

**CONSTITUTIONS AND CONTROL OF THE MILITARY: CAN
THE EXPERIENCE OF THE AMERICAS ASSIST THE
MIDDLE EAST?**

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To demilitarize the country means to make a profound decision. It is not enough to change the name of the armed forces. It is necessary to change the minds of those people who only yesterday wore a military uniform. It is necessary to have the courage to ban the army as a permanent institution, and to say yes to a future when arms are no longer needed, when the force of reason prevails over any reason to use force.

–Oscar Arias Sanchez¹

On February 16, 2012, the Willamette Law Review and the Willamette Journal of International Law and Dispute Resolution conducted a symposium with two panels; one panel addressed constitutions in the “Middle East” and the other addressed constitutions in “Latin America.” While this might suggest two quite disparate discussions, the presentations illustrated general and recurring issues common to considerations of constitutionalism in both regions. This Article discusses one issue—constitutional mechanisms to control the military in a democracy—where the Latin American experience with constitutionalism may give relevant guidance to present efforts by reformers in the Middle East to transition to successful democratic governance. How may

for national defense while guarding against either the military or the executive supplanting the nation's own democratic governance and, in the worst incidents, committing major human rights abuses?

Two recent developments in the Middle East are of particular interest in the context of the Latin American experience with constitutions and the military. One is the United States' insistence that a peace plan between Palestine and Israel should result in a non-militarized Palestinian State. The second is the growing realization that the Arab Spring movement in Egypt, which brought about the removal of President Mubarak, has not removed the entrenched military power that fortified his decidedly undemocratic regime.

I. A NON-MILITARIZED PALESTINIAN STATE

On May 19, 2011, President Obama gave a major policy address at the State Department outlining United States policy in response to the "extraordinary change taking place in the Middle East and North Africa."² He included remarks directed to the Palestinian-Israeli conflict and a hoped for peaceful resolution of the conflict. The President stated:

[A] lasting peace will involve two states for two peoples: Israel as a Jewish state and the homeland for the Jewish people, and the state of Palestine as the homeland for the Palestinian people, each state enjoying *self-determination*, mutual recognition, and peace. . . .

. . . The Palestinian people must have the right to govern themselves, and reach their full potential, in a *sovereign* and contiguous state.

As for security, *every state has the right to self-defense*, and Israel

undermine the power of democratic governments.

II. EGYPT: MUBARAK GOES, DOES THE MILITARY STAY?

The second recent development in the Middle East in which past Latin American experience may be informative is the realization that the removal of a particular President, in this case Hosni Mubarak in Egypt, does not mean that an entrenched military with an independent source of financial support can easily be returned to civilian democratic control—the problem is clear. Two commentators recently observed:

One year after the revolution that ousted President Hosni Mubarak, the Egyptian military is closing down civil society organizations and trying to manipulate the constitution-writing process to serve its narrow interests. . . . Alarming, Egypt's army is seeking even greater influence than what Pakistan's top brass now enjoys: an explicit political role, and freedom from civilian oversight enshrined in law.⁶

The Egyptian military is deeply involved in the Egyptian economy. Since the late 1970's, the military has been active in undertaking economic development projects and in running enterprises in the mainstream Egyptian economy.⁷ A recent newspaper report observes:

At the heart of the gathering dispute in Egypt is an existential crisis for a military regime that is protective of its expansive political and economic privileges. The military has significant control over the economy, overseeing more than a third of Egypt's industrial production, according to some estimates.⁸

The military's direct role in the economy gives it an independent source of support that immunizes it, in part, from legislative efforts to

6. Michele Dunne & Shuja Nawaz, *Can Egypt Avoid Pakistan's Fate?*, N.Y. TIMES (Feb.

limit its role by reducing military spending.⁹ In a recent book review in the Washington Post, “The mili

enemy attack or a threatened Indian invasion.¹⁸ The first sentence of Article IX, listing the powers of the Confederation's Congress, reiterated that "[t]he United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war," providing again an exception for actual enemy attack of a State or threatened Indian invasion.¹⁹ Further, the same Article prohibited the United States from engaging in war unless a supermajority of nine out of the thirteen States agreed.²⁰ The same supermajority vote requirement applied to authorizing the number of naval vessels, the number of land or sea forces to be raised, and the appointment of the commander in chief of the army or navy.²¹ The Articles of Confederation reflect a strong desire to prevent the individual States from involving the United States in war by their unilateral action, to maintain State militias while controlling their ability to develop into full-time standing state military forces, and to require extraordinary consensus before the Congress could prepare for or engage in warfare.

The Constitution of the United States of America created a more complete and powerful federal government than had existed under the Articles of Confederation. In doing so, the founders, while not abandoning all concern for limiting State military actions,²² concentrated on the possible abuse of power by the Federal Government. With regard to the military and the authority to use military power, the drafters of the Constitution used the techniques to separate and balance powers, and control the appropriation of funds in an attempt to control the use of the military.²³ The powers to declare

18. *Id.*

19. *Id.* at art. IX.

20. *Id.*

21. *Id.*

22. U.S. CONST. art. I, § 10 ("No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, . . . or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."). *Cf.* U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.").

23. See Lori Fishler Damrosch, *War and Responsibility: A Symposium on Congress, the President, and the Authority to Initiate Hostilities*, 50 U. MIAMI L. REV. 181, 198 (1995) ("The framers' choices made for the Constitution of 1787 reflect their convictions that no one person, or body of persons, should have sole responsibility for deciding to go to war; that the person who would be crowned with the laurel of victory has the greatest temptation toward war and therefore should be denied the decision-making prerogative; that those who hold the purse strings should determine at the outset whether to incur the costs of conflict; and that the war power should rest with the most representative organ.").

war, to raise and support armies and provide and maintain a navy, to make rules to govern the land and naval forces, to call forth the militia and to organize, arm, and discipline it is given to the Congress.²⁴ The Constitution, on the other hand, gives the power to be Commander-in-Chief of the military forces to the unitary power of the President.²⁵ Most significantly, the authority of the Congress to control the use of the military by controlling funding is enforced by Article I, Section 9. It provides, in part:

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.²⁶

The power of the purse has proven to be one of the most important constitutional elements supporting Congressional efforts to counterbalance the President's role as Commander-in-Chief and to prevent military interference in domestic affairs.²⁷

Maintaining civilian control of the source of the funding for the military is a clear problem in Latin America where militaries are engaged in extensive commercial and other economic activities which give them an independent source of funding and political power, contributing to their ability to interfere in democratic governance. In Ecuador, for example, the military benefits from the exploitation of the country's oil resources and engages in many economic activities including manufacturing, banking, and commercial airlines.²⁸ A similar pattern of substantial direct, independent military involvement in the economic activity of the country exists in Honduras.

Constitution on “New Rights and Guarantees” contains Article 36, which states in part:

This Constitution shall remain in force even if its observance is interrupted by acts of force against the institutional order and the democratic system. Such acts shall be irrevocably void.

Their authors shall be subject to the sanction provided in Article 29, forever disqualified from holding public office and excluded from the benefits of pardon and commutation of sentences.

Also suffering the same sanctions shall be those who, as a consequence of these acts, usurp the functions reserved to the authorities of this Constitution or those of the Provinces, and shall answer civilly and criminally for their acts. The aforementioned actions are not subject to the statute of limitations.

All citizens have the right of resistance against those who execute the forcible acts stated in this article.³⁹

With this Article, the Constitution announces in advance that the a

is restored.⁴⁰

Argentina is not the only Latin American country to try such an approach. Honduras is another country with a long history of military disruption and usurpation of civilian governments.⁴¹ Honduras also tries to dissuade potential coups leaders and participants with a constitutional provision asserting that the Constitution remains binding in the face of a coup. A chapter of the Constitution titled “The inviolability of the Constitution” contains Article 375, which states:

This Constitution does not cease to be in effect nor does it cease to

experiences of Costa Rica and Panama, two countries that have voluntarily abolished their militaries to their political and economic advantage.

1. Costa Rica

Costa Rica has a different history than much of Latin America. Its relative geographic isolation in colonial times did not encourage the development of large landholders who amassed great wealth.⁴⁷ Rather, it developed a somewhat more homogenous culture and economy.⁴⁸ Its people largely avoided major violence and no strong military tradition emerged.⁴⁹ In 1948, however, a brief civil war occurred after the Congress sought to annul the results of a Presidential election.⁵⁰ The Civil War lasted 44 days and claimed the lives of more than 2,000 people.⁵¹ The Civil War was followed by a brief provisional government and the election of a constituent

assembly.⁵² What emerged was the Constitution of 1949, still in force in Costa Rica today.⁵³

Before the civil war, then-President Calderón Guardia fell into disfavor with many citizens who believed that he violated the nation's "tradition of opposition to a standing military force" because of actions taken during World War II when the United States had pressured Costa Rica to help defend the region.⁵⁴ The tradition of opposition to a standing army came to full fruition in the new Constitution when it abolished the army. As one commentator states:

The decision to do without a standing army had already been taken by the Governing Junta and was confirmed without greater

or make statements or representations individually or collectively.⁵⁶

Costa Rica has not merely formally abolished its military. Its citizens and judicial institutions have actually sought to develop, preserve, and enforce a broader tradition of pacifism. Symposium participants Professor Robert Barker and Professor Bruce Wilson have described the extremely active judicial review of constitutionality applied by the Sala IV, the constitutional chamber of the Supreme Court of Costa Rica.⁵⁷ Professor Wilson observed that Sala IV has become:

[a] major actor in Costa Rican politics and one of the most influential and activist courts in Latin America. The constitutional amendment that created the court sparked a judicial revolution that shook the country's judicial system out of a 200-year slumber and has touched virtually every aspect of the country's social, economic, and political life.⁵⁸

The Sala IV has shown little deference to either the executive or legislative branches of government and has remained steadfast in its exercise of judicial review. The Sala IV has taken the extraordinary step of finding justiciable claims asserted against the government alleging violation of Article 12.

In one lengthy decision, the court declared that statements by the Costa Rican President and Foreign Minister that endorsed the coalition of nations organized by the United States to support the invasion of Iraq had no legal effect. The Court recognized that Costa Rica, within its constitutional tradition, could praise the goal of returning respect for human rights to Iraq. But the Court concluded that Costa Rica could not constitutionally associate with the means—a military invasion. The Court stated:

[W]hat remains to be verified is whether this means is permissible in light of our constitutional order. On this point in particular, the

56. COSTA RICA CONST. art. 12. See BIRD, *supra* note 47, at 120–27 (describing the Constituent Assembly's adoption of Article 12).

57. Barker, *supra* note 53; WILSON, *supra* note 49, at 154–56.

58. Bruce M. Wilson, *Changing Dynamics: The Political Impact of Costa Rica's Constitutional Court*, in JUDICIALIZATION OF POLITICS IN LATIN AMERICA 47, 47 (Rachel Sieder et al. eds., 2005).

decision again focused on the peaceful heritage of Costa Rica. The court stated that the president's actions were unconstitutional in allowing Costa Rican citizens to display themselves in "a parade with military characteristics in Spain, while carrying the national flag, . . . which represents among other things, Costa Rican civility and repudiation of the army as a permanent institution."⁶⁴ Like the Iraqi case, the Court forbade the Executive from sending delegations giving the impression that Costa Rica possesses a military, and ordered the President work diplomatically with Spain to remove references to Costa Rica's involvement in the celebration of a military event from the Spanish Royal House website.⁶⁵

Sala IV has not always ruled in favor of challenges to government action brought under Article 12, however. One such case involved the constitutionality of the shipment of arms, tanks, and nuclear material through the country under the guise of the Treaty of Free Commerce between the Dominican Republic, Central America, and the United States. The Court cited the Iraqi case but found that shipment of weapons was, in fact, commerce, not military action.⁶⁶ Another instance involved whether the Legislature's project on the "Suppression of Maritime and Air Illicit Drug Trade of Narcotics and Psychotropic Substances in the Caribbean" violated Article 12 because it would involve the use of force outside of the country. The Court found that use of force to prevent drug trafficking falls within the police force's purpose of "conservation of the public order" under Article 12 and was not a violation of the principles of pacifism embodied in the Constitution.⁶⁷

Finally, the Costa Rican government has used the Country's abolition of the military effectively to its advantage in its foreign relations. For example, the country has pointed out that, in contrast to many developing countries, it can devote a much higher percentage of its available resources to education, health, and other social services than can those countries with expensive military commitments.⁶⁸ In

64. *Id.* (Lee Adams trans.).

65. *Id.*

66. Sala Constitucional, Res. No. 2007-09469.

67. Sala Constitucional, Res. No. 2009-018940.

68. For example, in addressing the United States Congress in 1987, Costa Rican President Oscar Arias stated:

I belong to a small country that was not afraid to abolish its army in order to increase its strength. In my homeland you will not find a single tank, a single artillery piece, a single warship, or a single military helicopter. In Costa Rica we

1978, the Costa Rican representative addressed the United Nations General Assembly:

I represent a very special nation and people that 30 years ago decided to entrust its internal security to a constitutional regime and its external defence to international order and solidarity,

intelligence and occasional CIA informant.⁷⁷ The United States tolerated Noriega's undemocratic actions and involvement in the illicit drug trade while he was complicit in the U.S.-instigated Contra insurgency in Nicaragua.⁷⁸ The United States ended its support when Noriega's behavior became erratic and his drug dealing activities more apparent. After nonviolent methods failed to force him from power, the United States invaded Panama in December, 1989, arrested Noriega, and shipped him to Miami to stand trial.⁷⁹ "The U.S. intervention removed Noriega from power and re-established constitutional order by restoring the winner of the May election, Guillermo Endara, to the office of President."⁸⁰ Since 1994, Panama has selected democratic governments through free elections.⁸¹

The post-Noriega period brought substantial constitutional reform in Panama. After an initial unsuccessful effort, the military was eliminated.

In 1991, a number of constitutional reforms, including demilitarization and the strengthening of the legislature vis-à-vis the President, were put forward by the legislature. However, they did not obtain the required majority in a referendum in 1992 in which 68 percent (68%) of the electorate chose to abstain from voting. Important objectives of the demilitarization reform had already been implemented by presidential decree, however. The Panama Defense Forces were renamed the Panamanian Public Forces (*Fuerza Pública Panameña*) and its ranks reduced from 15,000 to 12,000. A number of senior officers were purged through a combination of voluntary and mandatory retirements

A second round of constitutional reforms in 1994 was more successful. This time the reforms were adoin. Imp4(0.rtitutireforms w)10..

adopting identical amendment proposals . . . Legislative Act No. 2 of August 23, 1994 modified the Preamble to the Constitution by dropping any reference to the principles of the Panamanian Revolution contained in the original text, and abolished a standing military in Panama.⁸²

A new provision, Article 310, eliminates the military:

The Republic of Panama shall not have an Army.

All Panamanians are required to take arms to defend the national independence and the territorial integrity of the State.

For the preservation of public order, the protection of life, honor and property of those who live under the jurisdiction of the State and for the prevention of punishable acts, the Law shall organize the necessary police services, with authority and separate roster.

In the face of external aggression and by authority of the Law, special police services may be organized temporarily for the protection of the frontiers and jurisdictional spaces of the Republic.

The President of the Republic is the Chief of all services established in the present Title; and they, as authority agents shall be subordinated to civil power; therefore, they shall obey the orders issued by the national, provincial or municipal authorities in the exercise of their legal functions.⁸³

law.