the vote of 39 out of 45 Senators. However, this argument is flawed. In most presidential systems, including in the case of Paraguay, the elections for members of parliament and for the president are administered in different ballots. A president may not have a majority in parliament yet still should be legally able to run the country.

When considering the motion of no confidence in parliamentary systems along with the impeachment procedure in presidential systems one simply cannot ignore that in the latter parliament has no democratic mandate to remove the president according to its political will. The impeachment is an exceptional procedure which should be used only in extreme circumstances and all due process guarantees must be observed. For instance, in 1992 an impeachment process in Brazil removed Fernando Collor from the presidency. In this case, the accusations first appeared in the press in 1991, the investigation committee in parliament was set in May 1992 and the impeachment deliberation by the Senate was completed in December 1992. More than 7 months divided the formal accusation from the final decision in stark contrast to the rapidity with which matters proceeded in Paraguay preventing Fernando Lugo from being able to prepare his case.

Recent academic writing attempted to elaborate on the concept of a legitimate 'democratic coup' which would be applicable in very specific circumstances (Varol O., *Harvard Int Law J*, vol. 53 n.2). This oxymoron has no room in modern Paraguay. The absence of tanks in the streets is surely a welcome change for a population that lived under one of the longest military dictatorships on the continent, but that does not make what happened any less of a coup. It was not up to the parliament to decide whether Mr Lugo had a 'poor performance in office' but to the people of Paraguay.



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