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Democracy and the Rule of Law: Myth or Reality?

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Democracy and the Rule of Law: Myth or Reality?

*Renaldy J. Gutierrez**

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I. INTRODUCTION

I am deeply honored this morning; first, by the kind invitation that Professor Robert Barker extended to me to be the keynote speaker at the *Separation of Powers in the Americas . . . and Beyond* seminar at Duquesne University School of Law; and second, by representing the Inter-American Bar Association (“IABA”)¹ as its Immediate Past President at this seminar. Thank you for having me here; thank you for this wonderful opportunity.

Founded in 1940 in Havana, Cuba, by a group of distinguished jurists representing 17 nations of the Americas and 44 bar associations, the IABA champions the rule of law as the foundation of a just and free society in the Western Hemisphere. Just recently, the IABA joined forces with the American Bar Association and other institutions to launch and implement the World Justice Project (“WJP”), a program designed to create awareness and to emphasize the importance of the rule of law around the world.²

At the World Justice Forum that was held at the close of the WJP in Vienna, Austria, in July of 2008, along with a rule-of-law index and a vast collection of scholarly work, the WJP planted

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1. Its members include bar associations, individual lawyers, law firms, and law schools from the Americas and Europe. The IABA offices are located at 1211 Connecticut Avenue, N.W., Suite 202, Washington, D.C. 20036, and online at www.iaba.org.

2. The WJP is a multinational and multidisciplinary American Bar Association (“ABA”) initiative founded by former ABA President William H. Neukom (2007-2008). For more information, please visit www.worldjusticeproject.org.

throughout the world the notion of the rule of law as “the foundation for communities of opportunity and equity.”³

Four universal principles compose the rule of law for the purpose of the WJP:

1. The government and its officials and agents are accountable under the law;
2. The laws are clear, publicized, stable, and fair, and protect fundamental rights, including the security of persons and property;
3. The process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient; and
4. The laws are upheld, and access to justice is provided, by competent, independent, and ethical law enforcement officials, attorneys or representatives, and judges who are of sufficient number, have adequate resources, and reflect the makeup of the community they serve.

These principles and the idea of the rule of law enunciated above imply other intrinsic and interrelated concepts that must be present if we are to talk about the rule of law at all. Paramount to this notion is the human being, the integrity and rights of whom the state is meant not only to protect and respect, but also to create the necessary conditions for individuals to prosper and be happy. There, we also find the principle of democracy as the political form of government that begins and ends with the human being as its very expression and the citadel for the protection of human rights.⁴

Thus, we come to the realization of the existence of two interconnected concepts: democracy (a political form of government) and the rule of law (the legal framework in which democracy ex-

3. The World Justice Project, *About the WJP*, <http://www.worldjusticeproject.org/about/> (last visited May 15, 2009).

4. It has been claimed, even by Jean Jacques Rousseau, that democracy is such a perfect system that it could only be achieved among angels. But that system has been adopted as the norm for political organization in the Western Hemisphere. And it is also reassuring for us that Catholic doctrine emphasizes its virtues, in the case of the rule of law, as “a realistic vision of men’s social nature, which requires adequate laws to protect the freedom of all,” and regards democracy as the system that “ensures citizen participation in political options and guarantees to the people the possibilities of electing and controlling their government officials, and that of removing them in due course in a peaceful manner.” Letter from Pope John Paul II, Encyclical Letter “Centesimus Annus” (May 1991).

presses itself and in turn protects its integrity against detracting or destructive forces). I submit to you that one cannot exist, at least for long, without the other. More importantly, they both nurture and support each other.

In contrast with this notion, we are witnessing today in the Americas political actions clothed in legal arguments (or theories) that erode the very foundations of democracy. We are also witnessing populist movements clothed in democracy, which shackle the free operation and function of the rule of law. And all this is being carried on in the name of—and under the guise of—democracy and the rule of law.

These actions are indeed a contradiction to the universal principles mentioned above; they are a negation of democracy itself and of the rule of law. However, in their tactics, we detect an effort to hide reality under a mask, as it were. Thus, it may be proper to characterize and call these actions “Formal Democracy,” the mask of democracy, and the rule of law.

II. FORMAL DEMOCRACY

As democracy and rule of law are elusive concepts, each with different meanings for different peoples in different parts of the world,⁵ this uncertainty has been exacerbated in Latin America, giving birth to the era of Formal Democracy.⁶

By Formal Democracy, I mean those efforts that governments or political parties make to disrupt democracy and the rule of law while using methods usually associated with the democratic free play of ideas. Their efforts aim to constrict democracy itself, or, at the very least, to tamper with its principles. The proponents of Formal Democracy claim that if the judiciary is controlled by the executive but the latter was duly elected, that is democracy; or if the executive assumes legislative powers, but it is authorized by the constitution, that is also democracy.

As a result, our Western-civilization understanding of democracy and rule of law is being eroded, perhaps not so much by 20th-century dictators but, as it were, from within. This erosion occurs

5. See Thomas Carothers, “Rule of Law Temptations,” paper presented at WJP, Vienna, July 2-5, 2008.

6. Theoretically, we may explain it in terms of the so-called natural states, that, although they “have many of the same institutions as open orders, such as parties, elections, markets, and judiciaries . . . they have limited access to organizations, lack competition, and lack a perpetual state.” (Barry R. Weingast, “Why Developing Countries Prove Resistant to the Rule of Law,” WJP, Vienna, July, 2008).

at times by the open manipulation of the democratic system itself, but more often by subtle and concerted actions, difficult to detect and even more difficult to guard against. Indeed, we are facing a perversion of democracy and of the rule of law.

To illustrate this 21st-century assault on democracy, I would like to refer to a constitutional crisis that took place in Nicaragua in 2004—a “constitutional coup d’état” against former President Enrique Bolaños that generated a flurry of national and international legal decisions and legal actions that spanned four years, with the most recent Supreme Court of Nicaragua decision rendered in January 2008.⁷ And the dust may not yet be settled.

A. *The Players*

- The president of Nicaragua, Enrique Bolaños, democratically elected in 2001 for a five-year term (2002-2007)
- The legislative power (or National Assembly), controlled by two political parties, the Liberal Party and the Sandinista Party, together holding more than two-thirds of the votes in the National Assembly
- The Supreme Court of Nicaragua, integrated by political appointees of the same two parties and equally divided, 50% Liberals and 50% Sandinistas

7. A full chronology of the events is as follows:

- Government of Nicaragua in cooperation with the National Endowment for Democracy, *Democracia Secuestrada*, October 2005 (Nicar.) (hereinafter *Democracia Secuestrada*). IVAN ESCOBAR FORNOS, ESTUDIOS JURIDICOS, 471-84 (Hispaner 2007).
- Corte Centroamericana de Justicia [CCJ], *Demanda interpuesta por el Señor Enrique Bolaños Geyer*, Res. 71, (Jan. 6, 2005), <http://www.ccj.org.ni/resolnes/94-05/Resol71.pdf> (hereinafter CCJ Res. 71).
- Sentencia [S.] No. 17, 29 Mar. 2005, Boletín Judicial Vol. I [B.J.] [Supreme Court] pp. 51-58, Cons. XI(i) (Nicar.).
- Ley No. 520, 13 Jan. 2005, Reforma Parcial a la Constitución Política de la República de Nicaragua [Partial Reforms to the Constitution of Nicaragua] No. 35, La Gaceta [L.G.], 18 Feb. 2005 (Nicar.).
- CCJ, *Demanda por presunta “violación a la normativa jurídica del Sistema de la Integración Centroamericana” (SICA)*, Res. 69, (Mar. 29, 2005), <http://www.ccj.org.ni/resolnes/94-05/Resol69.pdf> (hereinafter CCJ Res. 69).
- S. No. 17, 29 Mar. 2005, Boletín Judicial Vol. I. [B.J.] [Supreme Court] pp. 51-58, Cons. VI (Nicar.).
- S. No. 52, 30 Aug. 2005, Boletín Judicial Vol. II. [B.J.] [Supreme Court] pp. 421-23, Cons. II, IV, and V (Nicar.).
- Ley No. 556, 20 Oct. 2005, [Framework Statute for the Stability and Governance of the Country] No. 203, La Gaceta [L.G.], 20 Oct. 2005.
- S. No. 1, 10 Jan. 2008, not yet published in the Boletín Judicial [B.J.] [Supreme Court] Cons. III (Nicar.).

The silent player and victim here, the people of Nicaragua, an innocent bystander,⁸ saw the pendulum move from left to right, perhaps not fully understanding why and how. But in the end, their rights were violated, and their hopes for a better life were betrayed by obscure forces. The irony is that those obscure forces were the same powers of government that were supposed to work for the prosperity and happiness of the people of Nicaragua.

B. *Assault on the Presidency*

Halfway into his five-year term, President Bolaños launched an unprecedented anticorruption campaign that threatened the very foundation of the Nicaraguan political establishment.⁹ In response, the legislative power directed a three-prong attack against the Bolaños government, consisting of:

- a) "Partial" constitutional reforms¹⁰ that took away executive powers and vested them in the legislative power (the National Assembly), so much so that it virtually changed the Nicaraguan presidential system into a parliamentary system by concentrating so much power in the legislative branch;¹¹

8. Or guilty, perhaps?

9. Former President Arnoldo Aleman was in jail and had been sentenced to 20 years on corruption charges; other former government officials were also in jail and prosecuted; even the Catholic Church and the private sector's dealings with government property were being brought into question. Bolaños's transparency in government and anticorruption crusade irked and upset the Nicaraguan political interests and ruling class. *Democracia Secuestrada*, *supra* note 7.

10. The Nicaraguan Constitution of 1987 allows partial—as well as total—constitutional reforms (Articles 191-193). Partial reforms could be enacted by the legislative power as long as the reforms are passed in two successive legislatures. Total constitutional reform would require a constitutional convention.

11. It was precisely the government's position that the so-called partial constitutional reforms were substantial in nature, requiring a constitutional convention for approval. First, the reforms shifted a series of executive powers, transferring them to the Assembly. Second, it eliminated, to a certain extent, the checks and balances between the legislative and executive powers. Third, it eliminated the independence of the executive, with respect to the other branches of government, by subjecting it to the legislature. Fourth, it changed the presidential system of government of the Nicaraguan Constitution by introducing into it features that would be proper of a parliamentary system, foreign to the Nicaraguan Constitution and political tradition. This is evident by the preamble to the partial reforms, which states: "In the evolution of modern parliamentarism, the National Assembly is left to be the only branch of government with legislative powers, truly representative of the Nation, and therefore, placed in a superior hierarchical order with respect to the Executive Branch of government. This political and legal supremacy of Parliament is translated into a function of control over the government, which affirms the superiority of the former . . ." S. No. 51, 30 Aug. 2005, *Boletín Judicial* Vol. II. [B.J.] [Supreme Court] pp. 421-23, Cons. V. (Nicar.).

- b) The enactment of several laws with the sole purpose of bringing at least nine agencies or departments of the executive under the direct control of the Legislative power;¹² and
- c) An impeachment process brought against the President, initiated by the National Assembly at the request of the General Accounting Office¹³ as a result of an investigation on campaign contributions in the 2001 elections.

Facing a virtual coup d'état, President Bolaños sought protection, without avail, from local tribunals and from the international community, where he found solid support—legal¹⁴ as well as political.¹⁵ Of particular importance to this presentation are the decisions made by the Central-American Court of Justice (“CCJ”)¹⁶ and the Nicaraguan Supreme Court (“NSC”), to be discussed next.

12. Law # 511, “Law on the Superintendency of Public Services”; Law #512, “Law for the Establishment of the Institute for Reformed Rural and Urban Property”; Amendments to the Organic Law of Social Security Administration; Amendments to the Organic Law of the National Technology Institute, among others.

13. Resolution by the Superior Council of the General Comptroller’s Office (for simplicity called the General Accounting Office), dated October 7, 2004. Without delay on October 14, 2004, a special meeting of the Assembly was called to appoint an Investigation Commission against President Bolaños. See David R. Kolker, Council of Hemispheric Affairs, *An Unjust Attack on Nicaraguan President Bolaños*, at <http://www.scoop.co.nz/mason/stories/WO0411/S00218.htm>.

14. Based on Article 18 of the Democratic Charter, the Bolaños Government requested the intervention of the Permanent Council and the Secretary General of the Organization of American States to assist in the resolution of the crisis. On October 17, 2004, an OAS High Level Mission was sent to Nicaragua (see Final Report of the Commission, October 18-20, 2004, OAS/Ser.G/CP/Doc. 3953/04 rev.1, December 7, 2004). The crisis generated further involvement of the OAS until it was averted (see Minutes of the Permanent Council Meeting of April 27, 2005, at OAS/Se.G/CP/ACTA 1479/05; Minutes of the Permanent Council Meeting of June 21, 2005, at OAS/Ser.G/CP/Acta 1492/05; Resolution by the General Assembly in support of Nicaragua, emphasizing the principles of “separation and independence of the branches of government in that country,” AG/DEC.43 XXXV-O/05). The foregoing information was taken from the Conference delivered by Dr. Jean Michel Arrighi at the IABA XLIV Lima Conference, “Rule of Law and Governability,” June, 2008. Dr. Arrighi is the OAS Secretary for Legal Affairs.

15. Central American Presidents (Members of the Central American Integration System) signed a declaration in support of constitutional order in Nicaragua (XXV Ordinary Meeting of Chief of States, San Salvador, December 15, 2005). Additionally, the Andean Pact and the Group of RIO issued declarations in support of the constitutional order and against the constitutional reforms. *Democracia Sequestrada*, *supra* note 7; CCJ Res. 69, at Cons. III(e).

16. The CCJ is a supra-national regional tribunal created by treaty among the Central American States under the Interamerican System. Jurisdiction of the CCJ was based on Article 22(f) of its governing law (“Estatuto de la Corte”), which allows the Court to “review and adjudicate at the request of an aggrieved party over conflicts that may ensue between Powers or Branches of Government of the States” Jurisdiction was further based on the Tegucigalpa Protocol to the OAS Charter of December 13, 1991, and the Framework

C. *Judicial Decisions*

As a result of an action filed by President Bolaños, the CCJ made two decisions: first, an interlocutory decision¹⁷ ordering the Nicaraguan Assembly to suspend the ratification process of the constitutional reforms, which was not followed by the Assembly; and subsequently, its final decision¹⁸ declaring the constitutional reforms to be in violation of the rule of law in Nicaragua because they eroded the powers and independency of the executive branch and could only be approved by a constitutional convention.

In contrast, the NSC first suspended the CCJ interlocutory decision on purely formal grounds.¹⁹ Then, on the same day that the CCJ rendered its final decision, the NSC declared unconstitutional Article 22(f) of the enabling statute of the CCJ and rejected President Bolaños's complaint. In its decision, the NSC made a superficial analysis of the constitutional reforms and simply stated that the reforms

. . . only increase the scope of the current [constitutional] text without contradicting the functions granted to the President, which come indeed to strengthen the Rule of Law, by creating mechanisms of coordination between the two Powers of the State, and consequently there is no legal basis for a conflict between the Powers as alleged by claimant.²⁰

The Court said nothing about the shift of power (from the executive to the legislative branch), about the resulting concentration of power in the legislative branch created by the constitutional reform, or about its impact on the presidential system of the Nicaraguan Constitution. Instead, the Court dealt with the problem primarily on procedural grounds, explaining at length the types of constitutional reforms under the Nicaraguan Constitution and

Treaty for Democratic Security in Central America of December 15, 1995. CCJ Res. 71, at Cons. I and II.

17. See CCJ Res. 71, <http://www.ccj.org.ni/resolnes/94-05/Resol71.pdf>.

18. See CCJ Res. 69, <http://www.ccj.org.ni/resolnes/94-05/Resol69.pdf>.

19. Decision of January 7, 2005, indicating that the Nicaraguan internal proceedings have not been exhausted and that constitutional challenges in Nicaragua are governed by a special Nicaraguan Constitutional Law (known in Spanish as Law of *Amparo*, which provides for constitutional remedies to guarantee the rights set forth in the Constitution). S. No. 17, 29 Mar. 2005, *Boletín Judicial* Vol. I. [B.J.] [Supreme Court] pp. 51-58, Cons. XI(i) (Nicar.).

20. S. No. 17, 29 Mar. 2005, *Boletín Judicial* Vol. I. [B.J.] [Supreme Court] pp. 51-58, Cons. VI (Nicar.).

concluding that the legislature was empowered to pass partial reforms to the Constitution.²¹

There was yet another decision by the NSC on another challenge against the partial reforms.²² In that instance, although the Court declared the unconstitutionality of two specific aspects of the reforms, it looked only to the periphery of the problem; thus, the Court invalidated as unconstitutional the preamble of the statute discussed above,²³ as well as certain language added to the reforms²⁴ that they would be effective at a later time.²⁵

D. *The Aftermath of the Constitutional Reforms*

With the judicial battles lost and the constitutional reforms in full force and effect, the Bolaños government turned to negotiations with the “political players” to defer its application until after the end of his term in January 2007.²⁶ As a result of those negotiations, in October 2005, the Nicaraguan Assembly passed the Framework Law for Stability and Governance of the Country, whereby the partial constitutional reforms were to enter into ef-

21. By ignoring the allegations that the constitutional reforms attempted to change the system of government, the NSC circumvented the application of its own jurisprudence (NSC Decision #8 of May 8, 1995, in which the Court held that “for constitutional reforms to be total [and therefore requiring a constitutional convention] they should affect the existence of the state or the form of government or its democratic inspiration . . .” as it was in the case at issue). S. No. 8, 8 May 1995, Boletín Judicial Vol. 17, [Supreme Court] p. 12, Cons. II (Nicar.).

22. S. No. 52, 30 Aug. 2005, Boletín Judicial Vol. II [B.J.] [Supreme Court] pp. 421-23, Cons. IV. (Nicar.).

23. See *supra* note 11. The irony of this portion of the decision is that by invalidating the Preamble of the Statute that enacted the reform, the Court purports to uphold the independence and division of powers that were otherwise eroded if not nullified by the reforms themselves that the Court had left intact.

24. The language in question read as follows: [The constitutional reforms would be effective] only “by consent of the three principal political players in the country: the two major parliamentary [political parties] groups and the Government.” S. No. 52, 30 Aug. 2005, Boletín Judicial Vol. II [B.J.] [Supreme Court] pp. 421-23, Cons. IV (Nicar.).

25. The basis for this portion of the NSC decision was the fact that this language was added by the National Assembly in its second debate and was not included in the reforms initially approved by the legislator the previous year. A dissent by Dr. Ivan Escobar emphasizes the power of the Court to pass judgment on procedural grounds (*in procedendo*) but not otherwise (*in iudicando*), although the dissenter hints at the need for a constitutional convention in connection with the reform’s drastic changes from the presidential system to a parliamentary one. See Ivan Escobar Fornos, opinion cited, *supra* note 7, at 473.

26. Instrumental in those negotiations were OAS Secretary General Jose Miguel Insulza and OAS Secretary for Political Affairs Ambassador Dante Caputo, who met with the political players in Nicaragua and propitiated a dialogue among the parties. As Dr. Arrighi puts it: “The OAS fulfilled an important role by guaranteeing the full respect to the democratic regime in Nicaragua. President Bolaños was able to conclude his term and after democratic elections transferred power to his successor.” See *supra* note 12.

fect in January 2007, thus averting the legislative coup d'état against the Government and allowing President Bolaños to finish his term.²⁷

During the constitutional crisis, we have seen the legislative power twisting the words of Constitution to its side²⁸ and proceeding to encroach on the executive branch. We have also seen the NSC, with piecemeal (superficial) decisions, validating the political takeover by the legislative branch. From their "constitutional" points of view, for the legislative power, it was just a partial reform to the Constitution; and for the judiciary, it was a valid act of Congress where the procedure, as provided for in the Constitution, was followed and complied with. In short, form above substance and the birth of Formal Democracy in Nicaragua.

Had the Nicaraguan legislative power understood that its proper role is to legislate and to work with co-equal branches of government for the common good of the people, those reforms would never have been passed. Had the NSC understood that its role was to preserve democracy and the rule of law, as consecrated in the Nicaraguan Constitution, those so-called partial reforms would have been declared unconstitutional.

III. CONCLUSION

It has not been our primary purpose to analyze the decisions of the NSC or to pass judgment on the procedural grounds that led to those actions in Nicaragua. Our purpose is to unmask evil by showing truth—because truth shines in darkness.

If we have learned something from the IABA's 60+ years of championing the rule of law or from last year's WJP, it is that democracy and the rule of law are not only matters of constitutional dogma or, even less, of compliance with certain procedures. That is what some political undercurrents in Latin America would like us to believe.²⁹ There are indeed fundamental concepts and principles, but above all, for those concepts to become part of the social fabric, they need to be accepted by the people³⁰ and become a belief

27. On January 10, 2008, the NSC declared unconstitutional Law # 610 as well as Laws #s 551, 512, 539 referred to above. See *supra* note 10. S. No. 1, 1 Jan. 2008, not yet published in the Boletín Judicial [B.J.] [Supreme Court] Cons. III. (Nicar.).

28. To its political purpose of the season, to shackle the executive power.

29. I.e., the Chavez XXI Century Socialism and its followers.

30. When the U.S. Supreme Court has said in its many decisions that "it is a Constitution we are expounding," it is grounding its decision in the core beliefs of the people that enacted the Constitution. In a way, we may argue that, in doing so, the Court went even

system.³¹ In other words, it is imperative that those concepts and principles are part of community consciousness and beliefs, a common understanding of values worth living for—and dying for.

And so we go back, full circle, to the foundation of this construction, the human being, the individuals who vested the government with certain powers and rights for that government to better protect their rights and to assure them a better life in happiness, peace, and prosperity for all.³² Some may say that this is perhaps an illusion, but I submit to you that there is no better truth.

above the plain text of the Constitution, searching for those values and beliefs that gave way to the written Constitution. *M'Culloch v. Maryland*, 17 U.S. 316, 407 (1819).

31. Weingast, *supra* note 6.

32. There is a connection between the rule of law and economic, as well as political, development. For one thing, investment (national or foreign)—the *sine qua non* component of economic development—requires certainty in the rules of the game and the protection of rights—property rights in particular—which only the rule of law can guarantee. See Rule of Law, Economic Growth and Prosperity, Americas Society and Council of the Americas, July 2007. The World Bank, “Government Matters V: Governance Indicators for 1996-2005,” The World Bank. Doing Business in 2007 (Washington, D.C.: International Finance Corporation/The World Bank, September 2006). The World Bank, “World Development Report 2005: A Better Investment Climate for Everyone” (<http://go.worldbank.org/WVDAOSZJ20>).