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Institutional Innovation and the Steering of Conflicts in Latin America

Edited by
Jorge P. Gordin and Lucio Renno

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Chapter Seven

Constitutional Courts as Third-Party Mediators in Conflict Resolution: The Case of the Right to Prior Consultation in Latin American Countries[1]

Andrea Pozas-Loyo and Julio Rios-Figueroa

Introduction[2]

Ordinary courts help to solve conflicts. The basic social logic of courts is rooted in the triad for conflict resolution: whenever two actors come into a conflict that they cannot themselves solve they call upon a third for assistance (Shapiro 1981: 1). According to this simple but universal view of courts, the effectiveness and efficiency of the third-party is related to the extent that she is impartial to the issue in dispute and neutral to the parties in conflict, as well as to the extent to which it applies pre-existing legal norms after adversary proceedings (Shapiro 1981). Constitutional courts do more than help to solve specific conflicts: their authoritative interpretation of the constitution is a means for adapting existing institutions and rules of the political game to changing conditions. Constitutional jurisprudence also helps political actors and regular citizens adapt their views and preferences to make them compatible with the constitutional framework and principles. Constitutional courts are able to weigh in and mix different points of view, asking for opinions and discussion about the possibilities of constitutional interpretation to integrate popular, governmental, and other actors' views into constitutional interpretation (Friedman 1993). In a nutshell, constitutional courts can contribute to institutional stability allowing for the punctual adaptation of existing institutions and actors to changing conditions and challenges.

Constitutional courts are a relatively recent institutional innovation across Latin American countries. Although judicial review of legislation and certain government actions has been present in some countries in the region since the second half of the nineteenth century, it was not until the third-wave of democracy that we see a clear regional shift towards delegating this authority to judges who were also made independent (Rios-Figueroa 2011). In the last

1. We are grateful to Tulia Falletti, Jorge Gordin, and Lucio Renno and the participants of the Diego Portales workshop for comments and suggestions.

2. Parts of this chapter, in particular parts I and II, are based on Ríos-Figueroa (2016), where details of the theory are further developed.

three decades several institutional innovations took place in the systems of constitutional justice of the region: autonomous constitutional courts have been created in some countries, such as Brazil or Peru. Supreme Courts, or one of its chambers, have been invested with greater constitutional review powers, as in Mexico or Costa Rica. Access to constitutional justice has been broadened considerably in countries like Colombia or Costa Rica. At the same time, the list of justiciable rights has been expanded in virtually all constitutions of the region. In general, the gist of this institutional change is the incorporation of a new actor, the constitutional judges, with power to breathe new life into new or reformed constitutions across the region.

However, interesting variation not only in the timing but also in the content of judicial reforms across Latin American countries is expressed in diverse levels of independence, access, and judicial review powers of constitutional judges. These institutional elements are crucial for making constitutional courts effective forums to produce jurisprudence that allows for institutional stability through the gradual accommodation of the interests of the relevant actors. In this chapter, we take advantage of the variations in constitutional courts' levels of independence, access, and judicial review powers across Latin American countries to assess the role of these relatively new institutions in conflict resolution, emphasising how they help other institutions and actors to adapt to changing and challenging circumstances while keeping themselves within the constitutional framework.

To illustrate this role of constitutional courts we focus on an old conflict that has been reframed given the recently gained visibility of marginalised indigenous groups in Latin America. The conflict is between governments (and businesses), on the one hand, and indigenous communities, on the other, due to the attempts by the former to promote development via the extraction of natural resources or the construction of mega infrastructure projects in lands inhabited by the latter. Indigenous communities used to have few or no means to either stop or at least benefit from those development efforts. However, in 1989 the International Labor Organization (ILO) adopted the *Convention 169 on Indigenous and Tribal Peoples* that includes a right to prior consultation, which essentially requires that indigenous and tribal peoples be consulted on issues that affect them. In the Latin American countries that have ratified the *Convention 169*, the old conflict has been reframed as one pitting governments, seeking to encourage private investment with a view to promoting development, against indigenous peoples asserting their rights to use and enjoy their lands and to protect and manage them according to their own worldview. In this conflict, governments and indigenous communities claim to act according to their constitutional prerogatives and obligations.

This chapter is about the role that constitutional courts play in solving conflicts surrounding the right to prior consultation. In essence, it argues that constitutional courts' jurisprudence can serve as a road map guiding the behaviour of relevant actors and institutions under conditions of uncertainty, helping them to adapt to changing conditions (cfr. Goldstein and Keohane 1993: 16). Specifically, constitutional courts can reduce three types of uncertainties that lie at the heart of the seemingly incompatible goal of promoting simultaneously the rights of

indigenous communities and economic development: uncertainty over the legal consequences of certain actions, uncertainty over the bounds of the exceptions and special circumstances allowed by the constitution, and uncertainty about how to balance clashing constitutional principles or rules in particular cases. Constitutional courts can provide a road map to drive through uncharted territory, helping actors determine their own goals and alternative political strategies by which to reach these goals within the bounds of the constitution.

In what follows, we first present the *Theory of Constitutional Courts as Mediators* (Ríos-Figueroa 2016), which argues that constitutional courts that enjoy high levels of independence, access, and judicial review powers can produce constitutional jurisprudence on the right to prior consultation that reduces uncertainty and promotes institutional stability and cooperation among conflictive actors. Then we illustrate our theoretical claim with instances from Colombia, Peru, and Mexico. In the final section of the chapter, we conclude by pointing to some general lessons on the role of constitutional courts in promoting (or not) institutional stability and cooperation through conflict resolution.

A Theory of Constitutional Courts as Mediators

The political science scholarship on courts and judges stresses that courts not only check the government, disabling arbitrary actions, they can also enable the government to reach other goals. Specifically, recent scholarship theorises on the role that courts play in bringing about normatively appealing outcomes such as regime stability, human rights protection, or investment and economic growth by enhancing the *credibility* of government *commitments*, by providing focal points that help solve *coordination* problems, or by transmitting information that reduces the uncertainty that hinders *cooperation* between actors (e.g. Barro 1997; Blomquist and Ostrom 2008; Frye 2004; Gibler and Randazzo 2011; Milgrom, North, and Weingast 1990; North and Weingast 1989; Reenock, Staton, and Radean 2012; Sutter 1997; Weingast 1997). Through different mechanisms, therefore, constitutional courts can thus promote institutional stability and cooperation among actors.

To be clear, constitutional courts can help obtaining those goals but they do so through the solution of specific disputes. What makes the difference between courts simply solving specific disputes and courts that, in addition, contribute to obtain larger goals is *how* the court proceeds about solving them. The literature on conflict resolution offers two contrasting decision-making styles, that of the arbitrator and of the mediator. In essence, an *arbitrator* simply adjudicates responsibility based on the record and the disputing parties 'are confined by traditional legal remedies that do not encompass creative, innovative, and forward-looking solutions to disputes' (Sgubini, Prieditis, and Marighetto 2013: 2). In contrast, mediators help the parties reach a mutually satisfactory agreement 'facilitating dialogue in a structured multi-stage process assisting the parties in identifying and articulating their own interests, priorities, needs and wishes to each other' (Sgubini, Prieditis, and Marighetto 2013: 3).

Constitutional jurisprudence can approach the style of the mediator in resolving disputes. Mediator-like jurisprudence should aim at solutions that transcend the present conflict and instead look forward to forge a creative solution that integrates the views of the actual actors in the dispute with the more permanent roles of the institutions, groups, or principles that they represent (see Uprimny 2004: 73–75; see also Bush, Baruch and Folger 2004). Mediator-like jurisprudence does that by reducing the types of uncertainty established at the beginning of this chapter, and it is creative, forward-looking, and transparent in its argumentation that should be robustly grounded on constitutional principles and norms. This idea is not foreign to constitutional scholarship, especially the strand that consider constitutional courts as deliberative institutions according to which judges weigh reasons for and against an action, they deliberate, and then offer reasons for their decisions to the public (Ferejohn and Pasquino 2003, 2010).

The *Theory of Courts as Mediators* essentially posits that to the extent that constitutional courts are independent, accessible, and have ample judicial review powers they are more likely to produce mediator-like jurisprudence: they can obtain and credibly transmit relevant information to the actors in a conflict in a way that helps them address the underlying uncertainty that causes their conflict. Constitutional courts that are more accessible gather more information on how the actors in a conflict are actually operating under existing rules, and on whether the application (or lack thereof) of such rules is producing the expected results. Courts that review different types of cases, that have higher levels of docket control, and also higher levels of discretion over how to decide cases, are more able to transform such information into creative and forward-looking jurisprudence. Finally, courts that are more independent are more credible when transmitting such information. When courts lack independence they will tend to act as delegates of the actor to which they are subordinated. When courts have independence but they have meagre judicial review powers, or access to them is very limited, they would tend to act as arbitrators not as mediators.

In sum, independence is linked to the court's capacity to be credible. Access is related to the court's capacity to get information. And judicial review powers are related to the court's capacity to transform and transmit such information in an effective manner. In this theory, independent, accessible, and powerful constitutional courts transmit information via their jurisprudence, which has to have certain characteristics to be informative and cooperation enhancing. Let us look closer at the concepts of judicial independence, judicial access, and judicial review powers and explain how they combine to produce informative, mediator-like jurisprudence.

Judicial Independence: Credibility in Transmitting Information

In the most basic scheme of courts as third-party dispute settlers (Shapiro 1981) 'independence' is the bedrock for judges' legitimacy before the parties in the dispute, the political actors, and the public at large (see, e.g. Bybee 2010). It is thus a key element for courts, and under the courts-as-mediators framework it

is a necessary condition for judges to be credible. Without independence, judges would be mere delegates of those who control them undermining the credibility of the information they could transmit because it will always be biased towards the views of the controllers. In order to gauge independence it is useful to look at so-called *de jure* judicial independence, i.e. the formal rules that we think provide incentives to judges to decide based on her preferences. These incentives are contained in the appointment, tenure, and removal mechanisms and impact on whether the preferences of a judge diverge from those of the parties in the case, as well as on the extent to which judges can evaluate the cases before them, free from undue pressures. It is possible to state three conditions that appointment, tenure, and removal mechanisms should meet in order for judges to enjoy *de jure* independence:[3]

(i) At least two different organs of government (e.g. president and congress; the Supreme Court and the president; a judicial council and congress, etc.) appoint constitutional judges, or it is not the case that a single organ appoints a majority of judges in quota systems.

Whereas the above appointment condition is key to make the preferences of the judge differ from those of the government, conditions on tenure and removal mechanisms are important for judges to be the 'authors of their own opinions' (Kornhauser 2002: 42–45). If tenure is too short constitutional judges face incentives to curry favour with both the current and the incoming government with an eye in their next employment. Their views on issues, therefore, will likely be unduly influenced by what these parties prefer. Tenure need not be for life, but it should give judges a sufficiently long time horizon so that autonomous behaviour is incentivised. Similarly, if removal procedures are too easy, judges face a credible threat of removal if they vote according to their mind, given that their preferences diverge from those of the executive and the legislative. In a general way, the tenure and removal mechanisms should meet the following conditions:

(ii) The length of tenure of judges is at least longer than the appointer's tenure; and,
(iii) The process to remove judges is initiated by at least two-thirds of the legislature, and never by the executive.

Access to Constitutional Courts: Acquiring Information

Access to constitutional courts is directly related to how courts get information, how much information, and how often they have the chance to intervene in a conflict. This is a critical element of the *Theory of Courts as Mediators*. Constitutional courts are in a privileged position to learn how existing rules are

3. *See* Ríos-Figueroa (2011; 2016) and Ríos-Figueroa and Staton (2012) for more details on institutional incentives on judicial independence. On appointment mechanisms *see* (Malleson and Russell 2003).

actually working through reviewing specific complaints and controversies (Clark and Staton 2013). More access also implies that more actors can more easily sound the 'fire alarm' (McCubbins and Schwartz 1984) so that the court learns where exactly things are getting out of the proper constitutional bounds. In a nutshell, access is crucial because the more cases reach the court, the more the court learns, and the more information it can transmit. Notice that the constitutional court receives information from the plaintiff and from the defendant, which allows the court to learn both sides of the same issue. Moreover, the constitutional court also directly gets information on a particular topic or actor's behaviour from amicus briefs, other government actors (e.g., the solicitor general or the *procurador*), international court rulings, or experts that can be summoned by the court itself.

Constitutional judges with a continuous flow of cases not only will get more and more varied information, they will also be more able to express their jurisprudential preferences under favourable circumstances. If judges receive only a few scattered cases the scarcity of information is compounded by the fact that the chances that these cases arrive under non-favourable political circumstances are relatively higher. Moreover, wide and easy access to instruments of constitutional review implies that more and more diverse cases reach the judges allowing them to make subtler distinctions. On the contrary, when legal standing is restricted to state actors, the court gets fewer cases and political actors are parties to the case, which implies fewer external sources of information. Notice also that while other institutional elements augment the flow of cases, such as the automatic constitutional review of certain governmental decisions, still others reduce it, such as time restrictions to challenge certain government actions.

It is possible to assess the degree of access to constitutional courts by focusing on the scope of legal standing before the courts. In other words, one can look at how many instruments of constitutional review there are in a country and who are the actors that can use them. For instance, in some countries such as Mexico only political authorities can file constitutional challenges against laws in the abstract, but in other countries, such as Colombia, any citizen can file this type of suit. Because the instruments of constitutional review and their characteristics are stated in national constitutions, this is also a *de jure* proxy for access.[4]

Constitutional Review Powers: Processing and Transforming Information

The constitutional review powers of a court determine how the court processes and transmits the information that it gets. In other words, they are directly related to whether the court can produce informative and creative, i.e. mediator-like,

4. Therefore, the limitations of this proxy have to be taken into account. For example, this does not consider the capacities of actors to actually bring cases to the constitutional court. Specifically, for cases to reach the court it is necessary to have a legal opportunity structure, a support structure for legal mobilisation, and also an institutional framework that facilitates litigation (see, e.g., Epp 1998; Smulovitz 2010; Wilson 2006). Moreover, actual judicial decisions can give hope or promote despair on potential litigants with similar cases (Gauri and Brinks 2008; Helmke and Staton 2011).

jurisprudence. Constitutional review powers are related to how many different types of cases the court gets (e.g. abstract or concrete, *a priori* and *a posteriori*), to how much control over its docket a court has,[5] and to how much discretion a court has over the particular way in which a decision is processed and framed. A court that has discretion over its docket and sentencing guidelines can avoid cornering one actor asking it to comply with a resolution that is highly unlikely to be complied with, strategically managing conflict between the actors and avoiding setbacks for its own decisions. Discretion to pick cases also matters for efficiency, especially when the flow of cases to the court is very high (Clark and Strauss 2010).

Docket control and discretion on how to decide cases allow judges to better transmit information to the actors involved in a dispute and to better manage confrontation levels with and among them. Constitutional judges who can pick their legal battles can reduce the costs associated with their decisions. Flexibility on how to decide cases is greater when, for instance, there are no limits on time-to-disposition of cases, no limits on the topics that can be challenged with a given instrument, no super-majority requirements to reach a decision of unconstitutionality, or no instrument-dependent effects of judicial decisions. This last type of flexibility also helps judges to tailor their sentencing guidelines to reduce the likelihood of non-compliance, promote deliberation and cooperation, and minimise the chances of setbacks for its decisions.

To assess constitutional review powers and access to constitutional courts, an alternative is to look at the incentives set in formal mechanisms of judicial review. These incentives are of two types. The first impact the number of opportunities judges have to make decisions on a given topic (which is related to access, as mentioned before). The second impact the flexibility judges have to pick and choose which cases to hear and how to decide them. In conjunction, both types determine what and how many cases judges hear, how they craft their decisions, and the extent to which they can manipulate the degree of confrontation with the actors adversely affected by them. Therefore, these incentives are crucial for how for much information they get, and from whom, and for how effectively the constitutional courts can transmit the information they get. These incentives are contained in the characteristics of the instruments for judicial review available in a country (e.g. the *amparo* suit, the action of constitutionality, or the constitutional controversy), including who is entitled to use each of these instruments, how hard is to file them, or who is affected by decisions on them.

In sum, we suggest assessing levels of judicial independence, access, and judicial review powers through *de jure* incentives that are to be found in a country's

5. The writ of *certiorari* in the case of the United States is the obvious and most famous example. Most countries do not give to constitutional judges something like the *certiorari* power but some recognise the possibility of choosing which cases to hear from one type of instrument but not others (e.g. the *tutela* in Colombia). Other countries give to judges the possibility to attract some cases that are heard in lower courts when they consider them important enough (e.g. Mexico, Argentina).

constitution. To be sure, how these rules operate in practice may diverge from what they are intended to produce. Incentives found in formal rules constitute approximations to the concepts of interest, and would need to be contrasted to actual judicial decisions in a diversity of cases and situations, in order to fully gauge the impact of the incentives on behaviour. We use the *de jure* incentives as a standard against which we can then assess whether or not the expectations set in them are fulfilled (see Pozas-Loyo and Ríos-Figueroa 2007). We also take into account that institutional incentives are likely to be more effective under certain political conditions than under others. Specifically, we expect these incentives to be more effective under divided government and also with higher levels of public support for the courts, conditions that are also positive for compliance with judicial decisions (e.g. Ríos-Figueroa 2007; Staton 2010; Vanberg 2005).

Notice that under the Courts as Mediators framework, compliance with judicial decisions takes a distinctive character. Specifically, the informative jurisprudence implies that courts tailor decisions to produce agreements between conflictive actors, thus their decisions do not shame, do not create sharp winners and losers and underscore the iterated relation both among the parties and with the court. Moreover, in this framework compliance goes hand in hand with the transmission of information. For instance, courts-as-mediators can make use of forums where the parties in the conflict develop responses to the problems. These forums provide information to the parties about their preferences and view of the conflict, but they also increase public awareness and increment the costs on the parties for not complying (Botero 2014: 30). Transmitting information effectively does not assume compliance, but arguably simply issuing creative and forward-looking jurisprudence would incentivise the actors in the conflict to apply the solution suggested by the mediator.

Constitutional Jurisprudence on Prior Consultation in Latin America

The last decade witnessed an impressive rate of economic growth in several Latin American countries coupled with the reduction of poverty levels but also with an increment in the number and intensity of social conflicts. The causes of these conflicts vary but a significant proportion of them, including some of the most prominent, are associated with natural resources management and with resource exploitation and infrastructure projects. These conflicts pit two divergent views of development against one another. On the one hand, states seek to encourage private investment with the objective of promoting development without being viewed as infringing the relevant constitutional norms. On the other hand, indigenous peoples assert their rights to use and enjoy their lands and to protect and manage them according to their own worldview, safeguarded by the constitution and the international law. Both actors are pursuing good ends and both claim to act as required by the constitution and the international legal norms. How can these conflicting views be properly accommodated? How to promote economic development without jeopardising the rights and the identity of indigenous peoples?

The *right of prior consultation* presumably can help to reconcile these two aims. It was established in the Convention 169 on Indigenous and Tribal Peoples of the International Labor Organization (ILO). The spirit of consultation and participation constitutes the cornerstone of Convention No. 169 and all its provisions are based upon it. Essentially, the idea is to establish a requisite that indigenous and tribal peoples have a say on issues that affect them, and that they are able to engage in free, prior, and informed consultation in policy and development processes that affect them. Regarding the dilemma between development and indigenous people, prior consultation implies a collective right of indigenous communities, whose lands or environments could be potentially affected by resource extraction or mega-development projects, to be consulted before projects begin.

But what constitutes a 'free and 'prior' consultation? Who should organise the consultation and how? Does the prior consultation right imply veto power? What proceeds if agreement is not reached after the consultation? How should the different interests involved be balanced? Should they always be balanced or are there circumstances under which one of the interests always out-weights the other?

In this section we empirically evaluate the theory of courts as mediators using a most-similar cases research design on Colombia (since 1991), Peru (since 2002), and Mexico (since 2000) to investigate the constitutional courts' decision to regulate the right of prior consultation. These countries are similar regarding relevant variables that may lead to courts regulating this right. Specifically, in this period according to all existing indexes (e.g. Cheibub and Gandhi 2004), the three countries are democracies with healthy levels of political competition and no unified governments. This is relevant because political fragmentation has been shown to be a fertile context for judges to decide sincerely given that the political organs that could react to their decisions face coordination problems (e.g. Ríos-Figueroa 2007). Moreover, in the three countries democratically elected governments have attempted to develop infrastructure or mining projects that have been challenged by indigenous communities on the grounds that their right to prior consultation has been violated. Finally, in the three countries these communities have sued the government and the suit has reached the constitutional court.

These three countries, of course, also share other relevant characteristics that are related to constitutional judges' behaviour such as the civil-law tradition, a presidential system of government, the signing and ratification of the international treaties and Convention 169 of the ILO where the right to prior consultation is specified, and the jurisdiction of the Inter American Human Rights Court. But interestingly the countries differ in the variables that make it more likely that the constitutional court will behave as a mediator. In a nutshell, only Colombia shows high levels (*de jure* and *de facto*) of independence, access, and judicial review powers. Peru, in contrast, has low levels of independence, and medium levels of access and judicial review powers. Mexico, finally, has high levels of independence but low levels of judicial review powers and very low levels of access. The argument according to the theory is that only Colombia exhibits the necessary conditions that make it more likely that the constitutional court acts as a mediator. Table 7.1 summarises this discussion.

Table 7.1: Most-similar research design: right to prior consultation

	Y	X_1	X_2	X_3	X_4
	Judicial mediation on the right to prior consultation	Governmental development projects in indigenous lands	Signing of Convention 169, and law suits based on it	Competitive democratic elections	High independence, access, and powers of const. court
Colombia	YES	YES	YES	YES	YES
Peru	NO	YES	YES	YES	NO
Mexico	NO	YES	YES	YES	NO

Colombia: The Constitutional Court, 1991–2013

The Colombian Constitution of 1991 radically transformed the justice system and, in particular, the constitutional jurisdiction. First, an autonomous constitutional court with nine members enjoying an eight-year tenure was created. Each one of three different organs (the Council of the State, the Supreme Court, and the Executive) appoints three constitutional judges, with the approval of the Senate. In addition, to the public action of constitutionality and the automatic review of declaration of states of emergency and emergency decrees, the powers of constitutional review of the newly created court were expanded considerably with the creation of the *tutela*. This is an instrument for the review of rights protection that is widely and easily accessible to the citizens who, almost immediately, began using the courts to defend their rights.[6] The *tutela* can be filed with any judge in Colombia who is then obliged to submit her decision to the Constitutional Court, which in turn has the discretionary power to select for revision only those *tutela* decisions it considers relevant.[7]

Colombian constitutional judges enjoy institutional incentives to have many opportunities to assert their preferences, and to receive lots of information on how actors operate under actual rules. In a nutshell, since 1991 the Colombian Constitutional Court is independent and powerful enough to become a cooperation-enhancing mediator. Since 1991 the governing party does not have a majority in the legislative branch of government, the country has enjoyed relatively high levels of stability in economic terms, and the Colombian Constitutional Court enjoys relatively high public support (Rodríguez-Raga 2011; Wilson 2009). In other

6. Access to the Constitutional Court in Colombia is much easier than in Peru and Mexico and other countries and this has consequences on a broader set of court's outcomes that involve rights protection (Ansolabehere 2010).

7. The Constitutional Court receives all the *tutelas* decided by Colombian judges from all over the country after two judicial decisions had been made. *Tutelas* can also be filed against judicial decisions when procedural matters are violated, or when the substance contradicts the constitution according to the petitioner. The Constitutional Court, after receiving literally hundreds of thousands of *tutelas*, only reviews the ones it considers relevant and transcendent.

words, Colombia since 1991 operates under favorable socio-political conditions making the institutional incentives that affect the independence and the powers of constitutional judges more likely to be more effective.

The Colombian Constitutional Court (CCC) has a rich jurisprudence regarding the right of Prior Consultation.[8] In what follows we give an account of a subset of these decisions, in which we underscore how specific decisions have reduced the three types of uncertainty we discussed earlier in the theory of constitutional courts as mediators.

T-428 1992 MP CIRO ANGARITA[9]

This case involved the construction of a highway that affected the indigenous community of Cristianía in Antioquia. The construction had been contracted by the Ministry of Public Works (*Ministerio de Obras Públicas*) without consulting the indigenous authority. The CCC decided to grant the Amparo to the community and to order

> to suspend the construction of the Andes-Jardín highway's extension in the affected area (km 5+150 to 6+200), until an evaluation of the ecological impact has been completed, and all necessary precautions have been taken to avoid any additional damages to the community [...] (T-428 1992).

In this early decision the CCC made clear, against the decision of a lower court judge, that these conflicts were not about 'particular interests versus the general interest', but involve a clash between two collective interests'. Moreover it stated that given that 'the interest of the indigenous community [...] was grounded on fundamental rights extensively protected by the Constitution' (T-428 1992), it should be given full consideration, and could not be dispatched merely by the utilitarian argument that the project had a positive impact on a larger amount of people. This was the first step to approach the cases that involved prior consultation using, what we have called, mediation jurisprudence since it clearly opposed an arbitrational approach of the lower court judge. This decision reduced the uncertainty regarding the consequences of omitting prior consultation making clear that it would imply costs, and distanced itself from a resolution with a winner-takes-all structure.

8. The Colombian Court has more than forty decisions that makes reference to the *Convention 169 on Indigenous and Tribal Peoples* of the International Labor Organization (ILO) See: (OIT 2009: 9 available at http://www.ilo.org/public/spanish/bureau/inst/download/wow_2009_es.pdf (last accessed 27 January 2017).

9. MP stands for *Magistrado Ponente*, the author of the opinion. The decision can be reached at http://www.corteconstitucional.gov.co/relatoria/ (last accessed 27 January 2017).

SU-39 1997 MP ANTONIO BARRERA

This case involved the environmental license for seismic prospecting activities in Samoré, with the end of finding oil fields. The U'wa community claimed that the license was not legal since a prior consultation process had not taken place. The CCC determined that the government had thirty days to initiate a consultation with the U'wa community, and that this process ought to comply with the criteria established in the decision. This is a very clear case of judicial mediation. With it the CCC considerably reduced the uncertainty over the legal consequences of certain actions, in particular it gave decisive steps forward in defining what constitutes prior consultation. With it the Court established forward-looking criteria that took in consideration the iterated interactions between the Government and the indigenous communities. Moreover, with this decision the CCC also continued with the task of reducing the uncertainty regarding how to balance the constitutional principles involved in the dispute.

To appreciate the previous points let us quote the CCC at large:

> [T]he institution of the consultation to the indigenous communities that can be affected by the exploitation of natural resources, implies the adoption of communication and understanding relations, characterised by mutual respect and good faith [...] aiming to achieve that a) the community has full knowledge on the projects destined to explore and exploit natural resources in the territories that they occupy or that belong to them, and of the procedures and activities required to execute them. b) That the community is informed and illustrated on the ways that the execution of those projects can imply to negative impacts, or undermine the elements that constitute the grounding of their social, cultural, economic and political cohesion, and therefore the foundation for its survival as a distinct human group [...] c) That the community is given the opportunity to freely, and without external interferences, convene its members or representatives to evaluate the advantages and disadvantages of the project on the community, [that] their concerns and wishes regarding the defense of their interests are heard and that they express their opinion on the viability of the project. The aim is that the community has an active and effective participation in the authority's decision making procedure such that the final decision is to the extent possible an acceptable agreement to all parties.
>
> (SU-39 1997 MP Antonio Barrera Carbonell, our translation[10])

As a consequence of these criteria, the court concluded that 'informative workshops' did not constitute prior consultation, and established the rule that the agent responsible for organising the consultation was not the private company involved with the project, but the government. This decision was also conducive to

10. The decision can be reached at http://www.corteconstitucional.gov.co/relatoria/ (last accessed 27 January 2017).

the reduction of the uncertainty of how to balance clashing constitutional interests. In it the CCC put forward the following principle:

> The exploitation of natural resources in the indigenous territories makes it necessary to harmonise two conflicting interests: the necessity of planning the natural resources management and harnessing [Article 80 of the Colombian Constitution] and of securing the protection of the ethnic, cultural, social, and economic integrity of indigenous communities [...] an equilibrium or balance must be sought [Article 330 of the Colombian Constitution].
>
> (SU-39 1997 MP Antonio Barrera Carbonell, our translation)[11]

The CCC applied this general principle to the decision-making process in cases that involved prior consultation. In particular it clarified what proceeds when agreement is not reached after the community has been properly consulted.

> When no agreement is possible, the authority's decision must be devoid of arbitrariness and authoritarianism, it must therefore be objective, reasonable and proportional to the constitutional aim that requires that the State protects the [...] identity of the indigenous community [...] mechanisms must be devised to reduce, correct or restore the effects that the authority's measures produce or can generate to the detriment of the community or its members.
>
> (SU-39 1997, our translation)

The reduction of the uncertainty over what proceeds when no agreement is reached has been incremental, as the theory of constitutional courts as mediators claims. For instance, another important decision in this respect is the C-891/02 in which the CCC dealt with an unconstitutionality suit against the Mining Law. In it the CCC clarified the consequences of lack of agreement after a proper prior consultation vis-à-vis a legislative project. It stated that agreement was not necessary for the legislative process to proceed and gave further clarification to what constitutes 'prior consultation'.

C-208 2007 MP RODRIGO ESCOBAR

This is an unconstitutional suit against the Statute of the Teachers Professionalisation. The plaintiff, a member of the Indigenous Community Nasa 'KWET WALA', asked the CCC to declare the partial unconstitutionally

11. Other important decisions regarding how to balance these interests is SU-383 2003 MP ÁLVARO TAFUR in which the Organization of the Indigenous Peoples of the Colombian Amazonia (OPIAC) claim that the Program of Eradication of Illicit Crops had not incorporated prior consultation and resulted in considerable environmental damage. In addition this case is interesting because it shows that the right to prior consultation might need to be balanced with other constitutional principles such as 'the inherent right of the Colombian State to define and apply [...] the criminal policies, among them the eradication of illicit crops plans and programs [...]'(SU-383 2003).

of the Decree 1278 claiming that it did not consider the right of the indigenous communities to an education that respects and develops its cultural identity. He further argued that to make this right effective the requirements of a University degree and of winning an open competition for the post should not apply to teachers working in indigenous areas.

The CCC argued that this law was constitutional to the extent that it does not apply to schools in the indigenous territories, and that the legislature should make a statute of professionalisation that takes into consideration the rights of the communities. It also established that while this new statute was in place a prior norm that did not include these requirements applied to the indigenous territories. In this decision the CCC reduced the uncertainty regarding the bounds of exceptions allowed to the cultural identity right. It stated that these limits are related with 'what is truly intolerable because it damages the most valued good of human kind' such as the right to life, the prohibition against torture and slavery, individual responsibility for one own behaviour, and legal procedure of crimes and punishments (C-208 2007).

Another important decision that involved the reduction of uncertainty over the bounds of exception is the C-030 2008 MP RODRIGO ESCOBAR, an unconstitutionality suit against the general forestry law that established what should be understood as 'a law having a direct effect' on an indigenous community, and therefore clarified which laws do not require prior consultation.[12] Finally, T-129 2001 MP ALEJANDRO MARTÍNEZ is another good example of reduction of uncertainty over the limits of prior consultation. It involved three important projects that affected the Embera-Katio and Embera-Dobida peoples. In it, among other norms, the CCC established that in the cases where all the alternative projects of development would imply the disappearance of the community as such, the right of the community would take precedence and no balance should be sought.

Peru: The Constitutional Tribunal (PCT), 2001–2013

The Constitution of 1993 includes in its Article 201 the Constitutional Tribunal as the 'organ in charge of protecting the constitution'. The Peruvian Constitutional Tribunal (PCT) is composed of seven members elected by a two-thirds majority of the members of Congress for a period of five years without the possibility of immediate re-election (Art. 201). The PCT decides, in its original jurisdiction docket, conflicts of competence and actions of constitutionality, and in its appellate jurisdiction, *habeas corpus*, *amparo*, *habeas data*, and action of compliance (Art. 202). Access to the PCT is, in comparison to the Colombian Constitutional Court, more difficult. Legal standing in actions of constitutionality is restricted to political or collective actors such as the president, the attorney general, the *defensor del pueblo*, 25 per cent of members of Congress, regional presidents and

12. This is also an important decision vis-à-vis the reduction of uncertainty over the legal consequences of certain actions since it established the judicial implication of the omission of a prior consultation, and further clarified the necessary conditions for this requirement to be satisfied.

local mayors (in matters of their competence), 5000 citizens whose signatures have to be validated by the electoral court, 1 per cent of the inhabitants of a certain municipality against ordinances by their municipal government, and professional associations (in matters of their competence) (Art. 203) (see Dargent 2009: 254). Article 4 of the organic law of the PCT again requires a supermajority of six votes, out of seven, for the tribunal to declare a norm unconstitutional.[13]

The PCT was not properly installed until June 1996, because there was a protracted negotiation process to appoint the first set of judges. As soon as it started working, the PCT got the politically difficult case regarding whether Fujimori's attempt at re-election in 2000 was constitutional. In January 1997, the PCT circulated an opinion arguing that it was not (see details in Conaghan 2005: 126–132). The three judges who stood for the unconstitutionality of Fujimori's re-election were removed via impeachment on 29 May 1997, which meant that the PCT continued to function with only four members whose preferences were close to the president's. Interestingly, four judges was the minimum required by law for the PCT to continue working and decide all types of cases except actions of constitutionality. Fujimori's regime collapsed at the end of the year 2000 and on November of that same year the three impeached judges were reinstalled in the PCT. The four judges who were close to Fujimori ended their terms in 2001, and in May 2002 four new judges were elected. According to César Landa (2007: 280) this event marks two periods of the PCT, 'the tribunal in captivity' (1997–2002), and the 'tribunal in liberty' (2002-).

The actual composition of the 'tribunal in liberty' included some high calibre and neutral magistrates. To attain the required two-thirds vote, the four majoritarian groups in Congress arrived at an agreement that allowed each of them to name a magistrate. As Dargent (2009: 271) explains, 'in order to reach the two-thirds requirement for the candidates' appointment, parties were careful to nominate candidates that were acceptable to all of the political groups'. This mechanism produce judges that, even though they could be linked to a particular political group, were individuals with personal prestige as politicians or lawyers (Dargent 2009: 271). In addition, these four judges joined the three independent magistrates still in the court, which permitted a plural mixture of past and new magistrates. The PCT from 2003 to 2008 was indeed quite remarkable in the type and breadth of jurisprudence it produced.

However, the length of tenure of Peruvian judges is quite short (five years), which means that even high-calibre and professional judges face uncomfortable choices regarding the pace and the depth of the jurisprudence they want to produce. Moreover, the short length of judges' tenure coincides with the tenure of their appointers (congressmen) making this a highly unstable institution and an easy prey for political manipulation. Essentially, during each president's administration the full membership of the constitutional tribunal is renewed (see Ponce and Tiede 2014). The performance of the Tribunal from 2003 to 2008, which demonstrated

13. On 20 October 2002 this article was modified making the requirement of five votes, out of seven, to declare a norm unconstitutional.

how consequential a Tribunal can be, paradoxically also partly caused its demise because political actors wanted to influence the composition of such organ. As John Ferejohn put it, the judicalisation of politics leads to the politicisation of the judiciary, which is successful if the right incentives, conditions, and protections for the judicial institutions are not in place (Ferejohn 2002). A case in point is the appointment process of four new constitutional judges in 2007–2008, which was not transparent and was far from the way in which the election took place in 2002. This time, the process involved resignations, internal fights, and the loss of collegiality that characterised the Tribunal from 2002 to 2007 (Justicia Viva 2008).[14] The changes in composition were felt also in the quality and depth of jurisprudence produced by the Constitutional Tribunal.

As was the case with our account of the Colombian constitutional court jurisprudence on prior consultation, the aim of this section is to exemplify the type of decisions that the Peruvian Constitutional Tribunal has had in prior consultation cases to illustrate the theoretical argument we defend. Therefore, the aim is not to present an exhaustive account of the decisions, but provide an analysis that illuminates why we argue this Tribunal has not produced mediation jurisprudence in this important area.

We argue that the PCT has failed to systematically reduce uncertainty because its decisions have lacked an important requisite: consistency. Jurisprudential consistency is a necessary condition to reduce all types of uncertainty, for instance clarifying what are the legal consequences of certain actions reduces uncertainty, and hence enables the lessening of conflict to the extent that it is known that such criteria will stand in the future interactions among the parts. Hence, jurisprudential inconsistency taints the reduction of uncertainty that can be obtained through the decisions of a Constitutional Court. Furthermore, this type of inconsistency breaks the rule-making character of constitutional decisions since a rule that is later negated is no longer a rule. Finally, we will present instances of backward-looking and winner-take-all decisions. In sum, we want to show that the jurisprudence of the PCT in prior consultation cases lacks the characteristics of mediation jurisprudence.

06316-2008-PA/TC and Resolution N06316-2008-AA

06316-2008 PA/TC is an *amparo* suit against the Ministry of Energy and Mining. The plaintiff, the Interethnic Association for the Development of the Peruvian Rain Forest (AIDESEP) argued that contracts that such Ministry had made with Perupetro S.A., Barrett Resource Peru Corporation and Repsol YPF for the exploitation and

14. In fact, a first set of judges already selected by Congress was removed after Congress faced strong opposition from NGOs and public opinion regarding the characteristics of some of the judges and the lack of transparency in the election process. A new set of four judges had to be appointed and even then some judges whose closeness with a political party had been denounced were elected. In 2013, again, Congress had to cancel the appointment of four new judges due to heavy criticisms of some of the judges and of the process of election, and the appointment process had to be done again.

extraction of oil, violated several rights of the *waorani*, *pananujuri*, and *aushiris* indigenous communities of the 'proposed territorial reservoir Napo Tigre' (their right to life, ethnic identity, property, etc.) and that those contracts had been done without prior consultation with the communities. Therefore, the plaintiff asked for the nullification of the contracts and the suspension of all extractive activities. The PCT decided that the suit was unfounded since the plaintiff had not accredited the communities' status as communities in voluntary isolation.

Additionally, in Peru the parts of a suit can ask the Tribunal to clarify specific points of its decision. In this case the AIDESEP ask the Court to clarify part of the decision we have just presented. Resolution N06316-2008-AA is the decision that responds to that request for clarification. The PTC has taken inconsistent decisions regarding the right to prior consultation, which arguably have tainted its capacity to reduce uncertainty. In 06316-2008-PA/TC the PTC implies that the prior consultation is enforceable only after this decision:

> [we] consider that the right to prior consultation must, in this case, be enforced in a gradual way by the companies involved and with the supervision of the competent entities. With this the Tribunal will put in place a plan of shared commitments between the private companies involved, that will not see their actions paralysed and the communities [...] who cannot renounce their rights.
>
> (06316-2008-PA/TC, p. 30. Our translation)[15]

This pronouncement implies that the enforcement of this right will be gradual once the cited plan is put in place, but that it is not enforceable before that. This particular point, which is more clearly restated in its recourse to clarification, is in clear opposition with previous and posterior decisions in which the Tribunal clearly and explicitly established that the right of prior consultation was enforceable since 1995.

In the resolution to the request for clarification (N06316-2008-AA) the PTC 'establish[ed] that [prior] consultation was enforceable from the publication of the STC 0022-2009-PI/TC'. That meant that the right of prior consultation was enforceable, only from the 9 of June 2010, and not from 2 February 1995, which is the date of entry into force of the *Convention 169 on Indigenous and Tribal Peoples*. The argument was that the legislative branch had not produced law to regulate this treaty, thus enforcing it would affect the legal security of the parts involved.

> In terms of efficacy, the normative character of the treaty has been difficult precisely because of the omission of an appropriate normative development that [...] has generated legal insecurity [...] that affects not only the indigenous

15. The decision can be found in http://www.tc.gob.pe/tc/jurisprudencia/constitucional (last accessed 27 January 2017).

> people but also those people who have developed action without the State having required previously carrying out a consultation.
>
> (f.j. exp N0616-2008-AA)

This claim is in clear contradiction with previous and posteriors decisions from the PCT. For instance, in the 00022-2009-PI/TC it clearly establishes that:

> [it] is not a constitutionally valid argument to excuse the enforcement of fundamental rights due to the absence of legal regulation [...] that would be to leave in the hands of the state discretionarily the observance of fundamental rights [...].
>
> (00022-2009-PI/TC, p. 12)

Or

> all activity of public authorities must consider the direct application of the norms consecrated in international treaties of human rights (Exp. N02798-2004-HC/TC, p. 8).

Now the resolution 06316-2008-PA/TC is also a good instance to exemplify the lack of other characteristics we associate with jurisprudential mediation. It is arguably backward-looking and exhibits a winner-take-all structure. The PCT argues that after the Ministry of Energy and Mining granted the contracts to the companies, the latter acted in good faith grounded on the legal security and trust that those contracts transmitted (p. 27) The tribunal claims that the nullification of those contracts would affect the legal security of the companies. Needless to say: the legal security of the communities is not balanced.

First, this argument emphasises the past actions and expectations of one of the parties in conflict, it is not centred on the iterated relation between the government and the companies on the one side, and the communities on the others. Its reasoning does not focus on establishing rules that can reduce the conflict of future interactions, but on adjudicating the concrete conflict at hand. Moreover, the decision has a winner takes all structure, where the Waorani, Pananujuri, and Aushiris indigenous communities are left without any possibility to ask for their right of prior consultation to be enforced.

In sum, in this section we have exemplified the type of decisions that the Peruvian Constitutional Tribunal has had in prior consultation cases to illustrate how it has not systematically behaved as a mediator in the conflicts involving the right to prior consultation.

Mexico: The Supreme Court (SC), 2000–2013

A key constitutional reform in 1994 empowered the Mexican Supreme Court and also reduced and renewed its membership in order to increase its legitimacy and

independence vis-à-vis the other branches of government (see Fix-Fierro 2003). The 1994 reform increased the judicial review powers of the Mexican Supreme Court judges by creating instruments of both concrete and abstract control with the possibility of generating *erga omnes* effects and it granted the judges an effective fifteen-year tenure. While in independence levels this puts the Mexican Court somewhat above Colombia (and definitely more than Peru), regarding judicial review powers Mexico is below both of them. This is clearest regarding access to the Mexican Supreme Court that after the 1994 reform was still very limited: legal standing in the two new instruments of constitutional review created or strengthened in the reform (the action of unconstitutionality and the constitutional controversy, respectively) is allowed only to political authorities such as political parties, the representatives of the three branches of government, or a legislative minority. Ordinary citizens do not have the standing to use these instruments, and this is also true for most autonomous organs such as the Federal Electoral Institute (IFE) or the Federal Institute of Transparency and Information (IFAI) (see Ansolabehere 2010).[16] Moreover, the other instrument for constitutional review, the *amparo* suit, remained weak mainly because of its limited, *inter partes*, effects, and also for its de facto inaccessibility for ordinary citizens due to its technical complexity and high cost (see Pou Giménez 2012).[17]

The incentives on independence, access, and powers established by the reform of 1994 found a fertile political context to implant and grow. This context is essentially the increasing electoral competition and the gradual melting down of the PRI-regime. As part of the reform of 1994, the whole membership of the Supreme Court was renewed. But this time most of the judges proposed in 1995 by the president and confirmed by the Senate were the product of consensus between at least two political parties, more often the PRI and the right-leaning PAN (*Partido Acción Nacional*) (Magaloni, Sánchez, and Magar 2011). In contrast to the past, to be able to be part of the Supreme Court candidates should not be perceived as unconditional to the PRI, and they need to be respected lawyers.[18] Moreover, since 1997 there is divided government in Mexico and in 2000 the PRI lost the presidency for the first time in 71 years.

As in the case of Colombia and Peru, the following step is to instantiate the theoretical claim we make, that is to provide some evidence consistent with the claim that the low levels of judicial review powers have had a negative impact on the development of mediation jurisprudence.

16. The exception is the National Commission of Human Rights, CNDH, but only since 2006.

17. Since 1987 (but strengthened in 1994) the court enjoys the so-called *facultad de atracción*, the possibility to take cases that it deems important from lower courts in order to decide on them. This does not amount to *certiorari* power, but it does give the court the possibility to go after some cases in order to make a jurisprudential contribution. However, the Court only started using this for politically relevant cases in 2007–8 (Abad 2014).

18. Moreover, since 1997 Mexico has lived in a fragmented political context where the party of the president does not control legislative majorities. This increasing political diversity in the legislative and the executive branch, as well as in the local governments, decreased the threat of retaliation to rulings disliked by political actors (Rios-Figueroa 2007).

As we noted above, the low level of access is arguably the most significant characteristic of the judicial review powers in Mexico, and its direct consequence is that there is not a profuse jurisprudence on prior consultation. *Prima facie*, one would expect that a country of the size of Mexico – with a large number of indigenous communities, and numerous developmental projects – would have an impressive jurisprudence on prior consultation, especially after more than two decades from the 1994 judicial reform and the ratification the *Convention 169 on Indigenous and Tribal Peoples*. However, this expectation is not grounded: there are few and pretty recent cases that deal in depth with this right, so paradoxically the strongest evidence for our claim is the lack of a long and rich jurisprudence on this area.

Among the recent cases that deal with prior consultation one that has attracted more attention is the *amparo* suit 631/2012. In 2010 the government of the state of Sonora promoted the construction of an aqueduct to transport a large amount of water from the Yaqui River. In 2011 the Ministry of Environment and Natural Resources (SEMARNAT) gave the required permission without prior consultation to the Yaqui community that depends on the river for their economic and cultural survival. The Yaqui community presented an *amparo* against those governmental acts.

The Supreme Court recognised that the prior consultation right of the Yaqui community had been violated; that 'it was not enough that the responsible authority made the project public [...] through diverse media'. The Supreme Court made clear that the community should have been consulted (631/2012 Resolution, p. 88), and negated the validity of the permission that the SEMARNAT gave to the project and required a new assessment that incorporated the consultation with the community. However, in a statement issued as a clarification of its decision, the Supreme Court permitted that the aqueduct continued functioning without the required permissions and before the consultation had concluded. This clarification was in tension with its own decision that emphasised the need to respect the right of consultation (it also opposes the international standards). The tensions inherent to this decision undercuts its capacity to reduce the uncertainty, and to establish clear norms that ease the future conflicts between the government and the indigenous communities vis-à-vis the extraction of natural resources or the construction of infrastructure.

Conclusion

In this chapter we argued that constitutional courts can contribute to institutional stability allowing for the punctual adaptation of existing institutions and actors to changing conditions and challenges. We claimed that courts can do that through jurisprudence that approaches the mediator style of conflict resolution, and that only courts that are independent, accessible, and that have ample judicial review powers can do so. We analysed conflicts that involved the right to prior consultation and evaluate the theory using a most similar research design on Colombia, Peru, and Mexico. We argue that the conditions for mediator-like jurisprudence are only present in the Colombian Constitutional Court (1991–2013).

In a series of other decisions, the Colombian Constitutional Court has produced a line of informative jurisprudence on the right to prior consultation. In a case where the U'wa community claimed it had not been consulted before an environmental license for seismic prospecting activities with the goal of finding oil fields was granted, the court determined that the government had 30 days to initiate a consultation with the U'wa community and that this process ought to comply with the criteria established in the decision (SU-039 1997 MP Antonio Barrera Carbonell). In this clear case of judicial mediation, the Court took decisive steps forward in defining what constitutes prior consultation, for instance arguing that 'informative workshops' did not constitute prior consultation. In other decisions (e.g. C-208 2007 MP Rodrigo Escobar Gil; C-030 2008 MP Rodrigo Escobar Gil) the court continued to build a doctrine that attempted to balance the differing rights of the communities and the developmental state, reducing the uncertainties that surround this issue-area.

In contrast, the Peruvian Constitutional Tribunal and the Mexican Supreme Court have produced jurisprudence that is closer to arbitration, not mediation, style of conflict resolution. In Peru, lack of consistency (produced by low independence) has produced erratic jurisprudence on the right to prior consultation. For instance, the Peruvian Tribunal first accepts that some contracts for a development project violate indigenous community rights but when the community requests their nullification, the Tribunal does not nullify them based on convoluted arguments (see *06316-2008-PA/TC and Resolution N06316-2008-AA*). In the case of Mexico, a country with a large number of indigenous communities and numerous developmental projects, the jurisprudence on prior consultation is rare, which we argue can be explained by the lack of access to the Supreme Court. And when a case reaches the court, the Court has managed to discourage further litigation. For instance, in a recent *amparo* suit 631/2012 in which the Yaqui community challenges the construction of an aqueduct promoted by the government of the state of Sonora, the Supreme Court first recognised that the right to prior consultation of the Yaqui community had been violated, but then in a statement issued as a clarification of its decision, the Supreme Court permitted the aqueduct to continue functioning without the required permissions and before the mandated consultation had concluded.

The theory of courts as mediators is more applicable to the extent that the source of conflict is informational, i.e. when underlying the conflict between two or more parties there is one of the types of uncertainty discussed in this chapter. Of course, there are other sources of conflict between parties such as distributional sources. In a post-electoral conflict when two parties are claiming to have won the election, any resolution involves clear winners and losers. In these cases, according to the literature on conflict resolution, an arbitrator style (disposing authoritatively who wins and loses the particular dispute) would perhaps be a better approach. An interesting avenue for future research is to evaluate whether courts, such as the Colombian Constitutional Court or the Costa Rican *Sala Cuarta* that are independent, highly accessible, and have substantial powers of judicial review, vary their kinds of decisions depending on whether the source of the underlying conflict is mainly distributional or informational.

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