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Constitutional Courts and the Armed Forces

Modern states need a corps of armed forces strong enough to provide security against external threats as well as to guarantee internal peace. But strong armies have also proven to be a threat to the regime and, specifically, to democratic stability, weakening the state and harming thousands of people. Powerful armies subordinated to democratic civilian governments are the puzzling exception where people with guns obey people without them (Przeworski 2011, 180). But how to create armed forces bounded by the democratic rule of law without jeopardizing its *sprit de corps* or its efficacy? In 1780 Thomas Jefferson said, "The freest governments in the world have their army under absolute government. Republican form and principles are not to be introduced into government of an army."[1] Absolutism is no longer an ideal model for organizing armed forces. True, they require strict discipline and a corporatist identity to work efficiently. But a history of military abuses, both within the armed forces as well as carried out by them, warns against prioritizing efficiency at the expense of accountability. Still the conundrum remains: How to obtain simultaneously the seemingly incompatible goals of having strong and efficacious militaries subjected to the rule of law?

Civilian governments and their armed forces clash over this quandary (cf. Barany 2012). When the dilemma is not dealt with successfully, an extreme outcome may be a coup d'état. Even if the generals seize power in the name of the rule of law "taking upon themselves the moral duty of deposing the illegitimate government," as the Chilean generals led by Augusto Pinochet declared in justifying the 1973 military takeover,[2] coups kill the democratic rule of law. The balance of authoritarian forces may produce something that resembles the engine force of constitutionalism (Barros 2002), or the courts may attempt to square the circle shedding some legality upon the usurpers (Mahmud 1994), but the democratic rule

[1] Thomas Jefferson, Notes Concerning the Right of Removal from Office, 1780. Papers 4: 282.
[2] Cited in Loveman and Davies (1997, 181).

of law simply does not mix well with military regimes. The recent examples of the brief democratic interlude in Egypt interrupted by a military coup in 2013, or the coup d'état in Thailand in 2014, confirm that democracy dies the day of the coup, despite the statements and press releases of the generals.[3]

Short of a coup, a fairly rare phenomenon these days, the dilemma posed by the need to have strong militaries bounded by law permeates civilian-military relations in every democracy. There is no easy and permanent solution; rather democracies deal with this dilemma in different ways depending on the context and specific circumstances. Sometimes the emphasis is put on the "strong armed forces" part of the dilemma, while other times the "bounded by law" part is stressed. Argentina, since its return to democracy, has moved toward the latter to the point of abolishing the military jurisdiction, making sure that the ordinary justice system processes all cases of all citizens including, of course, the members of the armed forces (see, e.g., Saín 2010). In contrast, after a Taliban terrorist attack in December 2014 the Pakistani democratically elected government empowered the military courts to try suspected Islamist militants, opening the way for a rapid but roughly hewed judicial process that could move defendants from arrest to execution in a matter of weeks (Walsh 2015). To strike a balance is a delicate act: too much transferring of power to the military and democracy may be hopelessly hurt; too much limiting of the military and democracy may be dangerously at risk. In short, finding a way to build limited but strong armed forces is difficult but key for democracies.

What can constitutional courts do about this? One view is that, essentially, courts cannot contribute anything useful in this domain because they are powerless or not well suited to intervene in these inherently political matters. According to Alexander Bickel, the rationale for the so-called political-question doctrine recommends judicial self-restraint and avoidance of issues when "the court's sense of lack of capacity is compounded by the strangeness of the issue and its intractability to principled resolution,

[3] In Thailand, three days after the coup, the National Council for Peace and Order junta issued order number 37, replacing civilian courts with military tribunals for trying some offenses. The order empowers the military court to prosecute all crimes in the Thai penal code, including *lèse majesté* crimes for insulting the monarchy and national security and sedition offenses. "The first person to be tried is former education minister Chaturon Chaisaeng. He has been denied bail and can be held for 12-day periods for a maximum of 84 days. There is a right to counsel but no right to appellate review" (note from the *Bangkok Post*, Friday, May 30, 2014, http://globalmjreform.blogspot.mx/; accessed October 16, 2015).

the sheer momentous of it, and the anxiety not so much that the judicial judgment will be ignored as that perhaps it should but will not be" (Bickel 1962, 184). More recently, Eric Posner and Adrian Vermeule argued that in times of security crisis "there is no reason to think that courts possessing limited information and limited expertise will choose better security policies than does the government" (Posner and Vermeule 2007, 12). The conclusion is clear: "In times of emergency, judges should get out of the government's way because government will choose good emergency policies and even when not, judicial intervention may only make things worse" (ibid.).

An alternative view suggests that constitutions and constitutional judges are devices to limit the arbitrary actions of governments (e.g., Sajó 1999; Stone Sweet 2012) and that, even in emergencies "governments should not be permitted to run wild, many extreme measures should remain off limits, because emergency measures have a habit of continuing well beyond their necessity" (Ackerman 2002, 16). When governments commit to not making arbitrary actions in exchange for taxes, investment, or support, giving autonomy to a court allowing it to punish deviances from previously made commitments is a device to make them credible (e.g., Ferejohn and Sager 2002; North and Weingast 1989). In this framework, courts' failure to impose limits on arbitrary actions undermines the credibility of the government, making judicial intervention a necessary condition.[4]

This book argues that the role of constitutional courts is neither to duck, leaving governments and militaries unconstrained, nor to strictly and systematically impose limits on them but rather that their role is to help these parties solve their own problems, in particular when they are informational. The book shows that under certain conditions constitutional courts' jurisprudence can provide information to civilian governments and their armed forces that reduces the uncertainty that surrounds their relations, helping them to cooperate and resolve their conflicts. Constitutional courts can be instrumental in striking a democratically accepted balance between the exercise of civilian authority and the legitimate needs of the military in its pursuit of order and national security, so that they can perform this function under conditions of security crises and emergencies. This role becomes even more relevant when the threats to the state come from within its borders.

[4] A similar debate can be found on whether and how courts should enforce socioeconomic rights (e.g., Dixon 2007; Motta Ferraz 2011; Rodríguez-Garavito 2011).

Informational Challenges in Civil-Military Relations

The constitutional dilemma of building efficacious armed forces bounded by law, and the consequent tension this generates between democratic civilian governments and their armed forces, is due in no small part to the ambiguous limits between the "military" and the "civilian" spheres. In this sense, Huntington argued, "the problem is not armed revolt but the relation of the expert to the politician" (Huntington 1957, 20). Should the military decide tactical or strategy questions only? What about tactical questions of special political importance such as nuclear tactics? What about tactics that involve the whole society, such as a mandatory draft? In countries that have never experienced a coup, notably the United States, the challenge of designing the proper division of labor between "military matters" and "civilian matters" has driven much of the civil-military conflict (Feaver 1999, 219).

The line becomes blurrier, and the stakes higher, in contemporary democracies with a history of military intervention in politics and where the armed forces' role is not confined to external defense but rather involves internal security. As Narcís Serra, former minister of defense in Spain from 1982 to 1991, one of the most contentious periods of the transition to democracy, puts it:

> One could study the adjustment of the armed forces to democracy in terms of the reduction of its reserve domains to areas of autonomy compatible with the democratic rule of law. . . . The demarcation of what are "military issues" or "civil issues" has generated a large number of conflicts between governments and the military. This is not surprising because it has direct implications for the scope for military autonomy and becomes embroiled in the debate about imprecise delineations of what is civil and what is military. (Serra 2010, 43, 202)

The fluid borders between the "civilian" and the "military" spheres create tension in their relation due to uncertainty. In particular, three types of uncertainties lie at the heart of the dilemma and are relevant to civilian-military relations: (1) uncertainty over the legal consequences of certain actions, (2) uncertainty over the bounds of the exceptions and emergencies permitted by the constitution, and (3) uncertainty about how to balance clashing constitutional principles or rules in particular cases. Consider the first type of uncertainty. In democratic countries where the armed forces are called on to face an internal security crisis, members of the military engage in combats and casualties take place. Are those casualties "homicides" that should be investigated and

eventually punished, or simply "deaths in combat" that are acceptable in cases of armed conflict?

The answer depends on whether there is an officially declared internal armed conflict because that implies the use of the International Humanitarian Law (IHL) that recognizes "deaths in combat."[5] If an internal armed conflict is not officially declared, casualties are investigated and processed through the lenses of the national criminal law and thus we can have a "homicide." But whether there is an internal armed conflict, or who should declare one, is far from clear. Governments resist officially declaring an internal armed conflict because this implies greater international oversight and possibly also the recognition of the status of combatants to enemy armed groups. Members of the armed forces, in turn, urge the governments "not to tie their hands" with inadequate legal constraints. In contrast, what is crystal clear is that whether the facts are seen through the lenses of criminal law or the IHL is highly consequential. For one, serving soldiers may be charged with homicide in a civilian court and go to jail vis-á-vis facing no charge or a disciplinary sanction by a military court.

Consider now the uncertainty over the bounds of the exceptions allowed by the constitution. Many constitutions recognize the military jurisdiction as a separate body of law, prosecutors, and courts that are created to take into account the specifics of the armed forces' job in order to give stability to the institution and legal security to its members. But who can be investigated and tried in military courts, and under what circumstances? Military jurisdiction can be broader, including not only military officials but also civilians for diverse types of crimes, or narrower, including only military officials for strictly military crimes. At one extreme, one can find that broad military jurisdictions have often served as impunity mechanisms to cover crimes not related to the military service or the security of the country. At the other extreme, military justice can be abolished, creating a unitary justice system on the grounds that this exceptional body of laws and officers violates established rights and principles of constitutional due process.[6]

[5] To put it simply, the IHL is the law of war and it is applicable in situations of external or internal armed conflicts. The IHL, of course, sets limits as to what is permissible in armed conflicts based on principles that regulate the use of force such as proportionality, humanity, or necessity. Chapter 6 deals with IHL and the judicial regulation of the use of force in more detail.

[6] According to Serra, "the move to a unitary judiciary has an immediate consequence in the process of democratizing the armed forces: it gets rid of an autonomous power center that has been used to making its own rules and ordering itself, even ideologically, in opposition to the wishes of the duly constituted government" (Serra 2010, 244). Interestingly, this is a similar line of reasoning to that of the Argentine Supreme Court justices who argued

What is the right scope of the military jurisdiction is uncertain. Taking the jurisprudence on this issue of the Inter American Court of Human Rights (IACHR) as a standard, arguably a normative consensus around three points has been reached: civilians do not belong in military courts under any circumstance; only members of the armed forces for strictly military crimes committed under service can be investigated and tried in this special jurisdiction; and, when grave human rights violations are involved, even military officials should go to ordinary courts.[7] However, individual countries fall below/on/above the standard, and the timing, velocity, and historical patterns greatly differ among countries. In Brazil,

that the military justice system was unconstitutional in *Caso López* (Fallos 54:577; 310:1797, March 2007).

[7] The list of the IACHR's most notorious cases on the topic includes the following: (1) *Caso Loayza Tamayo v. Perú. Fondo.* Sentencia del 17 de septiembre de 1997, Serie C, núm. 33; (2) *Caso Loayza Tamayo v. Perú. Reparaciones y Costas.* Sentencia del 27 de noviembre de 1998, Serie C, núm. 42; (3) *Caso Castillo Petruzzi y otros v. Perú. Fondo, Reparaciones y Costas.* Sentencia del 30 de mayo de 1999, Serie C, núm. 52; (4) *Caso Cesti Hurtado v. Perú. Fondo.* Sentencia del 29 de septiembre de 1999, Serie C, núm. 56; (5) *Caso Durand y Ugarte v. Perú. Fondo.* Sentencia del 16 de agosto de 2000, Serie C, núm. 68; (6) *Caso Cantoral Benavides v. Perú. Fondo.* Sentencia de 18 de agosto de 2000, Serie C, núm. 69; (7) *Caso Bámaca Velásquez v. Guatemala. Fondo.* Sentencia del 25 de noviembre de 2000, Serie C, núm. 70; (8) *Caso Las Palmeras v. Colombia. Fondo.* Sentencia del 6 de diciembre de 2001, Serie C, núm. 90; (9) *Caso Myrna Mack Chang v. Guatemala. Fondo, Reparaciones y Costas.* Sentencia del 25 de noviembre de 2003, Serie C, núm. 101; (10) *Caso 19 Comerciantes v. Colombia. Fondo, Reparaciones y Costas.* Sentencia del 5 de julio de 2004, Serie C, núm. 109; (11) *Caso Lori Berenson Mejía v. Perú. Fondo, Reparaciones y Costas.* Sentencia del 25 de noviembre de 2004, Serie C, núm. 119; (12) *Caso de la Masacre de Mapiripán v. Colombia. Fondo, Reparaciones y Costas.* Sentencia del 15 de septiembre de 2005, Serie C, núm. 134; (13) *Caso Palamara Iribarne v. Chile. Fondo, Reparaciones y Costas.* Sentencia del 22 de noviembre de 2005, Serie C, núm. 135; (14) *Caso de la Masacre de Pueblo Bello v. Colombia. Fondo, Reparaciones y Costas.* Sentencia del 31 de enero de 2006, Serie C, núm. 140; (15) *Caso Almonacid Arellano y otros v. Chile. Excepciones Preliminares, Fondo, Reparaciones y Costas.* Sentencia del 26 de septiembre de 2006, Serie C, núm. 154; (16) *Caso La Cantuta v. Perú. Fondo, Reparaciones y Costas.* Sentencia del 29 de noviembre de 2006, Serie C, núm. 162; (17) *Caso de la Masacre de la Rochela v. Colombia. Fondo, Reparaciones y Costas.* Sentencia del 11 de mayo de 2007, Serie C, núm. 163; (18) *Caso Escué Zapata v. Colombia. Fondo, Reparaciones y Costas.* Sentencia del 4 de julio de 2007, Serie C, núm. 165; (19) *Caso Zambrano Vélez y otros v. Ecuador. Fondo, Reparaciones y Costas.* Sentencia del 4 de julio de 2007, Serie C, núm. 166; (20) *Caso Tiu Tojín v. Guatemala. Fondo, Reparaciones y Costas.* Sentencia del 26 de noviembre de 2008, Serie C, núm. 190; (21) *Caso Usón Ramírez v. Venezuela. Excepción Preliminar, Fondo, Reparaciones y Costas.* Sentencia del 20 de noviembre de 2009, Serie C, núm. 207; (22) *Caso Radilla Pacheco v. México. Excepciones Preliminares, Fondo, Reparaciones y Costas.* Sentencia del 23 de noviembre de 2009, Serie C, núm. 209; (23) *Caso Fernández Ortega y otros. v. México. Excepción Preliminar, Fondo, Reparaciones y Costas.* Sentencia del 30 de agosto de 2010, Serie C, núm. 215; (24) *Caso Rosendo Cantú y otra v. México. Excepción Preliminar, Fondo, Reparaciones y Costas.* Sentencia del 31 de agosto de 2010 Serie C, núm. 216.

for instance, civilians constituted 13.5 percent of defendants in military court cases in the period 2002–12 (some 2,555 cases).[8] In contrast, the Argentinean Congress in 2008 derogated the Code of Military Justice and the whole military jurisdiction, considering it unconstitutional.[9] In Pakistan, as mentioned, military jurisdiction has recently been substantially enlarged (see Chapter 7).

Consider, finally, the third type of uncertainty. How to balance clashing constitutional rights or principles in particular cases? For instance, discipline is often mentioned as a necessary condition for the effective operation of the armed forces. And discipline is based on obedience. But should soldiers obey whatever orders they are given? What if complying with an order implies violating human rights, like killing innocent civilians? What if complying with an order implies going against one's most deeply held beliefs? In these cases, the principle of discipline clashes with either the right to object based on conscience or with the duty of not violating human rights. Going back to military justice: accepting that military trials need to be expedient (especially in situations of combat), should basic due process rights such as the right to know the charges against you and the right to be tried before an independent judge be upheld nonetheless? Under what circumstances is expediency more important than the observance of these rights, or the other way around?

Constitutional Courts as Mediators

Constitutional courts help solve informational problems to the extent that their jurisprudence mirrors what mediators do in conflict resolution. The literature on conflict resolution offers two contrasting decision-making styles, that of the arbitrator and of the mediator. In essence, an *arbitrator* adjudicates responsibility based on the record and the disputing parties "are confined by traditional legal remedies that do not encompass creative, innovative, and forward-looking solutions to disputes" (Sgubini, Prieditis, and Marighetto 2013, 2). In contrast, mediators "facilitate dialogue in a

[8] "Julgamento Militar é posto em debate," *O Globo*, August 3, 2014.

[9] See *Caso López* (Fallos 54:577; 310:1797, March 2007), a case about the right of due process in criminal cases that took place in March 2007, where a dissenting opinion by judges Zaffaroni and Lorenzetti argued that the military jurisdiction was altogether unconstitutional because the principle of independence of its judges is not guaranteed – the president is commander in chief of the armed forces. Following the reasoning set forth in that dissenting opinion, Congress in 2008 derogated the code of military justice and the military jurisdiction.

structured multistage process assisting the parties in identifying and articulating their own interests, priorities, needs and wishes to each other," thus helping the parties reach a conclusive and mutually satisfactory agreement (ibid., 3).[10] Arbitration tends to be a better dispute-resolution mechanism when a conflict is an isolated instance, but when the parties' relation transcends the particular conflict mediation tends to be more effective. For instance, a dispute-settlement procedure that avoids clear winners and losers, and that considers relations between the actors in the future, would be better for a conflict of a divorcing couple with kids who will very likely continue seeing each other for the rest of their lives (Singer 1994, 55).

Constitutional courts often deal with conflicts that have more resemblance to a family dispute than to an isolated strife. The institutional parties before the court keep their relation after a specific conflict between the individual holders of a particular office has been solved. For instance, in *United States v. Nixon* the Supreme Court limited the powers of any U.S. president, not of Richard Nixon. In other words, in most cases the parties before constitutional courts will continue to have a relationship independent of the specific identity of the holder of the position at the time of the dispute. In these cases, the constitutional court's jurisprudence will be more effective at resolving conflicts to the extent that it aims at solutions that transcend the present conflict (i.e., the disposition of the case) and instead looks ahead to forging a creative solution (i.e., rule making) that integrates the views of the actual actors in the dispute with the more permanent roles of the institutions, groups, or principles that they represent (cf. Uprimny 2004, 73–5; see also Bush and Folger 2004).

Whether the jurisprudence comes nearer to the arbitrator or the mediator model is consequential for the parties whose conflict reaches the court. In Bolivia in 2003, after months of massive demonstrations, the government called the military to combat protesters. By the end of the year, after a series of confrontations, the death toll reached eighty people and the wounded were in the hundreds (Kyle and Reiter 2013, 389). Some military officials were accused of having used force disproportionately and of

[10] In the literature on conflict resolution, arbitrators can impose a solution to a conflict but mediators cannot. I argue that constitutional courts can be seen as a particular kind of mediator, a "mediator with power" (Uprimny 2004, 69), that share with regular mediators the goal of helping the parties in a conflict to reach an agreement, but at the same time share with regular courts and arbitrators the capacity to impose a legal solution to a conflict. In a nutshell, I argue that constitutional courts can be seen as *commanding mediators*, but I use the shorter phrase *mediators* for simplicity. More details on this aspect of the literature on conflict resolution can be found in Chapter 2.

having violated human rights. Should they be tried in military or civilian courts? For years, in Bolivia cases like these were sent to military courts.[11] But on May 6, 2004 the Bolivian Constitutional Tribunal ruled that military personnel allegedly responsible for human rights violations had to be tried in civilian courts (Sentencia Constitucional 0664/2004-R). In reaction to this ruling, the leaders of the military confined their troops to barracks and held an all-day meeting to decide on a response. In an open letter, the military threatened the court with "grave consequences," and in the ensuing political standoff, the Bolivian president and the high courts dropped their efforts to hold the military accountable (Pion-Berlin 2010, 537–9).

Interestingly, the Bolivian Constitutional Tribunal cited a decision by the Colombian Constitutional Court in support of its ruling, in which the latter argued that the link between a crime and military service, a requisite to be tried in military courts, is severed in cases of grave violations of human rights (C-358 1997 MP Eduardo Cifuentes Muñoz).[12] But in contrast to the Bolivian decision that came suddenly, without a warning, the Colombian one built on a jurisprudential trend of gradual but progressive limitation of the scope of military jurisdiction.[13] Again in contrast to what happened in Bolivia, the Colombian armed forces accepted a ruling that they knew was coming, and they have come to adopt the criteria that military courts should never investigate or try grave human rights violations. The bottom line is this: the question is not whether courts should intervene in these inherently political matters but rather how they should do it. The more they approach the mediator style, the more effective they will be in helping actors solving their own problems.

In this book I advance a *Theory of Constitutional Courts as Mediators* that specifies the conditions under which it is most likely to observe courts playing that role. Essentially, the theory posits that to the extent that constitutional courts are independent, accessible, and have ample powers of judicial review, they are more likely to obtain and credibly transmit relevant information to the actors in a conflict in a way that helps them address the underlying informational causes of their conflict. Constitutional

[11] "In Bolivia, since the transition to democracy in 1982, human rights cases involving members of the military were handled by military tribunals that protected its members and failed to advance cases. . . . Despite hundreds of deaths at the hands of security forces, there were no convictions from 1985 to 2003" (*Human Rights Watch World Report* 2013).

[12] MP stands for "Magistrado Ponente," the judge who writes the draft of a decision that is discussed by the court.

[13] Details on the jurisprudential line can be found in Chapter 3.

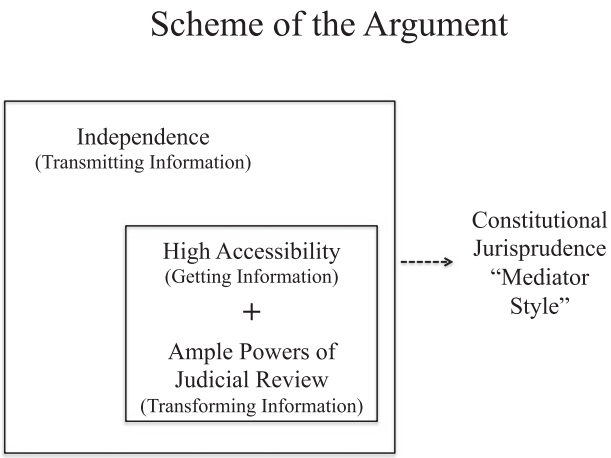

Figure 1.1. In the *Theory of Constitutional Courts as Mediators* judicial independence is a necessary condition. Given independence, more accessible courts with more powers of judicial review would be more likely to produce constitutional jurisprudence that mirrors what mediators do in conflict resolution.

courts that are more accessible gather more conflict-relevant information. Courts with higher judicial review powers – reviewing different types of cases, with higher levels of docket control and higher levels of discretion over how to decide cases – are more able to transform such information into creative and forward-looking jurisprudence. Courts that are more independent are more credible when transmitting such information. Independence is paramount because when judges lack independence they will tend to act as delegates of whoever controls them. Having independence, however, is not enough. Independent courts that are more accessible and that have more judicial review powers are more likely to produce mediator-like jurisprudence. In contrast, when courts do have independence, but they have meager judicial review powers and access to them is very limited, they would tend to behave more as arbitrators than as mediators. The general scheme of the argument is displayed in Figure 1.1.

The foundations of the *Theory of Constitutional Courts as Mediators* lie in the strategic account of judicial behavior. In this account, judges are strategic actors who realize that their ability to achieve their goals depends on the preferences of other actors, the choices they expect others to make, and the institutional context in which they act (Epstein and Knight 1998). The *Theory of Constitutional Courts as Mediators*