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Judicial Review and Its Politicization in Central America: Guatemala, Costa Rica, and Constitutional Limits on Presidential Candidates

Michael B. Wise

I. Introduction

Judicial review, the power of a state’s courts or a particular court to make a binding determination of the compliance of legislative enactments and executive actions with constitutional norms, is an important element of modern theories of democracy and the rule of law. Both the constitutional history of the Americas

1. Professor of Law, Willamette University.
2. Professor Allan R. Brewer-Carias has recently defined judicial review in the Latin American context:

Judicial review of constitutionality is the power assigned to the courts to decide upon the constitutionality of statutes and other governmental acts; therefore, it can only exist in legal systems in which there is a written and rigid Constitution, imposing limits to the state organs, and particularly to Parliament. That is why judicial review of the constitutionality of state acts has been considered as the ultimate result of the consolidation of the rule of law, extensively developed in the Americas due to the democratization process.

and the policies employed in assisting democratization in the region in recent decades demonstrate the importance of the institution of judicial review in establishing effective democracy and ensuring the rule of law. As Julio Faundez has observed:

Strengthening the institutional capacity of courts is one of the main objectives of contemporary promoters of democracy and legal reform. Their objective is to enable courts to play an active part in restraining arbitrary action by governments and safeguarding constitutional rights. Among the many mechanisms developed to strengthen the political status of judiciaries, none is more important than the power to protect the integrity of the constitution through judicial review of legislation.

In fact, since the 1980s, many observers have commented on the increased "judicialization" of politics in Latin America. This is a process wherein courts,


4. Abraham F. Lowenthal & Jorge I. Dominguez, Introduction: Constructing Democratic Governance, in Constructing Democratic Governance: Mexico, Central America, and the Caribbean in the 1990s 6 (Jorge I. Dominguez & Abraham F. Lowenthal eds., 1996) (emphasis added)("Effective democratic governance requires not only that the governing authorities be freely and fairly elected but that the public share the expectation that the rulers will remain subject to periodic popular review and that they can be replaced through equally fair elections. It also implies that executive authority is otherwise constrained and held accountable by law, by an independent and autonomous judiciary, and by additional countervailing powers"); See also Tom Farer, Consolidating Democracy in Latin America: Law, Legal Institutions and Constitutional Structure, 10 Am. U.J. Int'l L. & Policy 1295 (1995); cf. Miguel Schor, Constitutionalism Through the Looking Glass of Latin America, 41 Tex. Int'l L.J. 1, 6 (2006) (stressing that the entrenchment of democratic constitutionalism is ensured not so much by formal independent judicial review as by the acceptance by political actors that "constitutional politics is played by different rules than ordinary politics").


often supreme courts or constitutional courts exercising judicial review, have become increasingly active in political disputes over areas of public policy that previously were contested almost entirely in the political branches of government. The increased role of courts in enforcing constitutional norms is generally a positive development in solidifying the rule of law in Latin America, yet some courts’ actions caution against an uncritical acceptance of judicial review.

At the most general level of political theory, judicial review is subject to the counter-majoritarian critique that a small number of unelected judges may invalidate the considered policy determinations of the democratically elected legislature and president. More specific critiques have particular relevance in Latin America. For example, it is important to acknowledge that judicial review is not automatically a force for either progressive change or for preservation of an unjust status quo. It is a powerful instrument placed in the hands of the few that can serve to perpetuate the power of established political elites; yet it is also a powerful instrument that can serve to protect the politically weak, the electorally disadvantaged, and minorities subject to discrimination from abuse in violation of the constitution. Particularly in a legal culture in which the respect for rule of

Recent Trends in Latin America, 11 DEMOCRATIZATION 104 (2004), see also Symposium, Judicial Review in the Americas . . . and Beyond, 45 DUQ. L. REV. 361 (2007).

7. Sieder et al., Introduction to JUDICIALIZATION OF POLITICS, supra note 6, at 3.


9. Farer, supra note 4, at 1300-01 (identifying a number of characteristics that distinguish Latin American countries and that may affect their successful application of judicial review).

10. United States v. Carolene Products Co., 304 U.S. 144, 152, n.4 (1938) (This is one of the rationales articulated in United States jurisprudence by Justice Stone to justify heightened judicial review); Sieder et al., Introduction to JUDICIALIZATION OF POLITICS, supra note 6, at 9 (In Latin America, the disadvantaged may be in the majority: “One of the standard criticisms of “judicial-made law” is that it leads to unelected and unaccountable judges replacing elected officials in the policy-making process. However, counter to this, many would argue that activist judiciaries can be good for democracy if they uphold and protect the interests of the weak and the underprivileged—who after all in many countries are the
law principles is not firmly entrenched, judicial review can be unscrupulously exercised to achieve undemocratic ends inconsistent with the constitutional order. This is especially true if the judiciary lacks either the inclination or the ability to maintain its independence. As Pilar Domingo observes:

Any assessment of the perils and merits of processes of judicialization of politics inevitably raises questions about levels of judicial independence and judicial review powers. These are problematic issues in established democracies, where there is in fact very little consensus about the optimum balance in the relationship between the branches of power. In the absence of an established tradition of rule of law, as in many younger democracies, there is the added perceived danger of the judiciary being politicized.

Political interference with the judiciary in Latin America can take many forms: from court packing, to legislative efforts to alter the courts' powers, to outright illegal activities such as bribery or intimidation of judges. To evaluate whether judicial review is serving to advance democratization and the rule of law or undermine that development, it is useful to address such questions in the context of concrete examples.

This article explores the issue of the use of judicial review and the judicialization of politics by examining two case studies from Central America. The first, discussed in section II, is from Guatemala where the Constitutional Court, contrary to prior decisions, circumvented a constitutional provision that makes any person who had served in the past in a leadership role in a government established during a coup ineligible to run for President. The second, discussed in section III, is from Costa Rica where, also in contradiction to prior decisions, the constitutional chamber of the Supreme Court struck down a constitutional amendment prohibiting the reelection of presidents on the ground that the legislature had utilized the wrong amendment procedure in adopting the limitation.

At bottom, the discussion presents a cautionary tale. Judicial review, if courts

overall majority—against the rich and powerful”).


12. Domingo, *supra* note 6, at 111.

utilize it corruptly or overzealously for partisan political ends, can threaten to undo constitutionalism itself by overturning basic constitutional provisions democratically adopted to limit the eligibility of presidential candidates.

II. Guatemala

In considering judicial reform in Guatemala, Rachel Sieder identifies a number of “key historical features” shaping the country’s legal culture:

[t]hey are, first, marked distance and separation between popular mechanisms for conflict resolution and the state’s judicial apparatus; second, acute and persistent socio-economic inequality; third, military dominance of political and legal institutions of the state; fourth, racism and discrimination against the majority indigenous population, and; fifth, very high levels of state violence.14

These factors hardly describe a setting likely to favor the success of judicial review. As might reasonably have been anticipated, the institution succumbed to the blatant abuse of elements supporting former military strongman General Rios Montt and his effort to avoid an apparent constitutional disqualification from running for the presidency.15

The signing of final peace accords on December 29, 1996, ended a 36-year conflict in Guatemala and the country turned to the enormous task of trying to effectuate a transition to democratic governance and a respect for human rights as envisioned in the accord and a series of earlier agreements.16 During the conflict, Guatemala had one of the worst human rights records in the world.17 Following the peace accords, developing the capacity to investigate, prosecute and punish

15. See infra text accompanying notes 71-95.
17. Jonas & Walker, supra note 16, at 3, 21-22 (explaining that more than 200,000 persons died in the civil war—over 85 percent at the hands of government soldiers and related paramilitary forces).
human rights violations became a priority. The Inter-American Commission on Human Rights observed in 2001:

Guatemala is no longer in the initial stage of transition from the era of the conflict; rather, it has reached the point in the process of reform in which certain systemic problems must be decisively and definitively addressed. The interrelated deficiencies in the administration of justice and the resulting situation of impunity for human rights violations constitute one such serious systemic problem. In order for the consolidation of the rule of law to move forward (ensuring social stability and a propitious climate for development), the rule in cases of human rights violations must be effective investigation, prosecution and punishment of those responsible.

Of particular concern, and of particular importance to our consideration, is the use of intimidation and corruption to undermine the independence of the judiciary. Much of the human rights focus has been on the investigation, prosecution and trial of violators in the courts of first instance, while less attention has been given to the functioning of the higher courts exercising judicial review. The exercise of judicial review by the Constitutional Court in Guatemala has been worthy of some praise. For example, the Constitutional Court blocked efforts to extend the use of the death penalty, played a role in 1993 in undoing an attempted auto-coup, issued a consultative opinion in 1996 finding international

18. *Fifth Report, supra* note 16 at 8. (In 2001, the Inter-American Commission on Human Rights stated: “The State acknowledges that the systems for public security and the administration of justice are gravely deficient. Among the problems identified by the State itself are abusive and arbitrary action by the police forces; the lack of institutional capacity to investigate and prosecute crime, especially when committed by State agents; and serious deficiencies in due process and the administration of justice.”)

19. *Id.* at 71-74. Professor Sieder observes: “The vulnerability of judges, lawyers and public prosecutors to internal and external intimidation, interference and corruption explains much of the weakness of the judicial system.” *Sieder, Renegotiating ‘Law and Order’: Judicial Reform and Citizen Responses in Post-war Guatemala, supra* note 14, at 146-47.

20. *Id.* at 100-02.


22. The prototype of an “auto coup” is the assumption of autocratic power by President Alberto Fujimori of Peru. In the auto coup, the constitutional order was breached not by the military deposing the President and assuming all governmental power, but by the President himself declaring martial law and suspending the Congress and the Judicial authority, all with the backing of the military; *See Edelberto Torres-Rivas, Guatemala: Democratic Governability, in CONSTRUCTING DEMOCRATIC GOVERNANCE, supra* note 4, at 50, 53 (explaining that in May 1993, Guatemalan President Jorge Serrano Elias decided “to break the reigning legality in the country in a brutal manner by dissolving the constituent powers of the state—the Legislative Assembly and the judicial branch—and by suspending the constitution”; *Id.* at 57-58 (showing with regard to the Constitutional Court, Torres-Rivas observes: “the forgotten power of some institutions and their staffs . . . was revealed in the actions of the Court of Constitutionality. This court ruled the coup unconstitutional and later rejected vice-president Gustavo Espina’s plan to succeed Serrano ‘constitutionally’

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human rights agreements to be superior to domestic law, and, in the past, blocked former General Rios Montt’s efforts to overcome his ineligibility to run for the presidency. Nevertheless, a detailed examination of how the Guatemalan courts and the Supreme Electoral Tribunal have dealt with Rios Montt’s repeated efforts to overcome the constitutional prohibition of his candidacy demonstrates the lack of independence and submission to political pressure of the Constitutional Court. The discussion focuses, in particular, on the Constitutional Court’s abuse of judicial review when it ordered that Rios Montt be placed on the ballot in 2003.

A. General Rios Montt and Article 186 of the Constitution.

General Efrián Rios Montt became de facto President of Guatemala in 1982 as a participant in a military coup d’etat. He led the country during a period of major human rights abuses. Amnesty International labels him as the “military strongman and head of state during what is generally held to be the most repressive period of the Guatemalan army’s counter-insurgency campaign in the Guatemalan countryside (1982-1983) . . . . [T]he General faces law suits both at home and abroad for genocide and other crimes against humanity.” Despite his appalling record, Rios Montt has remained a very active participant in Guatemalan politics and the leading force in the Frente Republicano Guatemalteco (FRG) political party. He served as head of the Congress during the administration of President Alfonso Portillo until the elections of 2003. In fact, Portillo ran as the FRG candidate and took office in 2000 only after the Supreme Electoral Tribunal and the courts held that Rios Montt was ineligible to run for the presidency himself. These past failures to obtain a place on the ballot, however, did not keep Rios

because he had participated in the auto-coup”); id. (showing that at the end of the auto-coup crisis, the Constitutional Court also imposed a 24-hour deadline for the election of a constitutionally legitimate president); see also, Rachel Sieder, The Judiciary and Indigenous Rights in Guatemala, 5 INT’L J. CONST. L. 211, 224 (2007).

See infra text accompanying notes 26-28.


26. Montt v. Guatemala, Case 10.804, Inter-Am. C.H.R., Report No. 30/93, OEA/ser. LL/V/II.85, doc. 9 rev. (1994) [hereinafter IACHR case] (showing that the decisions of the Supreme Electoral Tribunal, the Supreme Court and the Constitutional Court are described by the Inter-American Commission on Human Rights).
Montt from once again seeking to enroll as the FRG candidate for President in the 2003 elections.

Prior to 2003, Article 186 of the Guatemala Constitution of 1985, as applied by the Guatemalan courts, had successfully blocked Rios Montt's ambition to return to the Presidency. Article 186 provides:

Prohibitions Against Running for the Positions of President or Vice President of the Republic.

The following cannot run for the positions of President or Vice President of the Republic:

a. The leader or the chiefs of a coup d'etat, armed revolution or similar movement, who have altered the constitutional order, or those who as a consequence of such events have assumed the leadership of the government;

b. The person exercising the position of President or Vice President of the Republic when elections are held for said position or who had exercised same for any duration within the presidential term when the elections are held;

c. Relatives to the fourth degree of consanguinity and second degree of affinity of the President or Vice President of the Republic, when the latter exercises the office of the President, and those of persons referred to in the first paragraph of this article;

d. He who may have been Minister of State for any period during the six months prior to the election;

e. Members of the Armed Forces, unless they have resigned or retired for at least five years before the date of the call for elections;

f. The ministers of any religion or cult; and

g. The judges of the Supreme Electoral Tribunal.27

By its terms, Article 186(a), appears to make Rios Montt ineligible to run for president. Such prohibitions have a rich heritage in the Guatemalan constitutional tradition.28 The former dictator was undeterred by mere constitutional language, however, and over the years he has continually challenged the prohibition. His challenges met with no success until 2003, when a panel of the Constitutional Court, packed with a majority of Rios Montt supporters, ordered his inscription.29 To understand the complexity of the dispute over the years regarding Rios Montt's

27. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA art. 186 (1993) (emphasis added) [hereinafter GUAT. CONST.].
29. See infra text accompanying notes 80–86.
ineligibility, it is useful to review some of the most relevant Guatemalan governmental institutions and their relationship to the Constitutional Court.

**B. Relevant Government Institutions**

The Constitutional Court’s role in electoral matters is part of a complex set of relationships with other governmental entities. One such entity is the Supreme Electoral Tribunal (TSE), which was established in 1983 as part of an effort to transition to democracy in Guatemala.\(^{30}\) The TSE has a broad range of responsibility for organizing and supervising the entire electoral process including certifying the vote and declaring winners.\(^{31}\) Of particular importance to the Rios Montt case, the TSE is responsible for enforcing legislative and constitutional restrictions on voter and candidate eligibility.\(^{32}\) The Electoral Law provides for a Nominating Committee to propose a slate of thirty candidates from which the Congress selects five magistrates for the TSE and five alternates.\(^{33}\) In 2001, the Inter-American Commission on Human Rights concluded that “[t]he TSE plays a fundamental role in ensuring the credibility of electoral processes, and is [sic] generally enjoys the respect and confidence of the public.”\(^{34}\)

Second, the judicial branch in Guatemala is made up of a Supreme Court established by the Constitution and appellate and courts of first instance, including specialized courts, established by law.\(^{35}\) The Supreme Court has thirteen magistrates elected by the Congress for five-year terms from a slate of twenty-six candidates chosen by a special commission composed of representatives selected by defined social and political groups.\(^{36}\) The Constitution expressly states that the judicial branch shall be independent\(^{37}\) and also contains certain structural protections for judicial independence such as prohibiting removal from office during a judge’s term unless for cause, establishment of a judicial career track with civil service protections and protection of the judicial branches’ financial independence by allocating a fixed percentage of state revenues to it.\(^{38}\) In spite of

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31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. GUAT. CONST. art. 203. *See also* GUAT. CONST. arts. 217, 219-221 (showing references to Court of Appeals and other Tribunals).
36. *Id.* art. 214.
37. *Id.* arts. 203, 205.
38. *Id.* arts. 205, 208, 209, 210, 213.
these provisions on paper, however, judicial independence in Guatemala historically has often been severely challenged.39

Third, the Constitution of Guatemala of 1985 established an independent Constitutional Court.40 The Constitutional Court is authorized in Title VI of the Constitution, "Constitutional Guarantees and Defense of the Constitutional Order," and not in Title IV, "Public Power," which contains the authorization of the Supreme Court and the rest of the judiciary.41 The procedural mechanisms established in the Constitution to guarantee rights are habeas corpus,42 amparo 43 and an action of unconstitutionality, either in the regular courts in particular concrete cases44 or directly in the Constitutional Court against laws and regulations of a general character.45

The Constitutional Court has an unusual composition that shifts size depending on the nature of the defendant. These unusual aspects of the Court contributed to the irregularities in the 2003 Rios Montt case. The unusual composition is defined in Article 269:

The Court of Constitutionality consists of five titled magistrates each of whom will have his respective alternate. When it is seized with matters of unconstitutionality against the Supreme Court of Justice, the Congress of the Republic, or the President or Vice President of the Republic, the number of its members will be raised to seven, the other two magistrates being selected by lot from among the alternates.

The magistrates serve in their functions five years and shall be appointed in the following manner:

a. One magistrate by the plenary of the Supreme Court of Justice;

40. GUAT. CONST. art. 203. For a brief discussion of the history and structure of the Constitutional Court, see Maria Luisa Beltranena de Padilla, The Guatemalan Constitutional Court, 13 FLA. J. INT’L L. 26 (2000).
41. GUAT. CONST. tits. IV, VI. Articles 263-76 comprise Title VI of the Constitution. Articles 152-222 make up Title IV.
42. Id. arts. 263, 264.
43. Id. art. 265. The writ of amparo is an important procedural device present in many Latin American legal systems that is used to protect constitutional guarantees. “In... Guatemalan amparo serves a dual function: (1) as a summary remedy to protect individual rights not protected by habeas corpus, and (2) as a means of securing a speedy judicial declaration that a law or regulation does not apply to the plaintiff due to its unconstitutionality.” Keith S. Rosen, Judicial Review in Latin America, 35 OHIO ST. L. J. 785, 803 (1974). See generally Hector Fix Zamudio, A Brief Introduction to the Mexican Writ of Amparo, 9 CAL. W. INT’L L. J. 306 (1979).
44. GUAT. CONST. art. 266.
45. Id. art. 267.
b. One magistrate by the plenary of the Congress of the Republic;

c. One magistrate by the President of the Republic in the Council of Ministers;

d. One magistrate by the Higher University Council of the University of San Carlos de Guatemala; and

e. One magistrate by the Assembly of the Bar Association.

Simultaneously with the appointment of the magistrate, that of the respective alternate will occur before the Congress of the Republic.\textsuperscript{46}

In addition, Article 272, defining the functions of the Constitutional Court, contains another provision expanding the Court from five to seven members.\textsuperscript{47} The Constitutional Court hears appeals of writs of amparo brought before any court of justice. In the event the appeal is against a decision of the Supreme Court of Justice, however, the Constitutional Court once again expands to seven members with the addition of two alternates selected by lot.\textsuperscript{48} The provisions for expanding the size of the Constitutional Court were a factor in the 2003 controversial decision of the Court to permit Rios Montt to stand for the presidency.\textsuperscript{49}

\textbf{C. Earlier Decisions Prohibiting the Inscription of Rios Montt}

Prior to 2003, Rios Montt made two unsuccessful efforts to enroll as a candidate for president: once in 1990 and again in 1995. In August 1990, the Office of Voter Registration applied Article 186 and refused to enroll Rios Montt and, in the same month, the Supreme Electoral Tribunal (TSE) both rejected the appeal of the TSE decision and declined to reconsider its decision.\textsuperscript{50} Rios Montt and political parties associated with him then sought writs of amparo in the Supreme Court, alleging violations of their constitutional rights. On October 12, 1990, the Supreme Court rejected the appeal. It ruled that applying Article 186’s eligibility restriction to Rios Montt was not a retroactive application of law and that the restriction was not inconsistent with the right to political participation guaranteed by Article 23 of the American Convention on Human Rights.\textsuperscript{51} The Constitutional Court, in the same month, upheld the decisions of the Supreme Court by denying a request for a

\textsuperscript{46} \textit{Id.} art. 269.

\textsuperscript{47} \textit{Id.} art. 272(c).

\textsuperscript{48} \textit{Id.}

\textsuperscript{49} See discussion \textit{infra} at text accompanying Part II.E.

\textsuperscript{50} IACHR case, \textit{supra} note 26, at para. 10.

\textsuperscript{51} \textit{Id.} para. 11. The text of Article 23 of the American Convention on Human Rights is set out \textit{infra} at note 56.
ruling of unconstitutionality and denying a writ of amparo.  

In 1991, following his rebuff in the Guatemalan courts, Rios Montt filed a complaint with the Inter-American Commission on Human Rights challenging the determination of the Guatemalan Government that he was ineligible to be a candidate for President.  

Here again he was unsuccessful. Rios Montt alleged that the actions of the Guatemalan government, in excluding him from standing for election, violated a number of provisions of the American Convention on Human Rights.  

He asserted it violated his right to fair trial and judicial protection, to impartial administration of justice, and to be free from the application of an ex post facto law.  

Rios Montt also argued that his exclusion from the ballot violated his "right to participate in government" as well as the right of Guatemalan citizens to vote for him, a right allegedly protected by Article 23 of the American Convention.  

The Inter-American Commission decided that the exclusion of Rios Montt from the 1990 election did not violate the rights protected by the American Convention on Human Rights.  

The Commission recognized that Article 23 of the Convention created a right to be a candidate in a political election and that it only expressly allowed a State to impose limits on the basis of age, nationality, residence, language, education, civil or mental capacity, or sentencing by a

52. IACHR case, supra note 26, para. 14.  
53. Id. para. 1.  
54. Id.  
55. Id. at para. 15.  
56. Id. Article 23 of the American Convention on Human Rights provides:  

Right to Participate in Government

Every citizen shall enjoy the following rights and opportunities:  

a. to take part in the conduct of public affairs, directly or through freely chosen representatives;  
b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and  
c. to have access, under general conditions of equality, to the public service of his country.  

The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.  

57. IACHR case, supra note 26, at 215.
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criminal court. While the disqualification of a former president who served under a coup is not one of the grounds for regulation set out in Article 23, the Commission found that Article 32 suggested a broader framework for interpreting the Convention. Article 32 provides in part that "[t]he rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society." The decision suggests that it was appropriate to consider the issue at three levels. The first was "the convention as a whole and its relationship with the other principle instruments of the inter-American system." The Commission referred to the Charter of the OAS "and the many pronouncements down through the Organization’s one-hundred year history in reaffirming the constitutional democratic system as the bases and objectives of the action of the system and its component States."

The Commission’s second level of consideration was the context of Guatemalan and international constitutional law. The Commission noted that throughout the twentieth century, Guatemalan constitutions had prohibited leaders who had breached the constitutional order from running for President. Such ineligibility was also the practice in constitutions of other Central American nations, citing Nicaragua and Honduras. The Commission noted that such ineligibility provisions stemmed at least in part from the 1923 General Treaty of Peace and Friendship concluded among Guatemala, El Salvador, Honduras, Nicaragua and Costa Rica. The Commission described the relevant provision as follows:

"The contracting parties undertake not to recognize the governments of any of the five republics if they are taken over by a coup d'etat or if any of high elected officials have been "head or one of the head of a coup d'etat or revolution . . ." their blood relatives, or anyone who has held high military command immediately before or during such takeovers. The treaty also establishes the commitment to include the principle of non-reelection in their constitutions."

In light of these considerations, the Commission concluded: "[i]t is accordingly

58. Id. para. 19.
59. Id. para. 22.
60. Id. (quoting American Convention on Human Rights, supra note 56, art. 32.2).
61. Id. para. 21.
62. IACHR case, supra note 26, para. 23.
63. Id. para. 21. The court noted: "Among others the Constitutions of 1927, art. 25; 1935, RT.65; 1941, Art. 3; 1945, Art/131; 1956 Art. 161, and 1986, Art. 186." Id. at n.17.
64. Id. para. 26.
66. IACHR case, supra note 26, para. 27.
established that this ineligibility set forth in Article 186 of the Guatemalan constitution is a customary constitutional rule with a strong tradition in Central America.\textsuperscript{67}

The Commission next considered the Rios Montt complaint in the specific context of his exclusion from the ballot in Guatemala. This portion of the Commission’s report is of relevance to Rios Montt’s 2004 challenge to his ballot exclusion and also to the recent Costa Rican decision regarding the ineligibility of former presidents. The Commission assumes that the exclusion from reelection of a prior democratically elected president, either permanently or for a period of time, is common and permissible.\textsuperscript{68} The Commission used this observation to justify the exclusion of former heads of coups d’etat: “[i]f it is acceptable under constitutional law for a State to establish a constitutional term for democratically elected heads of state [citing Honduras, Mexico and Columbia], then it is perfectly conceivable that this same scope can be applied to those who lead a breach of constitution.”\textsuperscript{69} For these reasons the Inter-American Commission on Human Rights concluded that Guatemala’s determination that Rios Montt was ineligible to run for President in 1990 did not violate the American Convention on Human Rights.

In 1995, Rios Montt again tried to enroll as a candidate for president. The TSE, the Supreme Court, and the Constitutional Court following the logic of their prior decisions upheld Article 186 and excluded him from the ballot.\textsuperscript{70} While it might have appeared that the ex-dictator’s chances of running for president were at an end, the events of 2003 proved otherwise. Corruption and intimidation proved stronger than the rule of law. Only the voters, not the Constitutional Court, saved the day.

\textbf{D. 2003: The Constitutional Court Sells Out}

Rios Montt’s efforts to enroll as the presidential candidate of the FRG in 2003 at first were as unsuccessful as his previous attempts. Election officials denied his inscription based on Article 186 of the Constitution, and Rios Montt appealed that

\textsuperscript{67} Id. para. 29.
\textsuperscript{68} Id. para. 32-33.
\textsuperscript{69} Id. para. 35 (explaining that the Commission also argued by reverse analogy. “If the Commission considers that Article 86 establishes ineligibility that is inconsistent with the Convention, it would place in a privileged position those who breach the constitutional order compared to those who accede to high office in their countries constitutionally and democratically”); see \textit{Id.} para. 33.
\textsuperscript{70} See \textit{LEGITIMACY ON THE LINE}, \textit{supra} note 25, at 3.
denial to the Supreme Electoral Tribunal, which denied that appeal and his subsequent request for reconsideration. Rios Montt then requested a writ of amparo against the TSE decision in the Supreme Court. Again he alleged that the denial of his inscription violated the right to elect and be elected and that the application of Article 186 to make him ineligible because of conduct that occurred before the adoption of the Article was an impermissible retroactive application of law. Rios Montt premised his arguments on a right to elect and be elected on both the Constitution and on notions of fundamental human rights.

The Supreme Court, relying on its prior decisions, those of the Constitutional Court and the prior ruling of the Inter-American Commission on Human Rights, denied the requested writ of amparo in its decision of July 4, 2003. It held that the operation of Article 186 to Rios Montt was not a retroactive application of law. Rather the Article takes a fact that occurred in the past, participation in the breach of the constitutional order, and applies it to the future to determine who is or is not eligible to run for president under the Constitution. The Supreme Court noted that the legislative intent behind the Article 186 was precisely to protect the Constitution and the political system of the country from persons who had shown in the past that they were capable of disrupting the constitutional order. The Court drew an analogy to Article 187 of the Constitution that prohibits the reelection of a President who has already served in that capacity under the lawful constitutional order. It would be illogical to prohibit the reelection of such a person while permitting the candidacy of a person who had participated in the violent disturbance of the constitutional order.

Considering the claim that Article 186 violates human rights norms to be free to elect and be elected, the Supreme Court addressed Article 46 of the Constitution that provides: “The general principle is established that in the field of human rights

71. The procedural history of the Rios Montt case is described in decision of the Constitutional Court. Apelacion de Sentencia de Amparo, Expediente 1089-2003, July 14, 2003, Corte de Constitucionalidad (Guat.).
72. Id.
73. Amparo Rios Monte, Expediente No. 338-2003, July 4, 2003, Corte Suprema de Justicia Construida en Tribunal de Amparo (Guat.).
74. Id.
75. Id.
76. See GUAT. CONST. art. 187, Prohibition of Re-election. (explaining that “the person who has held for any time the position of President of the Republic through a popular election, or who has replaced the President for more than two years, is in no case eligible to hold the position. The re-election or extension of the presidential term by any means can be punished in accordance with the law. The mandate that he pretends to exercise will be null.”)
treaties and agreements approved and ratified by Guatemala have precedence over municipal law. It noted that the Constitutional Court had previously ruled that Article 46 established preeminence over national regulations but that treaties cannot modify or change the Constitution. The Supreme Court also recalled that the Inter-American Commission on Human Rights had already found that Article 186 did not violate the American Convention on Human Rights.

On July 14, 2003, the Constitutional Court ruled in favor of Rios Montt and ordered the Supreme Electoral Tribunal to list him as a candidate. The decision was taken by a vote of four magistrates to three and was a shocking departure from the numerous prior decisions denying his inscription. The majority determined that the case came down to two issues: first, whether Article 186 was retroactively applied, and second, whether or not the prohibition established by Article 186 is applicable in the present case. The majority answered yes to the first question and no to the second.

The majority opinion stated that the magistrates had reexamined the Court's prior view that Article 186 was not a retroactive application of the law. They concluded that Article 186 is applicable exclusively to events that occurred within the period of operation of the 1985 Constitution. The court found that the legislature intended to create a preventive, forward-looking rule that protects the constitutional order from future movements that may violate that order. The Court also considered the 1993 opinion of the Inter-American Commission on Human Rights and argued that the Commission had either addressed irrelevant questions or engaged in incomplete analysis. To the majority of the Constitutional

77. GUAT. CONST. art. 46.
78. Amparo Rios Monte, Expediente No. 338-2003, July 4, 2003, Corte Suprema de Justicia Construida en Tribunal de Amparo (Guat.).
79. Supra text accompanying notes 57 to 69.
80. Apelacion de Sentencia de Amparo, Expediente 1089-2003, July 14, 2003, Corte de Constitucionalidad (Guat.).
81. Editorial, Guatemalan Power Play, N.Y. TIMES, Aug. 1, 2003 (explaining that "[t]he Constitutional Court, the nation's highest, has bought the contorted argument that Mr. Rios Montt is not covered by a law that bars anyone who took power in a military coup from serving as president. Mr. Rios Montt took over the government in a coup, and the law clearly applies to him. In fact, it was approved because of his coup. It is legal sophistry to suggest, as the court did, that it does not apply to him because his seizure of power occurred three years before the law was adopted").
82. Apelacion de Sentencia de Amparo, Expediente 1089-2003, July 14, 2003, Corte de Constitucionalidad (Guat.).
83. Apelacion de Sentencia de Amparo, Expediente 1089-2003, July 14, 2003, Corte de Constitucionalidad (Guat.).
Court panel, the lower court invalidly restricted Rios Montt’s political right to run for election because the prohibition of Article 186, paragraph (a) should have been deemed inapplicable as he became the head of state of Guatemala on March 23, 1982, and the Constitution containing the prohibition was not enacted until January 14, 1986. They found that no constitutional prohibition applied so there was nothing to contradict or supersede Rios Montt’s right to run for election. The Constitutional Court also ordered that the Supreme Electoral Tribunal must act in accord with its decision within three days or the TSE’s members individually would be subject to fines and other civil and criminal penalties. Additionally, the Constitutional Court purported to prohibit the country’s other courts from receiving any further writs of amparo contesting its decision.

Three magistrates of the Constitutional Court dissented—Juan Francisco Flores Juarez, Rodolfo Rohrmoser Valdeavellano, and Carlos Enrique Reynoso. Each reiterated what they found to be an established principle of Guatemalan law—that the Constitution established the highest legal norm and cannot be superseded by an international treaty. Judge Rohrmoser, in particular, explained that the exclusion of Rios Montt did not violate his human right to be elected. No right is absolute and the individual’s interest is subject to necessary restriction required by overriding needs of the general welfare. To the dissenters, Article 186, paragraph (a) was such a restriction, was clearly intended to apply to Rios Montt, and was not a retroactive application of law. Judge Rohrmoser found Article 186 to be a situation where a law is binding for future situations but, as part of that future application, necessarily takes into consideration action that occurred in the past. He stated, “[i]that is not retroactivity, technically speaking; it is only the normal application of the law, meaning its effective application for the future, even if it is necessary to consider actions that took place in the past.” The dissenters’ views were consistent with the earlier opinions of the Constitutional Court, the Supreme Court, and Supreme Electoral Tribunal.

84. Id.
85. Id.
86. Id.
88. Id. (citing Article 32, paragraph 2, of the American Convention on Human Rights: “The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society”).
89. Id.
90. Id.
The July 14th decision of the Constitutional Court did not prevent other institutions and actors from trying to maintain the rule of law and enforce Article 186. For example, on July 20, 2003, the Supreme Court suspended the inscription of Rios Montt’s candidacy in response to a writ of amparo filed by two opposition political parties (UNE and Movimiento Reformador). In the period between July 20 and July 30, 2003, the FRG initiated several appeals of the decision of the Supreme Court’s order suspending Rios Montt’s inscription. The FRG did not limit itself to legal responses. Rather, as discussed in the next section, it undertook a campaign of increased violent intimidation against the courts and those who opposed Montt’s candidacy.

On July 30, 2003, the Constitutional Court took action to try, once again, to end all judicial opposition to its order requiring the inscription of Rios Montt as a presidential candidate. It ordered anew the former dictator’s inscription. It also, again, ordered that neither the Supreme Court nor other courts may entertain any further challenges to his inscription. Other valiant efforts to challenge the Constitutional Court continued but ultimately without success. For example, two former Presidents of the Supreme Court sought to bring an action of unconstitutionality against the inscription. Nobel laureate Rigoberta Menchú, on behalf of the Civic Front for Democracy, presented an ethical complaint against the four judges in the majority on the Constitutional Court. None of these efforts, however, stopped Rios Montt’s participation in the election of November 9, 2003.

E. Corruption and Intimidation Pervert Judicial Review and Undermine the Rule of Law

How was the institution of judicial review which had served effectively to enforce Article 186 in the past subverted? The answer lies in the pattern of corruption and intimidation brought to bear by Rios Montt and his supporters.

92. Id.
These actions included packing the Constitutional Court with FRG supporters, manipulating the selection of the judges to hear particular cases, death threats, and actual violence.  

Human rights organizations and other observers have noted that Rios Montt used his position as President of the Congress to pack the Constitutional Court with supporters. Judge Mario Guillermo Ruiz Wong who served as president of the Constitutional Court when it made its controversial decision had very strong ties to the FRG. He served as Minister of the Interior during the first six months of the Portillo presidency and was presidential security advisor when nominated for the Constitutional Court. Another Judge, Francisco Paloma Tejeda, had represented Rios Montt and other FRG deputies when they were charged with improper alteration of a law.

Judge Ruiz Wong is also alleged to have corrupted the process of selecting the judges and alternate judges to make up the panel of the Constitutional Court to hear the appeal of the Supreme Court’s denial of a writ of amparo to the former dictator and related cases. Allegedly, the selection ‘by lot’ was fixed to ensure a majority of Rios Montt supporters on the Constitutional Court composed to hear his appeal. In one instance, Ruiz Wong conducted the lottery in private and then merely announced the results. Later, Ruiz Wong, allegedly altered the weight of the lottery-type balls used to conduct the selection by lot. He did this to ensure the selection of Rios Montt supporters as alternate judges and thereby guarantee a four judge majority. Rios Montt himself is reported to have stated that he owns

96. See LEGITIMACY ON THE LINE, supra note 25, at 10-15.  
97. Id. at 2-3.  
99. Id.  
101. Id.  
103. Villaseñor, supra note 100.  
104. Id.; LEGITIMACY ON THE LINE, supra note 25, at 13 (Amnesty International reports: Critics, including some of Guatemala’s most eminent constitutional jurists, themselves
the votes of four Constitutional Court judges.\footnote{105} Such corruption is an obvious and direct threat to the independence of the judiciary and the rule of law.

Rios Montt and FRG supporters also were involved in efforts at violent intimidation to coerce the courts to support his inscription as a candidate. Violence, intimidation and resulting impunity have long been a problem undermining the judicial system in Guatemala.\footnote{106} Violence and intimidation were a major factor in the Rios Montt case after the Supreme Court’s order of July 20, 2003 suspended his inscription.\footnote{107} After the Supreme Court order, Rios Montt came close to expressly calling for violence.\footnote{108} In fact, July 24th is called “Black Thursday” because of the extraordinary level of violence that occurred just days after his statements.

On “Black Thursday,” trucks brought thousands of persons from the past presidents of the Guatemalan Bar Association and/or magistrates of the Supreme and Constitutional Courts, have argued that the CC’s decision was itself unconstitutional. They further charged that the president of the Court, an FRG supporter, had ensured that the magistrates who ruled on any important decision concerning the Rios Montt candidacy always included a majority of FRG supporters. This was reportedly done by pressuring magistrates who did not support the FRG to withdraw from participating in such decisions, including via anonymous threats and intimidation, choosing from amongst the available substitutes those who could be counted on to follow the FRG line.)

\footnote{106. U.S. DEPT. STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, GUATEMALA (2004), http://www.state.gov/g/drl/rls/hrrpt/2003/27900.htm, (The Constitution provides for an independent judiciary; however, the judicial system often failed to provide fair trials due to inefficiency, corruption, insufficient personnel and funds, and intimidation of judges, prosecutors, and witnesses.)

... Judges and prosecutors continued to receive threats designed to influence pending decision or to punish past decisions. Death threats and intimidation of the judiciary were common in cases involving human rights violations, particularly when the defendants were active or former members of the military, military commissioners, or former members of PACs. Witnesses were often too intimidated to testify. Plaintiffs, witnesses, prosecutors, and jurists involved in high profile cases against members of the military reported threats, intimidation, and surveillance.)

\footnote{108. LEGITIMACY ON THE LINE, \textit{supra} note 25 at 11 (Amnesty International reports: “General [Rios Montt] publicly denounced the decision as “illegal,” and warned that ‘[w]hen law is not followed, violence can occur [...] He announced that he and his party would be unable to control the anger of his followers ... words which many observers took to be a direct threat of the violence that then ensued.”).}
countryside, who were allegedly organized, paid, armed with weapons, including guns and gasoline, and directed to their targets by FRG supporters. The intimidation was directed in particular at the judiciary:

Institutions targeted included the country's Supreme and Constitutional Courts; the TSE; the offices of the newspaper, El Periódico; and El Centro Empresarial, (business centre) . . .

The homes of former Guatemalan president, Alvaro Arzú and of Rudolfo Rohrmoser, one of the magistrates of the CC who had voted against the candidacy of the General, were also targeted by armed groups. Rohrmoser had to be airlifted from the scene by helicopter to save his life. Earlier, several magistrates of the CC had received death threats. . . .

[The judicial branch closed down all of its buildings after receiving several bomb threats. . . .

[Even after President Portillo belated announced in the afternoon that he had ordered police to reestablish order,] some 300 demonstrators remained in front of the Supreme Court Building, where they were guarded by armed men firing shots into the air.110

This intimidation was followed five days later by the order of the Constitutional Court to reinstate Rios Montt's inscription and for all courts to refrain from further interference.111

The recent history of Guatemala's Constitutional Court and its decision to ignore the mandate of Article 186 of the Constitution demonstrates how fragile the institution of judicial review may be. Corruption and intimidation can take an instrument designed to serve the constitutional order and the rule of law and use it to undermine the foundation of constitutional democracy. It is commendable and encouraging that many courageous Guatemalan individuals and groups condemned the subversion of the Constitutional Court and sought to preserve the rule of law by bringing other legal challenges, ethical complaints, and expressions of public outrage. Nevertheless, it remains that judicial review was manipulated to subvert the constitutional order. Rios Montt was permitted to be a candidate in the 2003 election. Only the ultimate wisdom of the Guatemalan voters prevented the corruption and intimidation from having its intended effect. Rios Montt finished a distant third in the initial round of voting112 and was excluded from the run-off

109. Id. at 11-12.
110. Id. at 12-13.
111. See supra text accompanying notes 86 to 93.
election on December 28, 2003, won by Oscar Berger.  

III. Costa Rica

Costa Rica provides a sharp contrast to Guatemala. It has a homogenous population and relatively high standard of living for the region. It has enjoyed peaceful democratic government with only two brief exceptions since the late 19th century. In this context, Costa Rica has a rich history of experimentation with, and expansion of, judicial review. In fact, today it may be appropriate to question whether judicial review in Costa Rica has run to excess in judicial policy making. After briefly reviewing its historical development, this section will explore the current status of judicial review in Costa Rica. In particular, it will focus on the constitutional court’s recent decision nullifying a one-term limit on serving as President contained in a constitutional amendment. The Costa Rican decision and its context provide a useful comparison with the efforts to limit presidential candidates in Guatemala that Section II examined.

A. The Development of Judicial Review in Costa Rica

When Costa Rica gained its independence from Spain in 1821, it drew upon both its long civil law tradition as part of the Spanish empire as well as the new and popular structures of the U.S. Constitution. While it established the
judiciary as a separate and independent branch of government, the legislature retained the final say on questions of constitutionality. After the adoption of the Constitution of 1871, the judiciary began to develop a role in constitutional matters that eventually led to Costa Rica's modern system of judicial review. Until the 1930s, however, it was unclear who had the last word on constitutionality and there was, consistent with the civil law tradition, no principle of binding precedent. Subsequent legislation and the Constitution of 1949 clarified judicial review and established judicial supremacy. During the period prior to 1989, however, the mechanisms of judicial review were complicated: some constitutional issues could only be brought in the Supreme Court while others could be brought in lower courts; some decisions had precedential effect and others did not; and, further complicating matters, a declaration of unconstitutionality required an absolute two-thirds majority of the Supreme Court. The use of judicial review was also constrained by the attitude of the judges themselves. As Professor Bruce Wilson observes in describing this period, "[t]he Supreme Court had traditionally played a very low-key role, acting on the belief that the laws of the Legislative Assembly were valid unless they were obviously and glaringly unconstitutional." Discussions of reforming the system of judicial review in Costa Rica came to fruition in 1989 with the passage of three constitutional amendments and a new Law of Constitutional Jurisdiction. This is the present system of extensive judicial control of constitutionality concentrated in a special chamber of the

in Costa Rica, as it did elsewhere in Latin America).


120. Id. at 273-74.

121. Id. at 274-76. See also Robert S. Barker, Constitutional Adjudication in Costa Rica, U. MIAMI INTER-AM. L. REV. 249 (1985) for review of the system of judicial review in Costa Rica prior to the 1989 reforms.

122. Barker, Judicial Review, supra note 119, at 276-78.


Supreme Court. The present system is described by Professor Barker:

The 1989 reforms establish a new, Fourth Chamber of the Supreme Court, called the Sala Constitucional, or Constitutional Chamber, composed of seven members. It has exclusive, non-reviewable jurisdiction in constitutional matters with authority to declare, by absolute majority of its members, the unconstitutionality of all legal norms of whatever nature, and of subjective exercises of Public Law. The Law of Constitutional Jurisdiction expands the notion of constitutional adjudication in a number of ways, among them, by making clear that constitutional jurisdiction includes the protection of not only constitutional norms, but also of “constitutional principles”; and by including within constitutional jurisdiction the norms and principles of international law in effect in Costa Rica. Decision of unconstitutionality in actions of unconstitutionality, habeas corpus, and amparo constitute binding precedent, except for the Constitutional Chamber itself.

The 1989 reforms also continued, altered, or added other forms of judicial review beyond direct litigation. These include review of the constitutional grounds for presidential vetoes and modes of review by which either judges or the legislature may receive constitutional consultations from the Constitutional Chamber. In addition to the increase in constitutionally authorized methods by which claims may be brought to the court, the 1989 reforms also led to new rules facilitating access to the court. By reducing fees, eliminating the requirement to have a lawyer, allowing issues to be raised repeatedly, and greatly liberalizing requirements for standing, these new policies gave previously marginalized groups an enhanced voice in constitutional politics. With these reforms in place, and with new claimants in the courtroom, the Constitutional Chamber, known as Sala IV, has not been shy in exercising its power of judicial review in a wide range of disputes.

125. See Wilson & Handberg, supra note 119, at 534-43, (For an excellent, detailed discussion of the political context in which the reforms were adopted and a description of their political consequences).
126. Barker, Judicial Review, supra note 119, at 279-80 (citations omitted).
127. Id. at 281.
128. Id. at 286-88; Wilson & Rodríguez Cordero, supra note 123, at 326-28, 332, 343-47 (providing extensive analysis of the political impact of easy access to constitutional review in Costa Rica).
B. Judicial Review in the Politics of Modern Costa Rica

Several observers have commented on the role that judicial activism in the exercise of judicial review has come to play in Costa Rica. Bruce Wilson observes 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.130

The newfound judicial activism produced a large increase in the number of constitutional decisions in Costa Rica131 and has effectuated a substantial shift in political power within that society.132

The range of Sala IV’s activity is clear from even a brief description of some of its decisions. The Court has made a number of far reaching decisions concerning individual rights and in doing so has often broadly required substantial and expensive affirmative governmental action. For example, Sala IV ruled in favor of a prisoner’s challenge to overcrowding and eventually led to the construction of five new penal facilities.133 Sala IV ultimately supported claims of AIDS patients for free antiretroviral drugs.134 With regard to gender equality, the Constitutional Chamber upheld an attack on a provision that had permitted naturalization of the foreign wife of a Costa Rican male but did not permit the naturalization of the foreign husband of a Costa Rican female.135 It broadly decreed that any statutory use of the word “man” or “woman” would henceforth be considered the same as the gender neutral term “person.”136 In making this ruling, the Sala IV relied on

130. Bruce M. Wilson, Changing Dynamics: The Political Impact of Costa Rica’s Constitutional Court, in JUDICIALIZATION OF POLITICS, supra note 6, at 47, 47 [hereinafter Changing Dynamics]; see also Lowell Gudmundson, Costa Rica: New Issues and Alignments, in CONSTRUCTING DEMOCRATIC GOVERNANCE: MEXICO, CENTRAL AMERICA, AND THE CARIBBEAN IN THE 1990S 78, 83-84 (Jorge I. Dominguez & Abraham F. Lowenthal eds., 1996) (observing that “the court system has been drawn into a more interventionist, proactive stance regarding a whole series of issues formerly limited to the executive and legislative branches . . . . The new judicial activism is based . . . on the involvement of the ‘Sala IV’ or Constitutional Chamber in virtually every public dispute over the past decade.”).

131. Changing Dynamics, supra note 130, at 50-51.
132. Id. at 58-62; Wilson & Rodriguez Cordero, supra note 123, at 343-47.
133. Wilson & Rodriguez Cordero, supra note 123, at 342.
134. See Id. at 339-40.
135. See Barker, Judicial Review, supra note 119, at 284-85.
136. Id.; see also Fernando Cruz Castro, Costa Rica’s Constitutional Jurisprudence, Its Political Importance and International Human Rights Law: Examination of Some Decisions, 45
international law and its application through the provisions of the Constitution. Sala IV also relied heavily on international law norms in a case involving indigenous groups and environmental rights. Here it invalidated oil exploration concessions to the extent that they affected indigenous reserves when there had been no prior consultation with the indigenous communities as was mandated by international treaty obligations. Similarly, in the midst of a budget crisis in 2002, the Costa Rican government tried to limit the number of days that children would attend public school in the following year. The Constitutional Chamber ordered that the longer 200-day school year be implemented. It based its holding, in large part, on a bilateral treaty Costa Rica had entered with other Central American countries setting that number as a minimum. Sala IV's interpretation of both international standards and the domestic provisions of the Constitution led it to conclude that life begins at conception and that an Executive Decree regulating in vitro fertilization which would inevitably lead to the destruction of some embryos was unconstitutional. Sala IV has not always ruled against the state in controversial cases, however. In cases related to homosexuality, the Constitutional Chamber has sometimes ruled against challenges to conventional mores. For example, while it ruled against police harassment of the patrons of a gay bar and mandated broad police training, Sala IV rejected claims that a ban

137. Robert S. Barker, Stability, Activism and Tradition: The Jurisprudence of Costa Rica's Constitutional Chamber, 45 DUQ. L. REV. 523, 531 (2007) (footnotes omitted) [hereinafter Barker, Jurisprudence] (explaining "The 1989 reforms give unprecedented importance to international law. Article 48 of the Constitution, as amended in 1989, guarantees to every person the right to bring habeas corpus and amparo actions in the Constitutional Chamber to maintain or reestablish the enjoyment of rights guaranteed in the Constitution or "in international human rights instruments" applicable in the country. The Law of Constitutional Jurisdiction declares it to be the objective of the constitutional jurisdiction "to guarantee the supremacy of constitutional norms and principles and of International and Community Law in effect in the Republic." The Constitutional Chamber is empowered to guarantee those human rights recognized by International Law in effect in Costa Rica, and to see to the conformity of the internal legal order with International and (Central American) Community Law"). See id. at 531-35; Barker, Judicial Review, supra note 119, at 284-86.
139. Barker, Jurisprudence, supra note 137, at 537; Wilson & Rodríguez Cordero, supra note 123, at 342.
140. Barker, Jurisprudence, supra note 137, at 547-49; Cruz Castro supra note 136, at 568-69.
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on same-sex marriage violated rights to equality or free expression.\textsuperscript{142}

The Constitutional Chamber’s judicial activism has also extended to areas such as foreign and economic policy where many other countries’ systems of judicial review might show greater deference to legislatures and executives. In economic matters,\textsuperscript{143} labor unions have used constitutional litigation to overturn long standing prohibitions of strikes\textsuperscript{144} and to thwart neoliberal efforts to privatize the cellular phone service in Costa Rica.\textsuperscript{145} The boldness of the Constitutional Chamber’s actions in exercising constitutional control over foreign affairs is illustrated by its declaration that executive statements supporting the coalition of nations that invaded Iraq were of no legal effect because they were inconsistent with “the pacifist tradition that impregnates our constitutional order.”\textsuperscript{146} Sala IV proceeded to order the Costa Rican government to insist that the United States remove Costa Rica from a White House web site statement listing it as a supporter of the Iraq invasion.\textsuperscript{147}

Finally, in actively exercising judicial review, Sala IV has gone so far as to declare that portions of the Constitution itself are unconstitutional because they were not adopted by the procedures established in the Constitution.\textsuperscript{148} One example occurred in 1991 and involved a challenge to provisions providing for public campaign financing. As described by Professor Barker, “the Chamber held that the constitutional provision in question was unconstitutional because it had not been approved by a two-thirds majority of two separate sessions of the Legislative Assembly, as required by the Constitution, since some of its language had been added during the second session.”\textsuperscript{149}

Another example occurred in 2003 and involved a challenge to a constitutional provision that had been added by amendment and that limited a President to a single term of office. This decision, its rationale and its context are discussed in detail in the next section.

\textsuperscript{142} Id. at 252-56 (describing the case and its social context at length); see also Barker, \textit{Jurisprudence}, supra note 137, at 552.

\textsuperscript{143} See Gudmundson, supra note 130, at 84-86.

\textsuperscript{144} Wilson & Rodriguez Cordero, supra note 123, at 340-41.

\textsuperscript{145} Id. at 341; \textit{Changing Dynamics}, supra note 130, at 55-56.

\textsuperscript{146} Sala Constitucional, Res. No. 2004-09992, translated in Barker, \textit{Jurisprudence}, supra note 137, at 546; See also Cruz Castro, supra note 136, at 570-73.

\textsuperscript{147} Barker, \textit{Jurisprudence}, supra note 137, at 546.

\textsuperscript{148} Barker, \textit{Judicial Review}, supra note 119, at 286-87; Barker, \textit{Jurisprudence}, supra note 137, at 538-41.

\textsuperscript{149} Barker, \textit{Judicial Review}, supra note 119, at 287.
C. Striking the Constitutional Prohibition on Presidential Reelection

The Constitution of Costa Rica authorizes two different methods for its alteration. Article 195 provides for the partial amendment of the Constitution but does not define what constitutes a partial amendment.\(^{150}\) It provides that such a partial amendment must be submitted in the Legislative Assembly with the signature of at least ten Deputies or five percent of registered voters.\(^{151}\) If, after three separate debates, the Assembly accepts the proposal for formal consideration, "it shall be sent to a commission appointed by absolute majority of the Assembly, which has to render its opinion within a period of twenty business days."\(^{152}\) Following the submission of the opinion, the Assembly must approve the proposed amendment by an absolute two-thirds majority for the amendment to progress. Finally, the proposed amendment must be submitted to the next Legislative Assembly at its first session and again must receive two-thirds majority support to be adopted.\(^{153}\)

Article 196 provides for a "general" amendment of the Constitution but does not define what constitutes a general amendment. It states:

A general amendment of this Constitution can only be made by a Constituent Assembly called for the purpose. A law calling such Assembly shall be passed by a vote of no less than two thirds of the total membership of the Legislative Assembly and does not require the approval of the Executive Branch.\(^{154}\)

The distinction between a partial and a general amendment, with the attendant different procedures required for passage, became the focal point of the Constitutional Chamber’s decision in April, 2003, declaring that the Legislative Assembly had adopted the constitutional amendment prohibiting the reelection of a President under the wrong procedure and that the amendment was therefore inoperable.\(^{155}\) The decision came as the latest stage of a longer running

\(^{150}\) CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA art. 195 [hereinafter COSTA RICA CONST.].

\(^{151}\) Id. art. 195(1).

\(^{152}\) Id. art. 195(2), (3).

\(^{153}\) Id. art 195(7). As of 2002, there is an additional variation for a partial amendment. After approval by two thirds of one Assembly, that same assembly, again by a two-thirds absolute majority, may submit the proposed amendment to a national referendum. 195(8) (added by Law No. 8281 of May 28, 2002).

\(^{154}\) COSTA RICA CONST. art. 196.

controversy in which the Constitutional Chamber became involved in a highly controversial political dispute.

The 1949 Constitution of Costa Rica provided that a person who served as President could not be reelected to that office unless eight years had elapsed between the end of the first term and the beginning of the second term. The Legislative Assembly amended this provision in 1969 to prohibit any Presidential reelection, and it did so by using the provisions for partial amendment of the Constitution authorized by Article 195. The prohibition remained in force from 1969 until the Constitutional Chamber's judgment in 2003. President Oscar Arias Sánchez, who served from 1986-1990 and received the Noble Peace Prize for his work on the Central American Peace Plan, and his supporters began to challenge the ban on reelection in the 1990s. In fact, former President Arias formally announced on December 1, 1999 that he would seek to run in the 2002 presidential elections and that he would seek a constitutional revision to permit him to do so. Other members of his political party who planned to seek the nomination, however, strongly opposed his proposal. Arias succeeded in having some Deputies from his political party propose an amendment to the Constitution in the Legislative Assembly to remove the prohibition, but the party remained severely divided. When things moved slowly in the Assembly, Arias took further actions to try and force the changes he sought. He took the highly unusual step of organizing a private referendum on the reelection issue, paid for from his own funds and private contributions, to be conducted outside the schools, within which members of his party were conducting the party's own election. Although a high percentage of those who voted in the private referendum favored reelection, they represented only a small percentage of Costa Rica's total electorate and the referendum had little effect on the Assembly.
Arias supporters took another controversial action seeking to allow his reelection as the debate on the proposed amendment to achieve that goal continued in the Legislative Assembly. They filed a challenge to the constitutionality of the 1969 amendment in Sala IV even though Arias himself had previously stated that "to request the Sala IV to declare the prohibition unconstitutional would be 'an undemocratic action.'" The challenge presented both substantive and procedural claims. Substantively, it asserted that the prohibition on reelection violated both the right of a person to stand for election and the right of members of the electorate to vote for whom they wished as arguably protected by the American Convention on Human Rights. This is essentially the same argument that, as we have seen, was rejected by the Guatemalan Supreme Court and the Inter-American Commission on Human Rights. Procedurally, the challengers argued that the Chamber should declare the 1969 amendment unconstitutional because the commission mandated by the Constitution to consider the proposed revision had taken longer than the 20 days specified in the Constitution to issue its report. In 2000, Sala IV rejected the claim that the 1969 amendment was unconstitutional. The Chamber held that it lacked the judicial competence to review the substantive merits of the challenge because to do so would intrude on the separate powers given to the political branches of government. It also rejected the procedural challenge holding that invalidation of the amendment would be an inappropriate remedy for the violation of a time limit where the legislative assembly otherwise was authorized to make an amendment. The political decision of the Legislative Assembly and the judicial decision of the Sala IV defeated former president Arias' attempt to gain a place on the ballot in 2002. Those decisions did not, however, stop his efforts to seek reelection in the future.

164. Changing Dynamics, supra note 130, at 53 (citing Alejandro Urbina, Reelección contra el impasse, LA NACIÓN (Costa Rica), Dec. 6, 1999).
165. Cerrati, Note & Comment, supra note 155, at 197.
166. See supra text accompanying notes 54-62.
167. Cerrati, Note & Comment, supra note 155, at 197.
168. Barker, Jurisprudence, supra note 137, at 538.
170. Cerrati, Note & Comment, supra note 155, at 198.
171. Changing Dynamics, supra note 130, at 53-54. For a useful summary of the political dispute surrounding the 2000 court challenge to the ban on reelection, see Tim Rogers, Court Dashes Hope for Reelection, TICO TIMES (Costa Rica), Sept. 8, 2000, http://www.ticotimes.net/archive/09_08_00_1.htm.
In 2003, Arias supporters again brought a challenge to the reelection prohibition in the Constitutional Chamber. The challengers’ hopes were undoubtedly buoyed by the changes in the membership of the Chamber since 2000 that increased the number of known supporters of reelection. The hopes of the challengers were not disappointed when the Sala IV ruled on April 4, 2003, by a 5 to 2 vote, that the 1969 amendment imposing the total ban on reelection was itself unconstitutional. The Chamber’s majority produced an elaborate opinion drawing mainly on its interpretation of Costa Rican constitutional history, political theory, and its conception of fundamental rights. The decision, in part, rested on the Chamber’s determination that there were fundamental interests involved both in a citizen’s ability to vote for whomever he or she desired and in an individual’s right to stand for election. These fundamental interests to elect and to stand for election, however, were not absolute rights that could never be altered. If that were the case, the Sala IV might have found itself in the position of holding that the original 1949 Constitution’s eight-year hiatus in reelection was unconstitutional. Rather, the Chamber held that the fundamental interests to vote for whom one chooses and to stand for election could only be limited by the people exercising its constituent power through a constituent assembly and not by the Legislative Assembly exercising the legislative power delegated to it in the Constitution. To the majority, the difference between a partial reform of the Constitution and a general reform, therefore, was qualitative and not quantitative. Because the 1969 Amendment banning presidential reelection limited fundamental interests of voting and election, it properly could only have

172. WILSON, Changing Dynamics, supra note 130, at 54, (Prof. Wilson observing “in the intervening three years the composition of the court had changed. The Sala IV’s presidency had moved from Luis Paulino Mora Mora (who voted against reelection) to Luis Fernando Solano Carrera (who voted in favor). More importantly, two magistrates who voted against lifting the ban on reelection had retired from the court and were replaced by magistrates who favored presidential reelection”).


174. Cerrati, Note & Comment, supra note 155, at 192-93; Cruz Castro supra note 136, at 573-76; see COSTA RICA CONST. art. 195.

175. Sala Constitucional, Res. No. 2003-02771 (Apr. 4, 2003), translated in Barker, Jurisprudence, supra note 137, at 539, (Prof. Barker provides a translation of this portion of the Chamber’s decision: “[T]he partial or total reform of the Political Constitution does not refer to the number of norms reformed, rather it points to a qualitative aspect. Qualitative, in the sense that if the purported reform implies change of the essential aspects of the socio-political and economic life of the nation, or the restriction of fundamental rights and guarantees, and even though it may involve only a single constitutional norm – or one of its subsections – the Legislative Assembly could not, through partial-reform procedure, approve such a reform without violating the Constitution”).
been adopted under the procedures of Article 196 for a general reform that require
the election of a Constituent Assembly. Since the Legislative Assembly had
adopted the 1969 Amendment prohibiting presidential reelection using the
procedures of Article 195, the amendment was inoperable and the original
provision of the 1949 Constitution requiring only an eight year hiatus between
presidential terms was restored since it had been adopted by a Constituent
Assembly.176

Two of Sala IV’s seven magistrates dissented from the decision.177 They
asserted that the right to be elected was not absolute and that a person who had
served as president had freely exercised that right.178 The restriction against
reelection to a specific office does not violate the right to be elected to that office
in the first place nor does it preclude running for any other office. The dissenters
argued further that the amendment prohibiting reelection had neither altered the
organization of the state nor modified the constitutional system for regulating the
national economy and was therefore a partial reform of the constitution
appropriately enacted under Article 195 of the Constitution.179

Sala IV’s decision on reelection stirred controversy. Political opponents of
former President Arias strongly criticized the Constitutional Chamber’s decision.
Some called it a legal barbarity, a seizure of state, or criticized that the court had
become a co-administrator and co-legislator and that this would have harmful
consequences for democracy.180 Critics challenged the decision as politically
motivated since the change of three judges in the Chamber accounted for the
reversal of the Court’s contrary decision in 2000.181 At least one Deputy in the
Legislative Assembly directly accused the Chamber of submitting to political
pressure.182

The very different approach taken by the majority of the Sala IV in 2003 from
its approach in 2000, coming directly after the change in composition of the

176. Barker, Jurisprudence, supra note 137, at 539.
177. Sala Constitucional, Res. No. 2003-02771 (Apr. 4, 2003) (dissenting opinion of
Magistrates Mora and Arguedas).
178. Id.
179. Id.
180. Dóriam Díaz, Lluvia de críticas a la Sala IV, LA NACIÓN (Costa Rica), Apr. 6, 2003,
http://www.nacion.com/in_ece/2003/abril/06/pais2.html; Changing Dynamics, supra note
130, at 61.
181. Id. See supra text accompanying note 172-73.
182. Mauricio Herrera U., Congreso no puede cercenar derechos: Reelección es un derecho

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Chamber, suggests that the magistrates may have reached the decision with their eyes set on a desired political result. The elaborately constructed rationale of the decision further suggests that the court was determined to reach a result allowing former President Arias to run again. In fact, observers soon questioned whether the Constitutional Chamber’s opinion had thrown into question all of the constitutional amendments adopted under the 1949 Constitution since the Legislature had adopted all of the amendments as partial reforms under Article 195.183 While the Chamber subsequently limited this potential of the reelection decision, its mere existence shows how boldly the majority had stepped into political terrain.185 In doing so, it may have fundamentally altered the nature of the political process in Costa Rica by weakening the political power of the legislature and increasing that of the presidency.186 While such a new balance may or may not be propitious, it is questionable whether it should be accomplished through the undemocratic and politicized application of judicial review. In addition, if the Constitutional Chamber is seen as highly politicized it may well jeopardize its present popular support.187 Finally, by requiring that a constituent assembly is necessary to authorize even a very specific change in the Constitution if the change would affect a fundamental right, the Constitutional Chamber has increased the possibility that such an assembly might be called. This raises the significant danger of uncontrolled and unpredictable action by such an assembly.188

183. Id.; see also, David Boddiger, Court OK’s 2 Terms for Presidents, TICO TIMES (Costa Rica), Apr. 24, 2003, available at http://www.ticotimes.net/archive/04_24_03_.htm.
184. Barker, Jurisprudence, supra note 137, at 539-41.
185. The Attorney General of Costa Rica stated that “the Chamber has assumed the role of defining topics of a political nature that are not proper [for a] Constitutional Tribunal [to define],” but attributed the court’s action as being caused by shortcomings of the legislature and the political parties. See Cruz Castro, supra note 136, at 575-76 (citing Guillermo Arce & Federico Tinoco, REELECCION EN COSTA RICA: GOLPE DE ESTADO “CONSTITUCIONAL” O REAFIRMACIÓN DEL ORDEN CONSTITUYENTE 170-71 (Costa Rica 2005).
186. Wilson, Changing Dynamics, supra note 130, at 54, (Professor Wilson concludes: “This ruling has two related momentous impacts on the political life of the country. First, the ruling is likely to re-equilibrate the balance of power between the legislative assembly and the executive . . . . On another more immediate level, the Sala IV’s ruling dealt a severe blow to the assembly’s policy-making sovereignty. The assembly had, with overwhelming majorities, twice rejected the reintroduction of presidential reelection in 2000. On the most obvious level, the court’s ruling was a public statement limiting the legislative assembly’s presumed powers”).
187. See id. at 60-62.
IV. Conclusion

Since the 1980’s, reformers have increasingly utilized judicial review in efforts to entrench the rule of law in Latin America. Such efforts have often increased respect for the courts and allowed marginalized groups to assert their interests more effectively. Nevertheless, the inherent anti-democratic nature of judicial review and the opportunity for its abuse when judges lack independence, are subject to intimidation or corruption, or act from partisan political motivations pose continuing challenges to democratization and the rule of law.

In Guatemala, the Constitutional Court’s 2003 order that former general Rios Montt be placed on the ballot as a presidential candidate was an astonishingly blatant display of the effect of corruption and violent intimidation. Rios Montt and his supporters in the streets, as well as the majority on the Constitutional Court, made a mockery of respect for the rule of law.

In Costa Rica, on the other hand, that democratic nation’s respect for the rule of law rests on longstanding and strong tradition. Constitutional reforms in 1989 expanded authorization for judicial review of constitutionality and the Constitutional Chamber of the Supreme Court has actively exercised that power. The Court’s actions generally have met with popular support and experts have regarded them with approval. Nevertheless, as the Constitutional Chamber addresses more and more highly political issues and intrudes in policy matters formerly resolved by the political branches, it runs the risk of backlash against perceived excessive politicization of its role.

The dangers to democratization and the rule of law are increased when constitutional courts undertake to limit the effect of constitutional provisions designed to place controls on who may stand for election for president. Unfair constitutional constraints on who may run for election to the presidency have not been a problem in Latin America. Quite to the contrary, the historical problem has been either continuismo, the practice of incumbent presidents remaining in office for long periods of time, or the suspension of the established legal order by military seizure of the state. In fact, the frequent usurpation of power by Latin American presidents in the past is featured in the arguments of political theorists

189. See supra text accompanying notes 124 to 129.
urging rejection of presidential systems of government in favor of parliamentary systems.  

Those responding to challenges to presidential systems point to constitutional protections like the provision of effective presidential term limits as an appropriate solution to these asserted problems with presidential systems. In fact, term limits are common in countries with presidential systems. In other regions struggling to establish democratic governance such as Africa, the establishment of presidential term limits is considered a major advance in constitutionalism and not a violation of rights. Thus the partisan use of judicial review to interfere with presidential term limits is especially problematic. Such limits, like judicial review itself, are important tools in the protection of democratic government and the rule of law. Constitutional Courts will best serve the cause of democratic government if they are active in the defense of the rule of law and the protection of fundamental rights but are not engaged in partisan political battles.


195. As a North American commenting on the threat that political partisanship can pose to the effective and legitimate implementation of judicial review in Latin America, I humbly acknowledge that the United States' Supreme Court is not immune to the same temptation. In Bush v. Gore, 531 U.S. 98 (2000), a majority of the Court determined the outcome of the 2000 United States presidential election in a decision that arguably intruded into matters constitutionally committed to resolution by the Congress and that utilized a rationale that stretched its prior doctrine to the breaking point. See, e.g., Bush v. Gore: The Question of Legitimacy (Bruce Ackerman ed., 2002); Howard Gillman, The Votes That Counted: How the Court Decided the 2000 Presidential Election (2003); The Vote: Bush, Gore and the Supreme Court (Cass R. Sunstein & Richard A. Epstein eds., 2001).