The Institutional Setting for Constitutional Justice in Latin America[1]

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The two main challenges that a Constitutional Tribunal should meet, as Aharon Barak, former Isareli Supreme Court member, recently put it, are to "bridge the gap between law and society and to protect democracy" (Barak 2008, 1). That is, constitutional judges consider matters relevant for the protection of rights, political competition, and the exercise of power. Why, however, are there constitutional courts that stand out for their work regarding rights enforcement[2] -while others distinguish themselves for their role in arbitrating disputes between political actors? In Latin America, for instance, the Colombian Constitutional Court or the Costa Rican *Sala Cuarta* have been highly active in the protection of rights (e.g. Uprimny 2006; Wilson 2005), while the Mexican Supreme Court and the Chilean Constitutional Tribunal have not. But the two latter courts have been involved as efficient arbiters regulating political competition in their respective countries (e.g. Magaloni B. 2003; Domingo 2005; Scribner 2004).

This paper discusses several arguments in which the institutional framework, or a certain feature thereof, is invoked to explain the behavior of constitutional judges. In particular, it surveys arguments that consider an institutional feature to explain why and to what extent constitutional judges tend to behave more like arbiters of political conflict or like active defenders of rights. For instance, the institutional location of the constitutional court, as part of the judiciary or as an autonomous organ, is said to influence the type of judges that reach this court and therefore the role it plays within the political system (e.g. Ferreres 2004). It has also been argued that different characteristics of the legal instruments available for constitutional adjudication (e.g. abstract or concrete, *a priori* or *a posteriori*) have also been pointed out to be more or less effective tools for rights protection or political dispute resolution (e.g. Magaloni A.L. 2007).

After discussing the arguments, the paper maps the existence or absence of the institutional features alluded to in a sample of eighteen Latin American countries from 1945 until 2005. This way, the paper attempts not only to provide an overview of the institutional setting for constitutional justice in the region, but also to suggest testable hypothesis for future empirical research. It is important to mention at the outset that the institutional framework is taken as given. The paper exclusively discusses arguments on the potential consequences of different institutional arrangements and does not attempt to answer what determines the existence of

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[2] I mean all kind of rights, economic, social, and political, although it is the defense of social and economic rights that has given some courts such as the Indian Supreme Court or the South African Constitutional Tribunal, worldwide reputation.

those institutions in the first place.[3] In addition, whether the institutional features indeed produce certain effects is also beyond the limits of this paper.[4]

The paper is divided into four parts. The first one considers arguments concerned with basic rules designed to insulate judges from undue political pressure (e.g. appointment, tenure, and removal institutions) that have been considered necessary institutional features for judges to autonomously decide to either protect rights or to solve political conflicts (e.g. Rosenberg 1991). The second part discusses arguments that have linked certain institutional features with the type of judges that arrive at constitutional courts, for example, institutions that make it easier or harder for non-judges or non-lawyers to reach the court. The third part is dedicated to discuss arguments that associate different characteristics of the legal instruments available for constitutional control with the tendencies in decision-making by constitutional judges. The last section briefly concludes.

Institutions that Influence Judicial Independence

Independence of constitutional judges from undue political pressures, especially coming from the executive and legislative powers, is often mentioned as a condition for judges to sincerely evaluate the cases that come before them without conditioning the content of their decisions (e.g. Rosenberg 1991). That is, in order to either enforce rights or arbiter conflicts, constitutional judges should enjoy a healthy degree of autonomy from the political branches in the first place. Scholars have pointed out a variety of institutional features aimed at producing an autonomous space for judges, among which appointment, tenure, and removal mechanisms are considered paramount.[5]

Scholars agree that the wave of judicial reforms that swept Latin America in the last two decades of the past century generally strengthened the institutions that aim to promote judicial independence, to the point that now some consider that judicial accountability should be taken care of in order to strike a better balance (Hammergren 2007, 207). Without doubt there are still challenges. But these reforms have changed the appointment, tenure, and removal mechanisms of constitutional judges in such a way that, at least on paper, Latin American judges now enjoy a considerably higher insulation from political pressures than they did in the recent past.[6] In order to document this trend more systematically, let us look at a simple index that considers five institutional features aimed at promote the independence of constitutional judges from undue political pressures: (i) whether the appointment procedure is made by judges themselves or by at

[3] On this question see Ginsburg 2003; Magaloni 2003; Finkel 2008; Pozas-Loyo and Rios-Figueroa, forthcoming.

[4] While the distinction between causes and consequences of institutions is useful for analytical purposes, in empirical analysis it should be taken into account that the consequences of institutions may or may not be linked to their causes.

[5] Under what conditions those institutions actually promote independent behavior is an open question that falls outside the limits of this paper. For different concepts and measures of judicial independence see Rios-Figueroa and Staton 2008.

[6] These reforms have also considerably increased judicial budgets all over the region, see Vargas (2009).

least two different organs of government, (ii) whether the length of tenure is at least longer than the appointer's tenure, (iii) the relation between appointment procedure and length of tenure, (iv) whether the process to remove judges involves at least two thirds of the legislature and, finally, (v) whether the number of constitutional judges is specified in the Constitution. In the following paragraphs I briefly explain these five elements.

Appointing procedures range from cooptation of new judges by the sitting judges to direct election by the executive or by the people (as in Bolivia's 2009 Constitution). Between those extremes one finds procedures in which the concourse of a different set of state and non-state organizations (e.g. the executive, the legislature, the judicial council, bar associations, NGOs) is required to fill a vacant in the constitutional court. It is not trivial to determine which of all the different appointing methods produces more autonomy for judges, nor which one produces a better mix of independence and accountability. But let us consider here a simple distinction between procedures in which the appointment is done by judges themselves[7] or by at least two different state or non-state organs and procedures in which a single organ or organization that does not belong to the judiciary appoints the judges. The former appointment methods would guarantee at least a minimum degree of independence of judges from their appointers, while the latter would not meet even this minimum requirement.

Closely related to appointment is the length of tenure. The appointment process may involve many different organs, but if judges' length of tenure coincides with that of their appointers or with that of the executive and legislators, there is potential for abuse. Thus, let us consider that judges' tenure should be at least longer than that of their appointers. Arguably, if tenure is sufficiently long, for life in the extreme, the appointment method tends to become irrelevant.[8] The index presented in this paper considers this relationship between appointment and length of tenure. I gave the following values to the four possible combinations of the two variables: three points for those countries in which both the appointment procedure and tenure meet the minimum requirements, two for those countries where only the minimum tenure requirement is met, one for countries where only the appointment minimum requirement is met, and zero for countries where neither minimum is met.

Removal proceedings also relate constitutional judges with the elected branches of government. Particularly important is the accusation part of the process because a simple accusation may tarnish a judge's reputation, so the easier it is to accuse, the more likely that the judge be unduly pressured.[9] Let us then consider removal procedures that at a minimum require a supermajority of one chamber of Congress to initiate the accusation. Finally, given that if the number of

[7] This can be a cooptation mechanism, or appointment by a judicial council in which judges are the majority.

[8] As Madison argues in Federalist 51, " … the permanent tenure by which the appointments are held in that department [i.e. the judiciary], must soon destroy all sense of dependence on the authority conferring them".

[9] The outcome of removal or impeachment procedures is usually, but not always, decided by a different organ from the one that accuses.

constitutional judges is specified in the constitution it is more difficult for the political branches to pack or unpack the court, this element is also included in the index of independence.

Figure 1 shows the average level of the index of independence of constitutional judges just described for the eighteen largest Latin American countries, except Cuba, from 1945 to 2005 (see Figure 1)[10]. It is apparent that independence has been increasing. This is especially true after a rather downward turn in the middle of the sixties that ended up with the transitions to democracy starting in the early 1980s. Strengthening institutions of judicial insulation then was part of the transitions. Table 1 shows the value of each variable of the index in the year 2005 for all the countries in the sample. Note that there is interesting diversity in the way countries combine these four institutional elements, and also that countries are quite concentrated around the average level four (the standard deviation is 1.08). The outlier in Table 1 is Peru, a country in which the appointment and tenure of constitutional judges do not meet the minimum requirements set out above. In the rest of the countries, constitutional judges enjoy at least a moderate degree of independence according to this index.

[Figure 1 and Table 1 here]

This index of institutional independence may be simple and crude. Nonetheless, it points in the same direction as the evaluations of experts with practical and academic experience in Latin American judicial reforms (e.g. Vargas 2009; Hammergren 2007; Gargarella 1997). In a nutshell, Latin American constitutional judges now enjoy the consistent effort to strengthen the institutions that are believed to insulate them from undue political pressure. If this institutional insulation has an impact on judicial behavior, Latin American constitutional judges work now under an institutional setting that allows them more space to sincerely evaluate the cases that come before

[10] All data comes from national constitutions obtained from different sources, including the *Political Database of the Americas* (PDBA) (n.d.) http://pdba.georgetown.edu/, and *Constituciones Hispanoamericanas*. (n.d.) http://www.cervantesvirtual.com/portal/. The constitutions included in the sample are (*denotes an amendment): Argentina 1853, 1949, 1957*, 1994; Bolivia 1947, 1967, 1995, 2002*, 2004*; Brazil 1946, 1967, 1988, 1993*, 1997*, 1998*, 2004*; Chile 1925, 1980, 1989*, 1991*, 1997*, 1999*, 2000*, 2005*; Colombia 1886, 1945*, 1947*, 1957*, 1960*, 1968*, 1979*, 1991, 2002*, 2003*; Costa Rica 1949, 1954*, 1956*, 1957*, 1959*, 1961*, 1963*, 1965*, 1975*, 1989*, 2003*; Dominican Republic 1966, 1994*, 2002*; Ecuador 1945, 1946, 1967, 1979, 1984*, 1993*, 1996*, 1998; El Salvador 1950, 1962, 1982, 1991*, 1992*, 1996*, 2000*; Guatemala 1945, 1956, 1965, 1985, 1993*; Honduras 1957, 1965, 1982, 1986*, 1990*, 1998*, 2000*, 2003*; Mexico 1946*, 1951*, 1967*, 1974*, 1977*, 1982*, 1987*, 1992*, 1994*, 1996*, 1999*, 2005*, 2006*; Nicaragua 1948, 1950, 1955*, 1962*, 1966*, 1971*, 1974, 1987, 1995*, 2000*, 2005*; Panama 1946, 1956*, 1963*, 1972, 1978*, 1983*, 2004*; Paraguay 1967, 1977*, 1992; Peru 1933, 1939*, 1979, 1993, 1995*, 2004*; Uruguay 1952, 1967, 1992*; Venezuela 1947, 1953, 1961, 1973*, 1983*, 1999.

them. Whether the judges use this space to enforce rights or to arbitrate political conflicts should then be related to other variables. Among these there are institutions that influence the type of judges that arrive at the constitutional court. I turn to them now.

Institutions that Influence the Type of Constitutional Judges

The attitudinal model of judicial decision-making holds that judges "decide disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices" (Segal and Spaeth 2007, 86). The type of judge that arrives at the court is, thus, crucial, at least according to this model of judicial behavior. For instance, it may be the case that in the American liberal-conservative continuum, more liberal judges would tend to be more sympathetic towards enforcing social rights and expanding the role of judges in policy making whereas more conservative judges would tend to prefer the classic role of the judge as a self-restrained neutral dispute settler. But, what makes a liberal or a conservative judge reach the court in the first place? What institutions may promote having one or the other type of judge? As the literature on the U.S. clearly shows, the ideological and partisan concerns of the actors involved in the appointment process play an important role in determining who actually reaches the court (see, e.g., Epstein and Segal 2005). But, of course, who the relevant actors are varies depending on the institutional setting. In this part, I discuss some arguments that link institutional features to the type of judges that may reach the constitutional court.

Institutional Location of the Constitutional Organ

Different arguments convey the message that if the constitutional court is located outside the judiciary it becomes easier to appoint respected lawyers with no previous judicial careers, or even respected professionals other than lawyers, who are more likely to be judges more prone to defend rights and expand the judicial role beyond its traditional dispute settler function. The reasons are varied. First, there is the possibility to design a completely different appointing process for constitutional judges than for ordinary career judges. According to Ferejohn and Pasquino, the inherent political nature of constitutional adjudication calls for politically appointed judges, better drawn from people particularly competent at making abstract comparisons among texts, and with the capacity to deliberate about norms and explain decisions and not necessarily from those with judicial experience (Ferejohn and Pasquino, 2003, 251-252). Thus, constitutional judges may be chosen by the parliament, with executive approval, from a pool of judges, law professors and politicians. They may also be chosen with the participation of civil society organizations and other state organs, such as Human Rights Commissions (more on this below).

On the other hand, when the constitutional organ is at the same time the apex of the judiciary (e.g. the Supreme Court or a chamber of it) it is also the pinnacle of the judicial career and there is more pressure from career judges to fill its vacancies from among their best and brightest. But career judges are selected by exams at an early age and climb up the ladder based on seniority and civil service career incentives and punishments. Thus, they share the values of civil service

such as long tenure, respect for the rules, technical capabilities and thus they are more likely to favor a more traditional role of the judge (cfr. Guarnieri and Pederzoli 1999, 65).

A different but related argument is that, in countries that have recently made the transit to democracy, the newly established Constitutional Courts and their judges represent the values of the democratic system, while the ordinary courts are associated with the authoritarian past, if not with corruption (Horowitz 2006, 126). Thus, in these places an autonomous constitutional court would be a better institutional choice since it would carry less baggage from the authoritarian period than the ordinary judiciary. In sum, for different reasons, the location of the constitutional courts as autonomous organs may promote the arrival of judges who are more open to expand the traditional role of the judiciary into policy-making areas traditionally reserved to the political branches.

In Latin America, seven countries currently have constitutional courts outside the judiciary (the year of creation is in parenthesis): Bolivia (1995), Brazil (1988), Chile (1970-73, 1980), Colombia (1991), Ecuador (1945),[11] Guatemala (1965), and Peru (1979). Venezuela had an autonomous constitutional tribunal from 1953 to 1960 but, in the Constitution of 1961 the Supreme Court became the constitutional organ and that continues to be the case to this day. In the rest of the Latin American countries, either the Supreme Court is the constitutional organ, as it is in Mexico since 1994, or a chamber of it plays this role, as does Costa Rica's famous *Sala Cuarta*. If the arguments presented are correct, then we should observe a tendency to appoint more liberal judges in those countries with autonomous constitutional courts.

Open versus Closed Appointment Procedures

Appointment procedures vary wildly (see, e.g., Malleson and Russell 2006) but let us consider here a simple distinction between more open processes in which civil society organizations participate and less open processes that restrict participation to political organs such as the executive, the legislature, or the judicial council. "Civil society" participation includes, for instance, non-governmental organizations, bar associations, law schools, women and minority movements, and unions. It has been argued that, when civil society organizations participate in the appointment process, they make a difference regarding the type of judges that arrive at the constitutional court. In particular, the more open the appointment procedure is to civil society participation the more likely it is that less traditional judges will arrive at the constitutional court. This is the case because the participation of these organizations would tend to widen the pool of candidates, since they prefer judges who represent them better, who don't come from predominantly affluent and conservative backgrounds, and whose views are more expansive and in favor of enforcing social and economic collective rights (Russell 2006, 433). At the same time, as Victor Ferreres Comella

[11]Ecuador established a *Tribunal de Garantias Constitutionales* in its 1945 Constitution. It dissapeared in the 1946 Constitution but a *Consejo de Estado* acquired the functions of constitutional control. In the Constitution of 1967 the *Tribunal de Garantias Constitucionales* was re-established.

has argued, this more democratic appointment process probably makes constitutional judges less worried about defying the legislature and participating in the policy-making process (Ferreres 2004, 1726).

Figure 2 shows the average number of organs that participate in the appointment process of constitutional judges in Latin America (Figure 2). The maximum number is five and it is reached if all the following actors participate: the president, Congress, the courts, judicial council, and civil society (broadly understood to include all the organizations mentioned in the above paragraph). I counted an actor as participating if it (i) nominates a judge from a pool presented by another actor, (ii) configures a list of judges from which another actor will nominate one, or (iii) directly elects at least one constitutional judge. Interestingly, the average number of participating organs has been increasing steadily since the mid 1970´s, after a downward trend that started in the middle of the century.

[Figure 2 here]

The Latin American countries in which the number of participating organs is more than the traditional two (i.e. executive and legislative) are: Dominican Republic , three organs from 1994 until 2005 (last entry in the database); El Salvador, three organs since 1991; Guatemala , four organs since 1985; Honduras, three organs since 2000; Nicaragua, three organs since 2000; Chile three organs since 1980; Colombia three organs since 1991; Ecuador, four organs since 1993; Paraguay, three organs since 1992; and Peru, three organs from 1979 to 1992. The Ecuadorean case is interesting because the number of organs participating in the appointing process has varied quite considerably through time: four organs from 1945 to 1967, three organs from that year until 1978, then again four organs from that year until 1983, again down to three organs from 1984 until 1992, and finally four organs participating since 1993. Arguably, out of this set of countries the most interesting ones for our purposes are those in which "civil society" (broadly understood) participates in the appointment process. In this shorter list we find El Salvador since 1991, Guatemala since 1985, Honduras and Nicaragua since 2000, and Ecuador in 1945 and then again since 1979 and until 2005.[12] According to the argument, this last set of countries should display a different kind of constitutional judges because of their open appointment process.

It is possible to combine the two arguments made above and ask if countries with an autonomous constitutional tribunal, that can have more flexible appointment procedures, are more likely to include civil society organizations in the appointment process. The answer, for the countries in our sample, is no. There are only two countries that have both a constitutional tribunal outside the judiciary and civil society participation in the appointment process: Guatemala and Ecuador. In

[12] The Ecuadorean case is interesting. In 1945 the constitution specified that a representative of the workers participated in the appointment of constitutional judges. This lasted only one year, and it is not until the Constitution of 1979 that another organ is added in the appointment process, but this time it is the president of the Electoral Tribunal. The military coup of 1978 and the heat of the Cold War probably explain why the worker's representative was replaced by the president of the Electoral Tribunal.

these two countries, the combined presumed effects of having an autonomous constitutional tribunal and a more open appointment procedure should be more evident on the type of judges. In Guatemala, for instance, there is some evidence that the constitutional judges are more liberal than the rest of the members of the judiciary if we look at some decisions to uphold indigenous peoples' rights, although they are still subject to pressures from the executive in politically salient cases (*cfr.,* Sieder 2007, 223-224). In the case of Ecuador, a study that measured the ideological position of constitutional judges in a left-right scale from 1999 to 2003 showed that only two judges out of nine included in the sample were on the left side of the spectrum, which means that they favor a more active role for the state in the conduction of the economy (Basabe 2008, 166-168). This data is only suggestive, of course, since the relevant comparison to test the stated hypothesis is between judges of the constitutional court and those of other courts in the same country, for instance, the Supreme Court.

The previous hypotheses of the impact of the institutional location of the constitutional organ and the appointment procedure on the type of judges should be taken with a grain of salt. There are potential problems with the measurement of civil society participation. For one, it may be the case that the participation of civil society in the appointment process is not explicitly mentioned in the Constitution, but regulated in an organic law and a common practice. This is the case of the 2003 statutory reform in Argentina, which created greater demands for transparency in judicial appointments. Moreover, it may be that the coding rule that demands that civil society participate in one of the three ways mentioned earlier leaves out a "weaker" form of participation that nonetheless has been shown to be quite effective, i.e. active participation to publicize and make more transparent the appointing process. This is the case, for instance, in Argentina where appointments to the Supreme Court after 2002 were made with an important participation of organizations such as the *Asociación de Derechos Civiles* (ADC) and the *Centro de Estudios Legales y Sociales* (CELS) and observers agree that the result was that first-level judges were appointed to the Supreme Court (see Ruibal 2007).

Requirements to Become a Constitutional Judge

Some constitutions also include specific requirements to become a constitutional judge that also have direct influence on the type of judges that reach this court. For instance, some countries specifically require a law degree or even judicial experience while in other countries these professional backgrounds are not necessary to become a judge. France is an interesting extreme case, where even sociology professors have become members of the *Conseil Constitutionnel*. In Latin America, the Constitutions of almost all the countries in our sample explicitly mention that a law degree is a necessary requirement to become a constitutional judge. The interesting exceptions are the Dominican Republic from 1963 to 1993, Brazil from 1946 to 2005, Chile from 1945 to 1979, Ecuador in 1945 and from 1967 to 1992, and Peru from 1945 to 1978. Notice that, currently and since the early 1990´s a law degree is a necessary requisite to become a constitutional judge, except for Brazil. That is, candidates may be law professors, public or private practice lawyers, or other professionals but who must have necessarily obtained a law degree.

There is another requirement that arguably could restrict even further the pool of candidates to the constitutional court: to have experience as a judge. It is interesting that, out of all countries in our sample, it was only in Chile from 1980 to 1996 that experience as a judge was required to become a judge in the Constitutional Tribunal. In general, Latin American Constitutions provide a series of "either – or" requirements, in which experience as a judge can be substituted by a certain number of years of legal practice (maybe as a professor or as a private lawyer), and most of them also require elected politicians or members of the government to leave their posts at least one year before becoming constitutional judge. In sum, in terms of requirements for becoming a constitutional judge Latin American countries are practically closed to professionals other than lawyers but not as close as to allow only previous judges to aspire to this position.

Legal Instruments of Constitutional Control

Before analyzing the arguments that link legal instruments available for constitutional adjudication with judicial behavior, let us categorize the possible types of legal instruments according to five relevant characteristics: -type, timing, jurisdiction, effects, and access. TYPE refers to whether the process of constitutional adjudication is *concrete* (when the review may not take place absent a real case or controversy) or *abstract* (when the review takes place absent a real case or controversy). TIMING determines if constitutional review occur *a priori* (before a law has been formally enacted) or *a posteriori* (after the law has been adopted). JURISDICTION can be either *centralized* (there is only one court responsible for it) or *decentralized* (more than one court can interpret the Constitution and render laws, decrees or regulations unconstitutional). EFFECTS of the decisions in constitutional cases may be *erga omnes* (valid for everyone) or *inter partes* (valid only for the participants in the case). Finally, ACCESS to legal instruments can be *open* (any citizen has legal standing to use them) or *restricted* (only public authorities, such as a fraction of legislators or leaders of political parties have legal standing).

The first three characteristics –type, timing, and jurisdiction- allow us to identify four different legal instruments for constitutional control (see Navia and Rios-Figueroa 2005). Technically, with these three features there could be eight different legal instruments. However, four of those combinations are either impossible or not observed because they are unappealing for practical reasons. For instance, notice that while abstract review might occur *a priori* or *a posteriori*, concrete review can only occur a posteriori. There cannot be concrete adjudication a priori, because 'concrete' requires the review to occur after the law has entered into effect. Also, logically, when there is *a priori* review, jurisdiction cannot be decentralized because the law hasn't even been enacted. Similarly, although it is possible to imagine abstract review with decentralized jurisdiction, this combination is not commonly observed because it is unappealing for practical reasons. That is, if every judge in the country could declare a law, in the abstract, unconstitutional, this would create not only extraordinary legal uncertainty[13] but it would also make lower court

[13] Kelsen believed that the concrete-decentralized adjudication approach of the U.S. system failed to produce unity and uniformity in decisions, and thus created legal insecurity among the citizens (2001, 43). Imagine a system in which the combination abstract-decentralized exists.

judges extremely powerful and create a necessity for a system of automatic appeals that would have to be resolved quickly in order to give stability to the legal framework. For these reasons, we are left with four different instruments of constitutional review: 1) concrete centralized *a posteriori*, 2) concrete decentralized *a posteriori*, 3) abstract centralized *a priori*, and 4) abstract centralized *a posteriori*. This discussion is summarized in Table 2.

[Table 2 here]

The effects of the decisions in cases where one of the four instruments is used can vary, and access to each instrument can also be different. For 'effects' and 'access', it is also possible to identify some combinations that are either logically impossible or practically unappealing. For instance, take the first instrument of constitutional control (i.e. concrete-centralized-*a posteriori*), which would be like the Spanish *amparo,* the German *Verfassungsbeschwerde*, or the Mexican *controversia constitucional*. Decisions of cases in which this instrument is used can have *erga omnes* or *inter partes* effects. [14] Similarly, access to this instrument can be open to all citizens or restricted to public authorities.

Now take the second instrument, i.e. concrete -decentralized- *a posteriori*, which is the Mexican *amparo* suit, the Brazilian *mandado de segurança*, or the Anglo-Saxon *habeas corpus*. Since these instruments can be heard by any judge, the legal processes that use this instrument typically start in the lower courts and thus decisions in these cases generally have *inter partes* effects. If these decisions are appealed and reach the last court of appeals or the constitutional court then they may acquire general effects. At the same time, this instrument is supposed to alleviate constitutional infractions of individual rights, thus, restricting access to this instrument although imaginable would be completely unappealing.

The prototypical example of the third instrument, abstract -centralized- *a priori*, is the one popularized by the French *Conseil Constitutionnel*. Decisions on this type of instrument must be *erga omnes* since the process is basically a quality control in the law-making process. For the same reason, even if it were possible, it would be unappealing to open access to this instrument to every citizen, and thus, it is generally available only for those who partake in the law-making process, i.e. the legislators and the executive.

Finally, the fourth instrument, abstract-centralized-*a posteriori*, like the Mexican *acción de inconstitucionalidad*, implies literally deleting a law or a part of it from the codes, and thus it is impossible for decisions in these cases to have effects only for those who filed the suit. At the same time, access to this instrument can be open to all citizens or restricted to public authorities. This discussion is summarized in Table 3.

[Table 3 here]

[14] The Colombian *tutela* is heard by the Constitutional Court and has *inter partes* effects. However, this Court has argued that in some situations the *tutela* points to "unconstitutional states of affairs" and give general validity to its rulings (see Cepeda, 2005).

We can now discuss some arguments that link legal instruments for constitutional adjudication to judicial behavior. The abstract -centralized- *a posteriori* instrument of constitutional control, invented by Kelsen, has been considered the most "political" tool that judges possess by some scholars because it directly implies legislating albeit in a "negative" way (e.g. Stone Sweet 2000, 142-5; Guarnieri and Pederzoli 1999, 113-115). However, it has been argued that this is not a good instrument for judges to enforce rights, because it is too rough a tool that forces constitutional judges to decide whether a law or a part of it violates a constitutional right, when answers to those kinds of questions usually require contextual arguments for which 'concrete' instruments are better suited. This is the idea behind Gerald Rosenberg's argument that, since "judges are gradualists", litigation for significant social reform must take place step-by-step, "small changes must be argued before big ones" (Rosenberg 1991, 31). Charles Epp made a similar point when he said: "[…] even landmark decisions are isolated symbols unless they are supported by a continuing stream of cases providing clarification and enforcement" (Epp 1998, 18). That is, constitutional judges give meaning to the abstract clauses of the Constitution on a case–by-case basis, taking into account the complexity of the contextual situation in which those cases occur. This does not make abstract review a good instrument for enforcing rights: it is a saw for a job that requires a scalpel.

For the same reasons, the abstract-centralized -*a posteriori* instrument may be better to arbitrate political conflicts, especially if access to this instrument is restricted to public authorities. In Mexico, for instance, the Supreme Court has been arbitrating partisan conflicts and leveling the playing field by nullifying biased state electoral laws (Finkel 2003; Ansolabehere 2007). In sum, the 'abstract' and 'restricted access' characteristics of instrument four make it good for settling political disputes but not that good for enforcing rights, while instruments that are 'concrete' are better for enforcing rights.

However, notice that there are two 'concrete' instruments: one that is also 'centralized' (instrument one) and one that is 'decentralized' (instrument two). Rosenberg's and Epp's arguments seem to imply that for enforcing rights, it is better to use the concrete-decentralized instrument, which is the U.S. style judicial review. However, the German and Spanish "individual complaints" that are concrete-centralized instruments seem to have also worked rather well to enforce rights (cfr. Stone Sweet 2000, 107-112).[15] Notice, moreover, that 'decentralized' instruments generally come with open access, while 'centralized' instruments may come with either open or restricted access. This is important because scholars have shown that open access to constitutional justice is crucial for a court to be more active in the defense of rights (Wilson and Rodriguez-Cordero 2006; Smulovitz and Peruzzotti 2000). According to the previous arguments, instrument two (concrete-decentralized-*a posteriori*) would be the best tool for rights protection,

[15] It should be noted that, in both Germany and Spain, this instrument has general effects so, as we will see below, it is not quite similar to many Latin American instruments of this type.

but it remains an empirical question to determine if this is actually the case in inter-country comparisons, and if one characteristic is more important than another.[16]

Another argument that links the legal framework with constitutional judges more willing to enforce rights is simply that the more rights are specified in the Constitution, the more likely judges will enforce some of them (Rosenberg 1991, 11). Some explanations of why the Colombian Constitutional Court has been so active in rights enforcement is the more extensive catalogue of rights included in the 1991 Constitution as compared to the previous Constitution (Uprimny 2006). In general, however, as Siri Gloppen argues, "rights are now incorporated into the legal frameworks of most countries, either in national constitutions, or in the form of human rights provisions in customary international law and legally binding treaties" (Gloppen 2006, 40). Thus, in the contemporary world, it wouldn't be difficult for judges to find valid legal sources to sustain their rights-enforcement behavior, although the legitimacy of that move certainly varies across countries.[17]

Scholars have also pointed out that if courts have the power to choose the cases they will decide, then they will choose more cases to enforce rights. In Latin America, only the Mexican Constitution specifies something similar but not exactly the same as the writ of *certiorari*, which is the faculty to attract cases that are deemed important. Ana Laura Magaloni has argued that the Mexican Supreme Court should actively use this power to engage more actively in rights enforcement (Magaloni 2007). To my knowledge, similar prerogatives exist in at least one more Latin American country, that is Argentina where there exists the *per saltum* mechanism that make cases jump directly to the Supreme Court. However, this prerogative is not specified in the constitution, and this may be the same situation in other Latin American countries.

Turning to the data on our sample of Latin American countries, Figures 3 and 4 show the proportion of countries that have each one of the four instruments of constitutional control previously identified. There are several interesting things to note, but I want to signal out the following: the proportion of countries with instruments one and four has been clearly increasing, especially since 1980; the proportion of countries with instrument two has a less steep but still upward tendency; and the proportion of countries with instrument three has remained around 50% during the whole period. Thus, 'centralized' instruments (one and four) have been the ones preferred by Latin American legislators to include in their respective constitutions (see Figure 3).

[16] Instrument three, abstract-centralized -*a priori*, does not seem to favor a particular kind of judicial behavior.

[17] Scholars have also pointed out that if courts have the power to choose the cases they will decide, then they will choose more cases to enforce rights. In Latin America, only the Mexican Constitution specifies something similar but not exactly the same to the writ or *certiorari*, which is the faculty to attract cases. Ana Laura Magaloni has argued that the Mexican Supreme Court should actively use this power to engage more actively in rights enforcement (Magaloni 2007). Similar prerogatives exist in other Latin American countries (e.g. *per saltum* in Argentina) but, to my knowledge, they are not clearly specified in constitutional texts.

[Figure 3 and Figure 4 here]

Instrument one (concrete – centralized – *a posteriori*) is currently most common in the region, about 80% of countries have it, and it has gained popularity since the 1990s. In almost as many countries this instrument has *erga omnes* effects. And, interestingly, recent reforms in a quarter of the countries in our sample have actually opened access to this instrument (See Figure 3, left panel, solid, long-dashed line and short-dashed line, respectively). Instrument four (abstract – centralized – *a poteriori*) is the second most common instrument in the region. Notice the interesting gap between the countries that have this instrument, around 70% by 2005, and those in which this instrument can be used by any citizen, around 30% by 2005 (Figure 3, panel on the right, solid and dashed line respectively). Variation in access to these instruments, thus, may be an important explanatory variable to why some constitutional judges are more prone to enforce rights and some others more likely to arbitrate political conflicts.

Let us look at what particular instruments each country had in the year 2005. Table 4 and Table 5 show this information. The first thing to note is that, in general, Latin American countries have chosen to include many different legal instruments of constitutional control instead of having only one. Most countries have at least two, and many have three instruments; some countries have all four instruments (e.g. Chile, Venezuela, Ecuador), while a handful have only one (e.g. Argentina, Uruguay). Instruments one and two, which share the characteristic that they are 'concrete' and thus more suitable for enforcing rights, are present in several countries. Of those countries only Mexico and Peru restrict access to instrument one, and only Colombia, Ecuador, Honduras and Mexico allow for *erga omnes* effects with this instrument.

Notice that the Latin American countries that have been more active defending rights, i.e. Colombia and Costa Rica, have instrument one and don't have instrument two, thus they would be closer to the Spanish and German than to the US model of constitutional review. On the other hand, the instrument that was identified as better suited to arbitrate political conflicts, instrument four with restricted access, is present in Bolivia, Brazil, Chile, and Mexico. As was mentioned in the beginning of the paper, Chile and Mexico have been considered among the countries in which judges have been closer to being arbiters of the political conflict than to the active defense of rights (Magaloni 2003; Scribner 2004).

[Table 4 and Table 5 here]

In general, Latin American countries have quite a diversified portfolio of legal instruments of constitutional control. Some instruments have been pointed out as being better tools for litigants to fight for rights (i.e. those that have open access) and also for judges to enforce those rights (i.e. those that are designed to solve concrete disputes and controversies). Some other instruments have been signaled out as being better for judges and political actors to settle disputes between them (i.e. those that are abstract and with restricted access). We can find these instruments in many countries, and most of the time more than two instruments in the same country, thus, the region is a fertile ground for empirical research to determine whether certain institutional features

related to legal instruments of constitutional control are directly or indirectly linked to the behavior of constitutional judges.

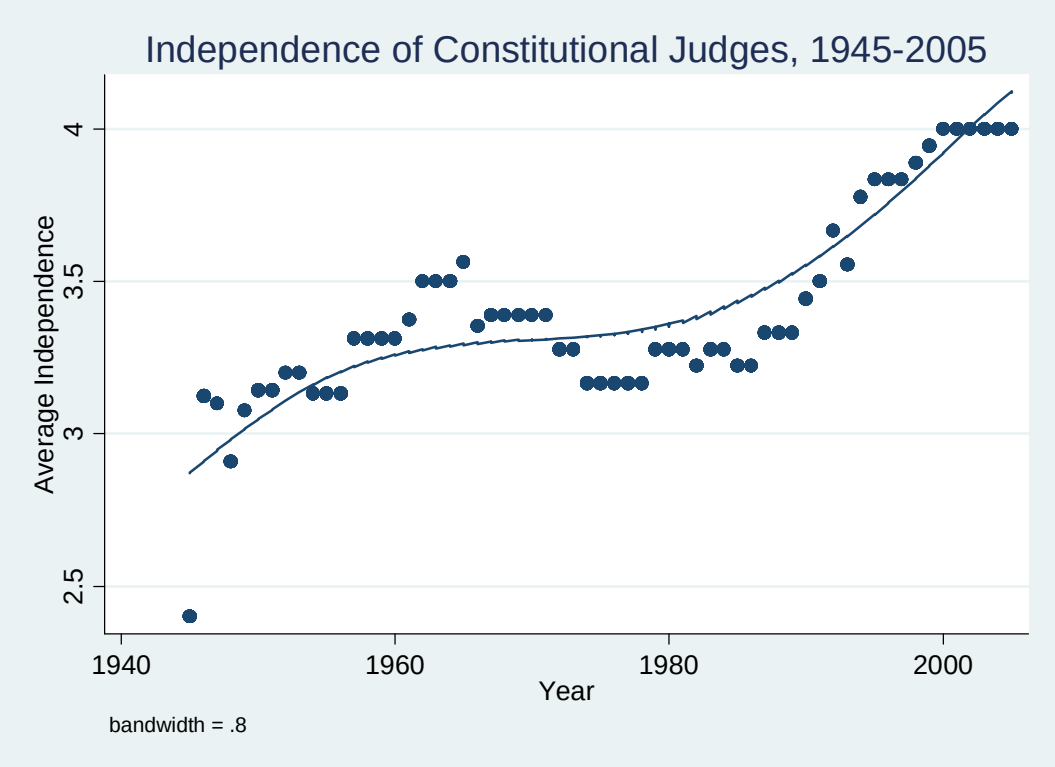
Conclusions

This paper analyzed several arguments in which the institutional framework, or a certain feature thereof, is invoked to explain the behavior of constitutional judges. In particular, I discussed arguments that consider an institutional feature to explain why and to what extent constitutional judges tend to behave more like arbiters of political conflict or like active defenders of rights. The paper also mapped the existence or absence of the relevant institutional features in a sample of eighteen Latin American countries from 1945 through 2005. Whether those features indeed produce a specific behavior is an interesting question that should be pursued. The impressive activity in reforming the judicial branch of government throughout Latin America signals that at least some of those involved in the reform processes (e.g. politicians, donors, consulting experts, etcetera) believe that change in behavior can start with institutional change. It is an issue for future research to establish whether it is indeed the case.

As Shugart and Carey have shown (1992) not all presidential systems are alike and the institutional differences in, for instance, presidential vetoes may be consequential (see also Alemán and Schwartz 2006). Similarly, this paper shows that there are interesting variations in the institutional structure of Latin American justice systems, all of which share the civil law tradition. If the institutional structure within which judges perform their jobs has an impact on their decision-making, the region is a good laboratory to explore these arguments. Kapiszewski and Taylor (2008) have pointed out interesting research avenues in the study of judicial politics in Latin America, and a comparative research agenda could bring the study of courts closer to the study of executives and legislatures, a field that has been growing and generating important insights.

Figures and Tables

Figure 1. Index of Independence of Latin American constitutional judges (min=0, max=6)



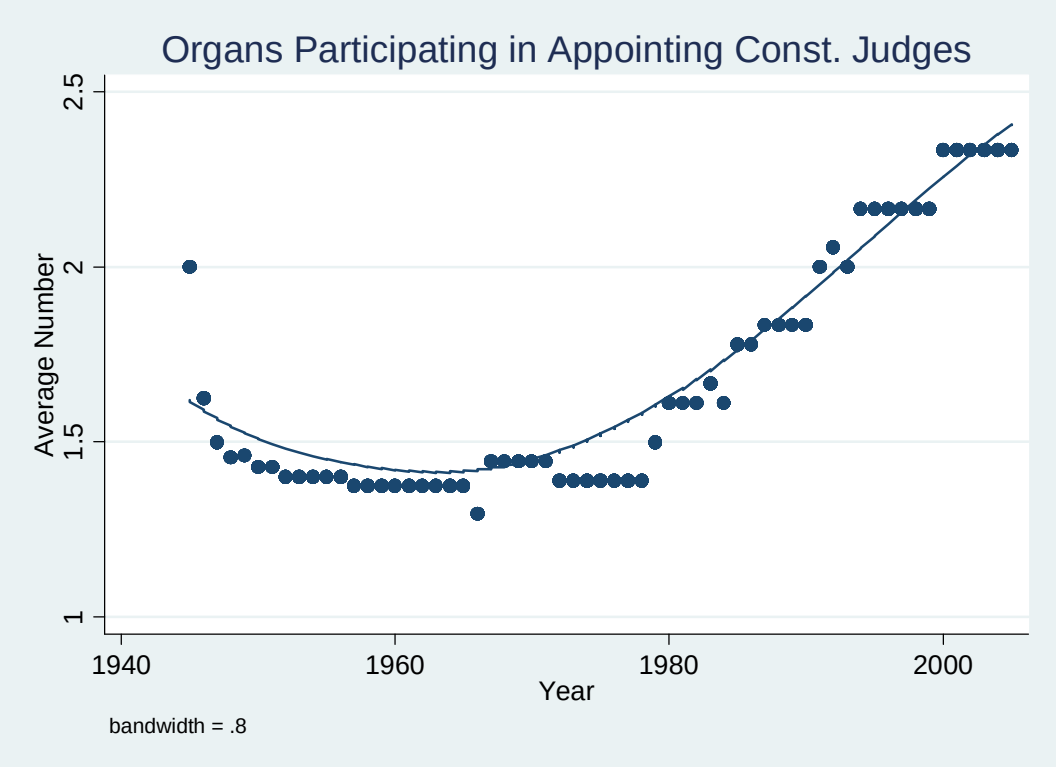
Note: the graph shows a locally weighted regression (lowess) of the average level of the independence index on time.

Table 1. Unpacked index of judicial independence in the year 2005

Country	Appointment	Tenure	App & Tenure	Impeachment	Number	Total*
Paraguay	1	1	3	2	1	6
Brazil	1	1	3	1	1	5
El Salvador	1	1	3	1	1	5
Honduras	1	1	3	1	1	5
Mexico	1	1	3	1	1	5
Argentina	1	1	3	1	0	4
Bolivia	0	1	2	1	1	4
Chile	1	1	3	0	1	4
Colombia	1	1	3	1	0	4
Dom. Rep.	1	1	3	1	0	4
Guatemala	1	0	1	2	1	4
Ecuador	1	0	1	2	1	4
Panama	1	1	3	1	0	4
Uruguay	0	1	2	1	1	4
Costa Rica	0	1	2	1	0	3
Nicaragua	1	0	1	1	1	3
Venezuela	0	1	2	1	0	3
Peru	0	0	0	1	0	1
AVERAGE						4

*Total = App & Tenure + Impeachment + Number

Figure 2. Average number of organs participating in the appointment of Latin American constitutional judges, 1945-2005 (min=0, max=5)



Note: the graph shows a locally weighted regression (lowess) of the average number of organs participating in the appointing process on time.

Table 2. Legal instruments for constitutional control according to type, timing, and jurisdiction

	Concrete		Abstract	
Jurisdiction/ Timing	**A priori**	**A posteriori**	**A priori**	**A posteriori**
Centralized	Not possible	Yes	Yes	Yes
Decentralized	Not possible	Yes	Not possible	Not observed

Note: "Not possible" means that the combination of characteristics cannot logically occur, and "not observed" means that while the combination is logically possible it is unappealing for either theoretical or practical considerations.

Table 3. Effects and access for different legal instruments of constitutional control

	Effects		Access	
	Erga Omnes	**Inter Partes**	**Open**	**Restricted**
Instrument 1	Yes	Yes	Yes	Yes
Instrument 2	Not observed	Yes	Yes	Not observed
Instrument 3	Yes	Not possible	Not observed	Yes
Instrument 4	Yes	Not possible	Yes	Yes

Note: "Not possible" means that the combination of characteristics cannot logically occur, and "not observed" means that while the combination is logically possible it is unappealing for either theoretical or practical considerations.

Instrument 1: Concrete / centralized / a posteriori
Instrument 2: Concrete / decentralized / a posteriori
Instrument 3: Abstract / centralized / a priori
Instrument 4: Abstract / centralized / a posteriori

Figure 3. Proportion of countries that have instruments one and four, 1945-2005

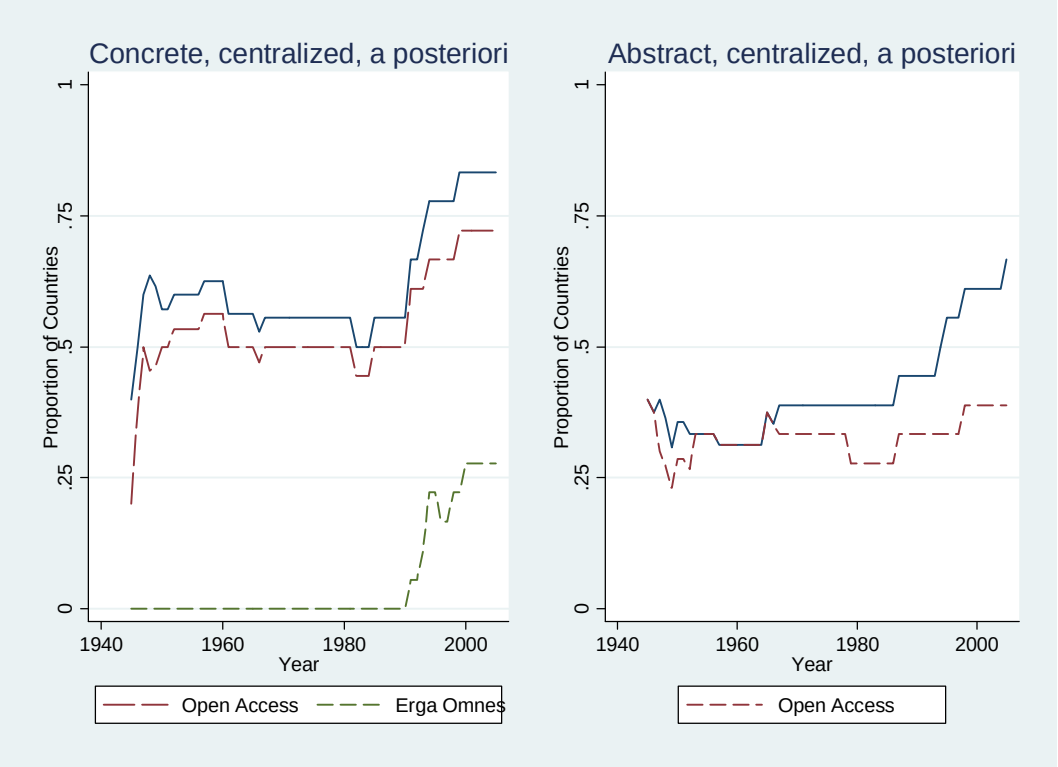


Figure 4. Proportion of countries that have instruments two and three, 1945-2005

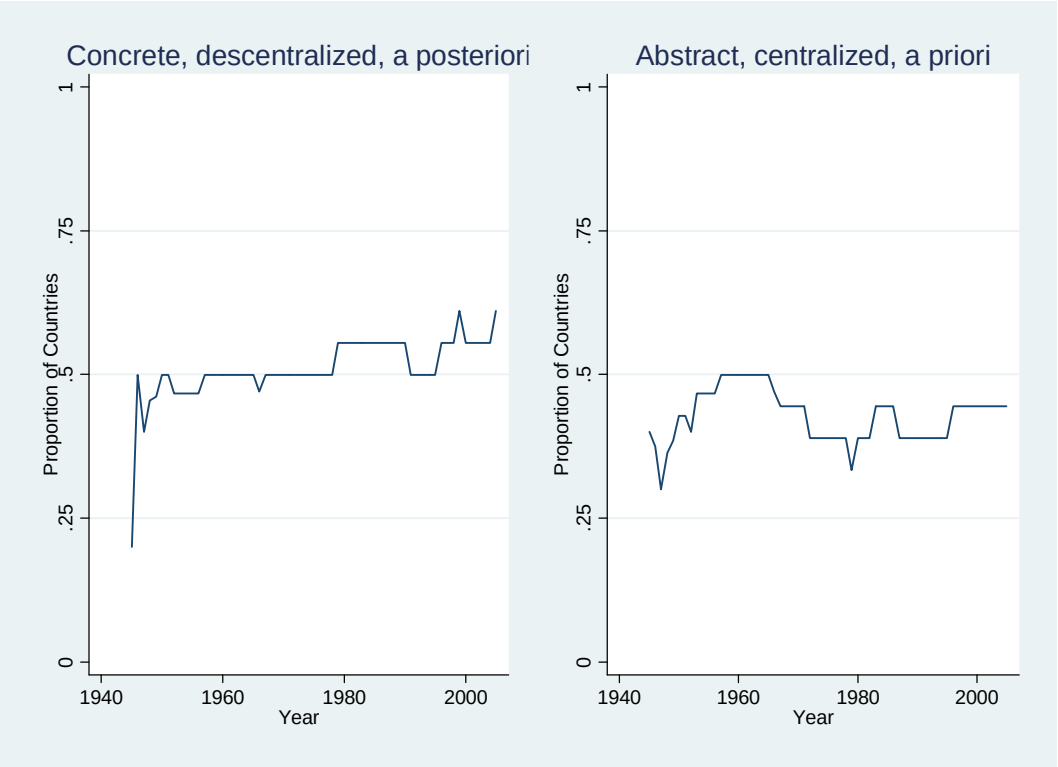


Table 4. Legal instruments of constitutional control in Latin America, year 2005

Concrete & A posteriori		Abstract & Centralized	
Centralized	**Decentralized**	**A priori**	**A posteriori**
Instrument 1	Instrument 2	Instrument 3	Instrument 4
Bolivia	Argentina	Chile	Bolivia
Brazil	Brazil	Colombia	Brazil
Chile	Chile	Costa Rica	Chile
Colombia	Ecuador	Ecuador	Colombia
Costa Rica	Guatemala	El Salvador	Ecuador
Dom. Republic	Mexico	Honduras	El Salvador
Ecuador	Nicaragua	Panama	Guatemala
El Salvador	Panama	Venezuela	Mexico
Guatemala	Peru		Nicaragua
Honduras	Venezuela		Panama
Mexico			Peru
Paraguay			Venezuela
Peru			
Uruguay			
Venezuela			

Table 5. Effects and Access of instruments of constitutional control in Latin America, year 2005

	Effects		Access	
	Erga Omnes	**Inter Partes**	**Open**	**Restricted**
Instrument 1	Colombia Ecuador Honduras Mexico*	Bolivia Brazil Chile Costa Rica Dom. Republic El Salvador Guatemala Paraguay Peru Uruguay Venezuela	Bolivia Brazil Chile Colombia Costa Rica Dom. Republic Ecuador El Salvador Guatemala Honduras Paraguay Uruguay Venezuela	Mexico Peru
Instrument 2	Brazil*	Argentina Chile Ecuador Guatemala Mexico Nicaragua Panama Paraguay Peru Venezuela	Argentina Brazil Chile Ecuador Guatemala Mexico Nicaragua Panama Paraguay Peru Venezuela	Not observed
Instrument 3	Chile Colombia Costa Rica Ecuador El Salvador Honduras Panama Venezuela	Not possible	Not observed	Chile Colombia Costa Rica Ecuador El Salvador Honduras Panama Venezuela
Instrument 4	Bolivia Brazil Chile Colombia Ecuador El Salvador Guatemala Mexico* Nicaragua Panama Peru Venezuela	Not possible	Colombia Ecuador El Salvador Guatemala Nicaragua Panama Venezuela	Bolivia Brazil Chile Mexico Peru

*Effects in these cases are erga omnes only if a supermajority of judges votes in the same direction

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