Binding the Armed Forces to the Rule of Law

The Role of Constitutional Courts in Latin America and Beyond

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Constitutional Dilemma

• How to bound the AAFF to the democratic rule of law without compromising its spirit de corps and efficacy?

• Present in all democracies

• More consequential in democracies with internal security crisis dealt with the AAFF
What can Constitutional Courts do?

• Jurisprudence can be a road map guiding actors’ behavior in conditions of uncertainty

• Providing `principled´ or `causal´ motivations for action channeling cooperation
Uncertainty About What?

- Legal consequences of actions
  - e.g. regulation of the use of force
- Limits to exceptions and extraordinary circumstances
  - e.g. the military jurisdiction
- How to balance conflictive rules or principles
  - e.g. liberty/equality vs discipline/obedience
Judicial Regulation of the Use of Force

• Is a casualty a “homicide” or a “death in combat”? 

• Is the crisis an internal-armed-conflict?

Colombia ✓
Peru ×
Mexico ----
Uncertainty About What?

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  – e.g. regulation of the use of force

• Limits to exceptions and extraordinary circumstances
  – e.g. the military jurisdiction

• How to balance conflictive rules or principles
  – e.g. liberty/equality vs discipline/obedience
Scope of Military Jurisdiction

“Who can be judged in military courts, and when?”

<table>
<thead>
<tr>
<th>Always</th>
<th>Emergencies</th>
<th>Always</th>
<th>Service</th>
<th>Military crimes</th>
<th>Human Rights</th>
<th>Never</th>
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<tbody>
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Measured by reading and coding opinions
Constitutional Courts as Mediators

Independent, accessible, and powerful constitutional courts can obtain and credibly transmit relevant information that reduces the uncertainty surrounding military intervention in internal security crisis.
Style of Decision-Making in Conflict Resolution

- Arbitration
  - LESS
    - Seeking Win-Win Solutions
    - Rule-Making
    - Lowering Uncertainty
  - Forward-Looking
- Mediation
  - MORE

- LESS
- MORE
The Armed Forces Before the Constitutional Courts

Constitutional Court

Citizens, NGOs, members of the Armed Forces, Legislators, Executive, etc…

Armed Forces
# Empirical Strategy

<table>
<thead>
<tr>
<th>Variation within countries across time</th>
<th>Variation across countries same time</th>
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Other cases within scope of argument: India, Israel, Turkey (Thailand, Indonesia, Pakistan)
1991-2013: THE COLOMBIAN CONSTITUTIONAL COURT AS MEDIATOR
(1) Mediation-like jurisprudence: Give and Take

- Progressive and gradual, but strong, 
  limitation of the scope of the military jurisdiction

- Respect for decisions made in the military jurisdiction
Decisions on Military Autonomy, 1958-2013

- Supreme Court: 1958-1991
- Constitutional Court: 1991-2013

Respecting Autonomy: 90 decisions
Limiting Autonomy: 45 decisions
(2) Mediation-Like Jurisprudence: Strategic

- "Marshall’s technique": announce doctrine but concede particular case

- Reduces uncertainty and gives time to actors to prepare for what’s coming

- e.g. Doctrine on states of emergency and scope of military jurisdiction
(3) Mediation-Like Jurisprudence: Trans late/form Actor’s Preferences

- International Humanitarian Law (HIL)
  - Judges declare “internal conflict”
  - Giving rules for Armed Forces – but rules of war
- e.g. is a death in combat a homicide (criminal code) or simply a death in combat (HIL)?
Impact on Civil-Military Relations

- Negotiations under the shadow of the (constitutional) law
- AAFF & Gov have embraced IHL
- AAFF accepted **limited scope** of military jurisdiction
- Gov and public opinion has accepted the specificity of AAFF’s work
THANK YOU