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Abstract

The legacy of military interventions in Latin America has produced the unstable democracies that characterize the region. A distinctive feature of this legacy is the prevalence of conflictive civil-military relations that are caused, in part, by uncertainty over the appropriate degree of autonomy for the military under a democratic regime, and uncertainty over each other actor's willingness to cooperate in building the democratic regime. This paper argues that constitutional courts, by and large an institutional innovation of the last round of transitions to democracy, can contribute to transform conflictive into cooperative civil-military relations if they play the role of third-party mediators. In particular, unbiased and accesible courts can credibly provide relevant information to reduce the uncertainty sorrounding civil-military relations. When these conditions are not met, constitutional courts tend to update or even expand an old jurisprudence of impunity and lack of accountability of the military. The argument is illustrated in the case of constitutional jurisprudence on the scope of military jurisdiction in Colombia from 1958 to 2010.[*]

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INTRODUCTION

Modern states need a corps of armed forces strong enough to provide security against external threat as well as to guarantee internal peace. But strong armies have also proven to be a threat to regime and, specifically, democratic stability, weakening the state and harming thousands of people. Powerful armies subordinated to democratic civilian governments are the puzzling exception where people with guns obey people without them (Przeworski, 2011, 180). For a democracy, therefore, the key question is how to constrain the armed forces and, in particular, how the military can be subjected to the democratic rule of law. For the military, however, the key question is how to maximize control and stability under a dictatorial regime or autonomy and influence under a democratic one.

In Latin America this question is of particular importance. As José Antonio Cheibub has argued, since the military stepped into politics as an organization,[1] a "spiral of instability" has dominated the region because military dictatorships leave in place weakened democracies that are prone to new military interventions (Cheibub 2007, 160).[2] Weak democratic executives use military forces to face not only external but also internal emergencies reinforcing the military's capacity to intervene in other internal issues, such as a perceived or real "legislative paralysis", an economic downturn, or the potential electoral triumph of a political enemy. A new military dictatorship emerges that will sooner or later heir a weak democratic regime, and so on and so forth.

The last round of authoritarianism and military interventions in the region took place during the Cold War. In fact, by 1970 all but three Latin American countries were dictatorships (Colombia, Costa Rica, and Venezuela) mostly led by the military.[3] Things began to change in 1978 with the transition to presidential democracy in the Dominican Republic followed by Ecuador the next year, Peru in 1980, and since then practically all countries in the region. Latin American "third wave" democracies are richer and politically more competitive and thus have lasted longer than in the past.[4] But the legacy of authoritarism and military interventions still hunts the region. Tense civic-military relations and unaccountable armed forces hollow out democracies. This is more pronounced in countries that have turned to the armed forces in their fight against terrorism, drug trafficking, organized crime, and sometimes even regular street policing, such as Brazil, Colombia, El Salvador, Guatemala, Honduras, Mexico, or Peru.

The hollowing out and potential derailment of democratic regimes produced by conflictive civic-military relations can be attenuated by a novel institutional feature: the delegation to independent judicial institutions of the power to interpret the constitution. Although some kind of judicial review has been present in the region since the second half of the nineteenth century, in the new or amended constitutions produced by Latin American "third wave" democracies there is a clear regional shift to delegate this authority to autonomous constitutional courts (e.g. Brazil or Peru), or to Supreme Courts or

[1] Cheibub dates this phenomenon in the ten years after 1925 when the first military coups occurred in Ecuador and Chile; followed by Argentina, Bolivia, Brazil, the Dominican Republic, Guyana, and Peru that suffered military coups in 1930; and then by Ecuador, and El Salvador in 1931 (2007, 160).

[2] Although Latin America comprises fewer than 10% of the world's countries, 37% of transitions to and from democracy have occurred there. Between 1946 and 2002, the average number of transitions in Latin America was 2.9 versus 0.5 outside this region (Cheibub 2007, 156). Contrary to the Linzian view that the culprit of such instability was the presidential form of government, Cheibub convincingly argues and shows that "the higher instability of presidential democracies can be entirely attributed to their authoritarian legacy; it has nothing to do with their constitutional structure" (2007, 173).

[3] Authoritarian rule, both civil and military, prevailed in Latin America before the expansion of electoral democracy in the region since the early1980s. From 1900 to 2008, Latin American countries were under authoritarian rule for an average of 65.2 years (Negretto 2013).

[4] Cheibub adds that this time military organizations are delegitimized due to the gross abuses perpetrated during the last round of authoritarian regimes (2007, 155).

one of its chambers (e.g. Nicaragua or Mexico). Moreover, the list of justiciable rights has been expanded in virtually all constitutions of the region, and access to constitutional justice has been expanded overall but at interestingly different levels and rates. In general, the gist of this institutional change is the incorporation of a new political actor, the constitutional judges, with power to breathe new life into new or reformed constitutions across the region.

But how exactly do constitutional judges help to generate cooperative civic-military relations and more stable and higher quality democracies? Constitutional courts that are independent and widely accessible can credibly provide relevant information that reduces the uncertainty sorrounding the relationship between the civilian governemnt and the armed forces, potentially transforming a conflictive relationship into a cooperative one. In other words, constitutional courts can play a role analogous to a third-party mediatior in international conflicts and contribute to conflict resolution when the source of conflict is uncertainty between two actors (Gilligan and Johns 2012; A. H. Kydd 2010; A. Kydd 2006).

To assess this argument, this paper focuses on constitutional courts' decisions on military jurisdiction (*fuero militar*): a separate body of law, prosecutors, and courts that are created to take into account the specifics of the armed forces' job in order to give stability to the institution and legal security to its members. The scope of the military jurisdiction is one of the key elements in autonomy granted to the military by civilian governments (see Kyle and Reiter 2012, 2013). In Latin America, however, the history of military interventions produced excesivelly broad military jurisdictions that gave way to impunity for members of the armed forces who committed crimes that had nothing to do with their specialized mission. Needless to say, members of the armed forces got used to a wide scope of military jurisdiction and tend to resist civilian attempts to limit it. Constitutional courts enter the scene here: when specific cases on this topic reach the court, it is obliged to give reasons to uphold, expand, or limit the scope of this special jurisdiction. Through these decisions, constitutional courts can provide solutions that are acceptable to civilian governments and the armed forces and also provide information on the willigness of each actor to build a democratic society, reducing the uncertainty sorrunding their relationship and promoting cooperation among them.[5]

The reminder of the paper is divided as follows. The first part develops the argument. The second part illustrates this role of courts through a longitudinal analysis of constitutional jurisprudence on military jurisdiction in Colombia (1958-2010). The third part briefly concludes.

CONSTITUTIONAL COURTS AS COOPERATION-BUILDING MEDIATORS

Recent scholarship on judicial institutions underlines the theoretical role of courts in the transition to and consolidation of democratic regimes. For instance, Gibler and Randazzo (2011) argue that courts and judicial institutions can contribute to prevent democratic backsliding by signaling when rulers overstep their constitutional bounds and facilitating civil society coordinated response to restrain them (see also L. Johns 2012; Weingast 1997). Similarly, Reenock, Staton, and Radean (2012) argue that judicial institutions can also facilitate credible commitments and the enforcement of compromises that matter for democratic survival. But what scholars of judicial politics have overlooked is that under certain circumstances constitutional courts can also play the role of third-party mediators and contribute to the quality of democratic regimes transforming conflictive relationships into cooperative ones.

[5] To be sure, there are other variables that contribute to reduce conflict in civil military relations such as electoral competition (Hunter 1997), the strength and legitimacy of the military after the transition to democracy (Pereira 2001), the degree of internal unrest and of the military's involvement in controlling it (Sotomayor 2008). These variables should be taken into account in a multivariate analysis, which is beyond the limits of this paper.

Third-Party Mediators in Conflict Resolution

To prevent or resolve conflict one must understand why it happened so that the causes may be addressed or removed (A. H. Kydd 2010, 104). According to the rationalist perspective on conflict different types of uncertainty may cause conflict between two actors. Actors can be uncertain about what is the solution to their conflict, assuming there is one. Actors can also be uncertain about whether the other side prefers to reciprocate co-operation or exploit it.[6] For instance, when actors contemplate the implementation of a deal that is being negotiated and they are uncertain whether the other side will abide by the deal, or whether it will exploit any vulnerability that may arise in the implementation of the deal (A. Kydd 2006, 454). If two sides don´t know what bargain can be a solution to their conflict, or if they mistrust each other, they may not be able to prevent or stop conflict between them.

When the cause of conflict between two actors is uncertainty over the right solution to their conflict or over each other's willingness to cooperate, a third-party mediator can facilitate cooperation by providing relevant information (A. Kydd 2006, 449). For instance, the mediator can propose or highlight a solution that both sides had not considered. Moreover, if two disputants are engaged in an ongoing civil conflict but wish to conclude a peace treaty, a mediator can reassure each side that the other is genuinely interested in peace and not attempting to deceive and exploit them.

In this perspective, conflict resolution is inherently trilateral and needs to be analyzed with three strategic actors: the two parties in the conflict and the mediator (A. H. Kydd 2010, 103). The mediator should care about the issue in dispute so that it proposes sensible solutions and it does not say whatever maximizes the likelihood of agreement between the two actors. Moreover, to be credible the mediator needs to be unbiased in the sense of not sharing completely the preferences of any of the actors in the dispute. Finally, the mediator should also have information that is relevant to reduce the uncertainty that causes the conflict (A. Kydd 2006, 450). If these conditions are met, a third-party mediator can credibly provide relevant information that reduced the uncertainty causing the conflict, thus contribute to build cooperative relations between the actors in a dispute.

Uncertainty and Conflict in Civil-Military Relations

In a democracy, civilian politicians must make military and foreign policy framing the debate on alternative policies and enlisting military experts as advisers as needed. In this endeavor, as Barany (2012) puts it: "civilians have the right to be wrong [but] officers do not have the right to be insubordinate". This built-in tension in civil-military relations requires constant engagement, monitoring, and interaction and compels politicians to keep and eye on and try to better understand the armed forces. The construction of a "democratic army", an army that unconditionally supports democratic governance, involves striking a delicate balance between ensuring the loyalty of the military to the popularly elected politicians while simultaneously granting to the military sufficient autonomy and strength to successfully discharge its functions and execute its missions (Barany 2012).

But it is not evident *prima facie* what is the appropriate degree of autonomy that the military should be granted in a democratic regime. On the one hand, the more autonomy for the military the more content this actor will be with the civil government and arguably the more effective it would be in carrying out its missions. But more autonomy also implies a weaker government relative to the military and a higher level of military threat to the regime

[6] Asymmetric information can also be a cause of conflict: actors can have private information about its own resolve, relative power, or costs for conflict. For instance, if one or both sides overestimate their own chance of winning or their opponent's costs of conflict, they may stick to positions that are irreconcilable. Asymmetric information also creates incentives to bluff, to claim to be strong and unmoved by the costs of war in order to persuade the other side to make further concessions (A. H. Kydd 2010, 106).

in case of civil-military disagreement. On the other hand, the less autonomy for the military the higher the level of accountability of this actor and thus the lower the levels of corruption and impunity in the armed forces. But less autonomy also implies a weaker and arguably less effective military and a higher instability of the democratic regime if a security crisis emerges.

Therefore, the relationship between democratic stability and the degree of military's autonomy follows an inverted U-shape (Figure 1). Because there is uncertainty about the right level of autonomy to the military, and it may very well vary across democratic regimes and across time within the same democratic regime, there are different democratically acceptable solutions, say within the range between X_1 and X_3 in Figure 1. This uncertainty over the right degree of autonomy is a source of conflict in civil-military relations. Both actors may be fighting because they don't know what is the range of acceptable solutions and, within it, which is the best solution to the conflict over the extent of military's autonomy given the specific circumstances of the country (that include the commitment of the regime to democratic values and the protection of human rights).

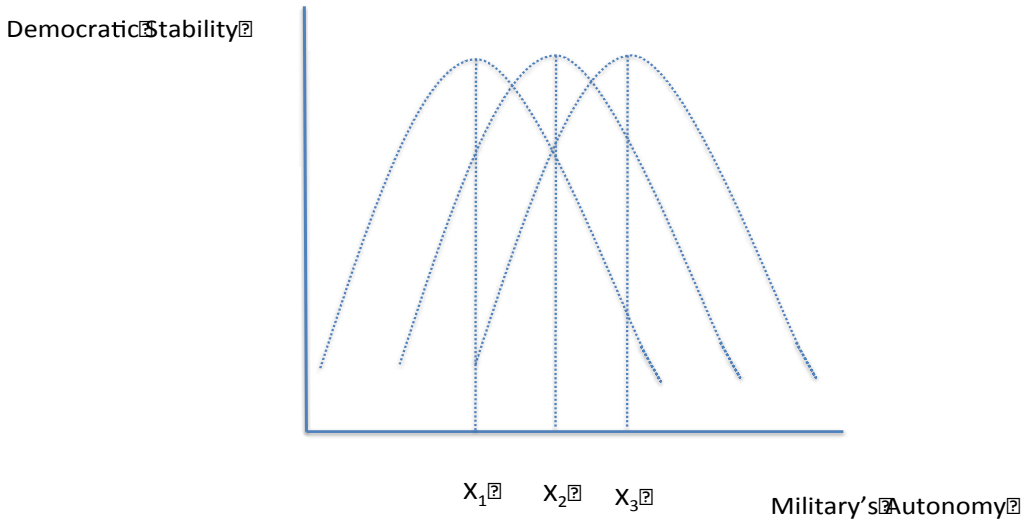
In transitional contexts, or in countries where the army is called to perform uncommon tasks, there is another type of uncertainty that exacerbates conflict in civil-military relations: the uncertainty each actor has over each other's willingness to cooperate in the building or sustaining of a democratic society with a democratic army. During transitions to democracy the civil government's resistances to veil or overt military pressures on policy in civilian are correlated to its attempt to impose greater control in military domains.[7] This creates tensions with the military which will worsen "should there develop within society armed groups, widespread violence, uncontrolled social mobilization, or autonomous movements that, for instance, seek accountability for past abuses of military officers" (Agüero 1995, 55. See also Agüero 2001).

In particular, in transitional contexts, or in countries where the army is called to perform unconventional tasks, the military is uncertain over the nature and extent of the impact of regime change or the policies of the civil government: How far do the civilian politicians want to push for loyalty? How much do they want to reduce the size of the army, or its control over its budget or the internal control of the profession? How far are they willing to push for accountability of current, and perhaps most importantly, past crimes and human rights violations? How much does the civil government value and honor the military's *sprit de corps* and how much they understand their particular needs? How much would the civil government support the military after unwelcome or controversial events derived from the military's participation in unconventional tasks? This uncertainty leads the military to maximize its autonomy from external political control, trying to obtain, keep, or increment its institutional prerogatives (cfr. Agüero 1995, 55. See also Agüero 2001).

On the other hand, the civilian government is uncertain about the military's acceptance of the civilian leadership over security and military affairs: how committed are the officers towards the regime, do they understand what does it mean to be a "democratic army"? How willing they are to carry out their missions strictly respecting human rights, or to accept the legal consequences if they don't? How much autonomy are the armed forces are willing to give away? How many and what institutional prerogatives will they defend and by what means? How much accountability over its finances, career promotions, and on-the-ground decisions is the military willing to accept?

[7] At the outset of transitions to democracy, the military regularly presents to the civilian politicians a list with the basic guarantees it demands. However, as Agüero puts it, "The assertion of civilian supremacy demands that guarantees initially given to the military be reduced, replaced or reformulated […] In any case, changes in the structure of guarantees will renew and increase uncertainty and civilians and the military will reassess the extent to which they regard each other as a continuing source of uncertainty." (Agüero 2001)

FIGURE 1.



In sum, two types of uncertainty produce conflict in civil-military relations. The first is the uncertainty about the range of acceptable solutions regarding the degree of autonomy for the military, and the right solution within that range given the peculiarities of the country at that time. This uncertainty is present in all democracies at all times. The second one is the uncertainty over each other actor's willingness to cooperate in building the democratic regime. This uncertainty is more prominent in transitional contexts and in places where the military performs uncommon tasks such as fighting organized crime or guerrilla groups.[8]

Constitutional Courts as Mediators

Because conflictive civil-military relations are in part caused by uncertainty, there is room for an unbiased third-party mediator to promote cooperative relations between these two actors by providing relevant information that reduces such uncertainty. Independent constitutional courts that are widely accesible and have ample powers of judicial review can provide that information. Independence is linked to the court's neutrality or unbiasness whereas

[8] The particular type of transition partly determines how much control the Armed Forces have over it. Latin America exhibits interesting variation in this regard. For instance, in countries such as Bolivia, Brazil, Chile, Ecuador, Peru, and Uruguay the military itself, from power, initiated the liberalization and transition process. In all these cases, the military managed to extract important concessions regarding their autonomy and legal security during the transition, whereas in some cases such as Brazil, Chile or Peru even the constitutions enacted during the military regime outlived it functioned under the new democracy (see, on this last point, Negretto 2013). In Argentina, in contrast, the transition started because of the generally poor performance of the military regime, which undermined its bargaining position (Agüero 1995, 114-15) (but see Barany 2012 for a different perspective on Argentina). The issue of military human rights violations, however, caused extreme uncertainty in the transitions most affected by it: those of Argentina, Chile and Uruguay. In other Latin American countries, such as Brazil, Colombia, Guatemala, El Salvador, Honduras, Peru, and Mexico the military has been engaged in uncommon tasks such as the fight against terrorism, drug trafficking, organized crime, and sometimes even regular street policing.

wide acess is related to the court's capacity to get information on the issue in dispute. In addition, courts that also have control over docket and sentencing guidelines are more capable of transmitting such information in a more effective way, strategically managing conflict between the actors and avoiding setbacks for its own decisions.

Specifically, by providing reasons to reject claims of the military/government that a certain case should belong to military/ordinary courts the court provides information to both actors regarding the acceptable limits to the scope of military jurisdiction. In addition, reactions and compliance to court decisions reveal the willigness of each actor to play by the rules of a democratic regime. A court that has discretion over its docket and sentencing guidelines can avoid cornering one actor asking to comply with a resolution that is highly unlikely to be complied with. In this perspective, constitutional courts do not always ask for absolute obedience from its rulings, instead they ask for opinions, discuss and dialogue about the possibilities of constitutional interpretation to integrate popular, governmental, and other actors´ views into constitutional interpretation (cfr Friedman 1993). By weighing in and mixing both actors' points of view in its reasoning the court promote deliberation and understanding of both actors, reducing the uncertainty surrounding their relationship (Ferejohn and Pasquino 2003; Friedman 1993; Gargarella 2008; Shapiro 2002). In a nutshell, independent courts with ample judicial review powers acting as third-party mediators can reduce the uncertainty surrounding civil-military relations promoting cooperation and improving the quality of democracy.

In order to assess the extent to which constitutional courts are independent and capable of producing information that reduces uncertainty, I focus on the institutional mechanisms that are intended to insulate judges from undue pressures and on those that specify their constitutional review powers. Focusing on these institutional mechanisms allows us to analyze objectively specific variations across constitutional courts, i.e. by looking at constitutional provisions instead of relying on subjective assessments of judicial behavior by surveyed experts or courts' users. However, because these institutional mechanisms may not be enforced in practice, I also specify the conditions under which they are likely to be more effective.[9]

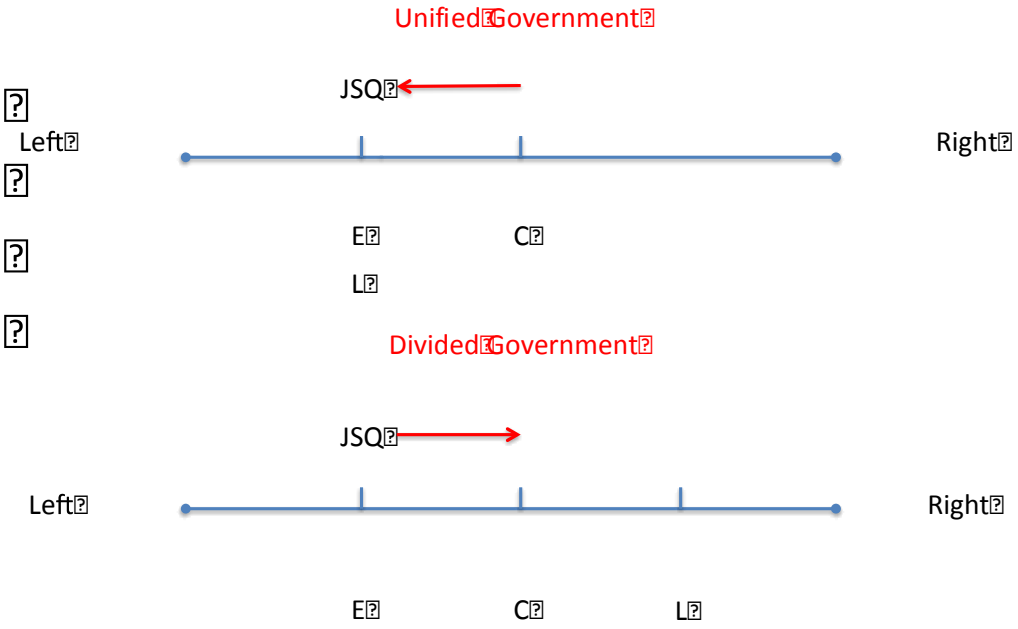
Judicial Independence

Incentives on judicial independence are of two types. The first impact directly on whether the preferences of a judge diverge from those of the executive and are contained in appointment mechanisms. The second determine the extent to which a judge can sincerely evaluate the cases that come before her and are contained in tenure and removal mechanisms. Consider, for ease of exposition, the basic setup in the separation-of-powers model in judicial politics: a single general left-right dimension where points on the line represent preferences of the Executive (E), the Legislative (L), the Court (C), as well as the location of the Jurisprudential Status Quo (JSQ) (Figure 2). In terms of the top panel in Figure 2, a situation of unified government where E & L share the same ideal point, the institutional design of the appointment mechanism impacts on whether C shares the same ideal point of E and L or not. On the other hand, tenure and removal mechanisms provide autonomy for a judge once appointed so that she can vote her preferences free from undue pressures, given that her preferences diverge from E and L.

The appointment mechanism works through various ways. For instance, it affects the type of judges that arrive to the court and thus the chances that judges with preferences distinct from those of the executive and legislative arrive at the court. Consider the distinction between "veto players" and "quota" appointment mechanisms. Veto-player judicial appointments require the consent of at least two actors (e.g. the president and the majority of the senate) and they tend to produce more "centrist" judges if the

[9] On measuring judicial independence and judicial power, and the relation between rules and behavior, see (Ginsburg and Melton 2013; Ríos-Figueroa and J. K. Staton 2012; Rios-Figueroa 2011).

FIGURE 2.



preferences of those actors differ. On the other hand, quota appointments give a certain number of the seats in the court to different organs that fill them unilaterally (e.g. the president and the senate each appoint 3 judges). Notice that while "quota" mechanisms would tend to produce more "extreme" judges, judges that share the preferences of E or L, the court overall could be "moderate" or "balanced" to the extent that the preferences of the appointing actors diverge.

The institutional and partisan identity of the appointer also matters. When the executive is the appointer, she would tend to appoint persons identified with, or closer to, the executive's agenda that is influenced both by the executive's personal characteristics and also those of the party to which she belongs. In contrast, legislative-appointed judges are selected through a bargaining process among parties with representation in congress and thus would more closely reflect the interests, ideology, and bargaining power of the parties. Finally, when a court or a judicial organ is the appointer it would tend to propose candidates identified with the interests of the judicial branch, which are related to the legitimacy of the organ, the protection of its institutional interests, and the development of jurisprudence.[10] Of course, in veto-player appointment systems the preferences of the appointers are subject to the restriction of what the organ that ratifies is willing to accept. Finally, the effects of the appointment method on the type of judges may be reinforced if the constitutional organ is located outside the judiciary.[11]

[10] The so-called cooptation method, i.e. when courts appoint judges unilaterally, may promote divergence of interests between the judicial and the elected branches, but it may also pose obstacles to the injection of new ideas and creative jurisprudential approaches from outside of the judiciary, producing a sort of crystallization of the jurisprudence.

[11] 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 competent at making

Appointment mechanisms vary considerably (Malleson and Russell 2003). In a general way, for judges' preferences to diverge from the executive's the appointment procedure should meet the following condition:

> (i) Judges themselves fill vacancies in the court (i.e. the so-called cooptation), or at least two different organs of government (e.g. president and congress) appoint judges, or it is not the case that a single organ appoints a majority of judges in quota systems.

Whereas appointment mechanisms promote divergence of preferences, tenure and removal mechanisms promote autonomous judicial decision-making, i.e. that judges are the "authors of their own opinions" (Kornhauser 2002, 42-45). If tenure is too short judges face incentives to curry favor with both the current and the incoming government with an eye in their next employment. Tenure need not be for life, but it should give judges a sufficiently long time horizon so that autonomous behavior is incentivized. Similarly, if removal procedures are too easy judges face a credible threat of removal if they vote their mind, given that their preferences diverge from those of the executive and the legislative.[12]

In a general way, the tenure and removal mechanisms should meet the following conditions in order for judges to have incentives to vote their preferences:

> (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.

In sum, if the stated conditions on appointment, tenure, and removal mechanisms (i, ii, and iii) are not met it is likely that executives will fill the court with its cronies producing judges that would not even want to decide against him, or that they will find it too costly to make decisions too far from the executive's interests. In other words, judges will be biased in favor of the government and not able to credibly produce information that reduces uncertainty. In Figure 1, C would be located at the same point than E & L if these conditions were not met, representing non-independent judges. These judges want the same thing than the executive wants. On the contrary, if these conditions are met then judges will not share the executive's preferences and would be insulated to express them, at least according to their institutional incentives.[13]

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abstract comparisons among texts and with the capacity to deliberate about norms and explain decisions (Ferejohn and Pasquino 2003; Ferreres Comella 2004). 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 the judicial ladder based on seniority and civil service career incentives and punishments. Thus they tend to share the values of civil service, such as long tenure, respect for the rules, and technical capability, and they are more likely to favor more traditional judicial roles (cf Guarnieri and Pederzoli 1999, 65).

[12] See (Helmke and J. K. Staton 2011, 332-324). Notice that the length of tenure and the removal mechanism could also indirectly affect the type of judges that arrive at the court (e.g. judges´ preferences) via a self-selection mechanism. For instance, some judges that value things other than simply being a member of the constitutional court (e.g. their reputation as a neutral and balanced judge) would not even want to be considered for this position tenure is too short or removal procedures too easy.

[13] It would be possible to create an index on de jure judicial independence based on conditions i, ii, and iii taking into account the conditional relations between appointment, tenure and removal mechanisms as well as their relative weights. For instance, if a variables takes a value of 1 if a condition is met and 0 otherwise, the index of independence would be defined as: Judicial Independence = (i)*[2ii + iii].

Judicial Review Powers

Incentives on judicial review powers are of two types. The first impact the number of opportunities judges have to make decisions on a given topic. 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 afected by them.[14] Therefore, these incentives are crucial for the type of information that constitutional courts get on a given issue and on how they can transmit this information. 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.

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 favorable circumstances. If judges receive only a few scattered cases the information loss is compounded by the fact that the chances that these cases arrive under non-favorable 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 decisions. 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.

Discretion to pick cases, i.e. docket control, and flexibility on how to decide them is also crucial for 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.[15] Discretion to pick cases also matters for efficiency, especially when the flow of cases to the court is very high (Clark and Strauss 2010). 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.[16] 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 minimize the chances of setbacks for its decisions.

In a general way, for constitutional judges to be able to produce new and relevant information that reduces uncertainty among conflictive actors,

[14] The popularity and legitimacy of the affected actors also may affect the level of confrontation. The same is true regarding the transparency of decision-making procedures and the saliency. This will be further discussed below.

[15] 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 recognize 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).

[16] For instance, instruments of concrete review usually produce inter partes effects while instruments of abstract review generate erga omnes effects. Notice also that constitutional judges that enjoy more flexibility on how to decide on cases are also regularly freer to use international court rulings to reduce the levels of confrontation. The argument here is that national courts that enjoy more flexibility will use international court rulings that behoove them, and try to ignore, delay, or minimize those that do not (cfr Hunneus 2012).

constitutional review powers should provide the following elements:

a. Many opportunities to make decisions on the same issue (captured by, for instance, the number of instruments of constitutional review that are widely and easily accessible, or the existence of automatic constitutional review for certain government acts)

b. Flexibility to pick cases and discretion on how to decide them (captured by, for instance, certiorari-like mechanisms, lack of super-majority or time-limit requirements to decide cases, or lack of limits to the effects of decisions)

In sum, constitutional review powers are associated to whether constitutional courts receive new and relevant information (i.e. information not exclusively provided by the actors involved in the conflict) and to how they process and provide this information. Institutional incentives on judicial independence are associated to the extent to which the court is neutral or unbiased and thus directly related to the credibility of the information it provides. Therefore, independent constitutional courts with ample powers of judicial review will be more likely to receive, process, and provide new and relevant information to the actors involved in a conflict, and to do so in a credible way, transforming their relationship into a cooperative one.

Conditions under which Institutional Incentives Tend to Be Effective

Measuring independence and judicial review powers using *de jure* indicators comes with a caveat: Institutions do not work in a vacuum, the social, political, and economic contexts in which they operate condition their effectiveness. In particular, two contextual elements are crucial for the effectiveness of incentives on judge´s independence and judicial review powers: the extent to which the executive and legislative branches can coordinate against a judicial decision that affects them, and the public support for the court.

Let us go back to the standard separation of powers model introduced in the previous section. The top line of Figure 2 shows that under unified government a strategic court will uphold the JSQ to avoid an override by the elected branches, even if the Court has different preferences than those of E and L. In contrast, under divided government (see Figure 2, bottom panel) a strategic court will move the JSQ to the right because disagreement between E and L impedes them to coordinate a re-action against the Court. Therefore, unified government renders ineffective the institutional incentives on judges' independence and powers of judicial review, whereas the opposite is true under divided government.[17]

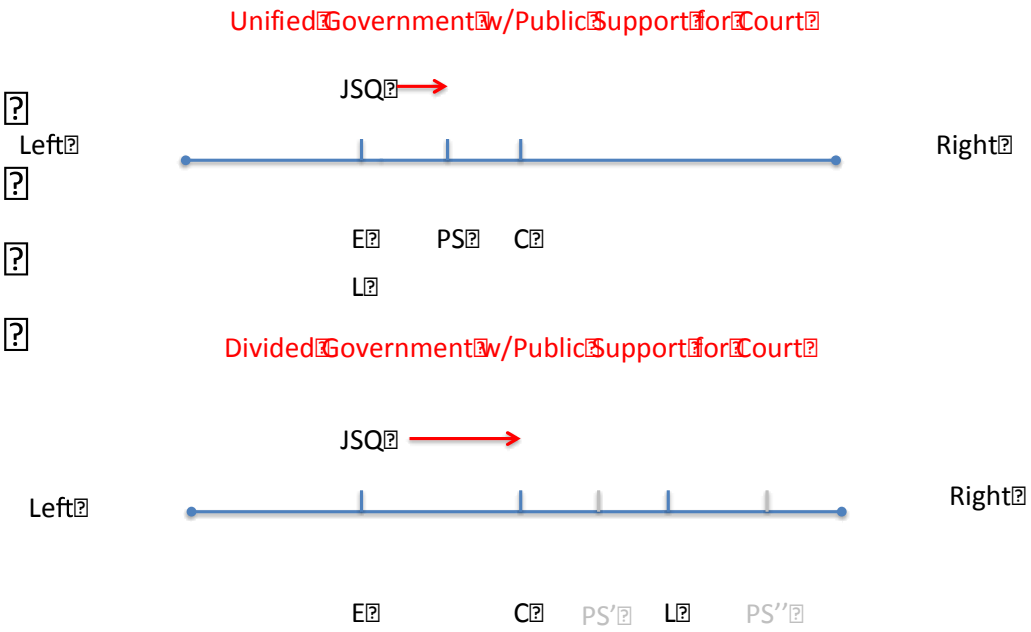
Figure 3 introduces Public Support for the court (PS). To be clear, public support is understood here as "diffuse" support, which consists in a "reservoir of favorable attitudes of good will that helps members to accept or tolerate outputs to which they are opposed or the effects of which they see as damaging to their wants" (Easton 1975, 144).[18] PS can effectively lower the costs for the court of making decisions against E and L, serving as a kind of backing force in case of retaliation or threats of non-compliance. This is precisely what the top line in Figure 3 depicts: C will be able to move JSQ to the right but only up to the location of PS, given that the public will back C against a reaction by E and L. Notice that strategic politicians may indirectly react against a judicial decision by not complying with decisions that adversely affect their interests, and in this case PS can also improve compliance rates by a threat to punish non-compliant politicians in the next election (J. K. Staton 2010; Vanberg 2005).

The line at the bottom of Figure 3 depicts a situation of divided government with public support for the court. Notice

[17] For a discussion on the effect of fragmentation on judicial behavior see (Aydın 2013; Hilbink 2012; Popova 2012)

[18] Public support for the court can be distinguished between "specific" and "diffuse". The former refers to support on particular cases, and thus may be erratic depending on whether the preferences of a majority align with those of the court.

FIGURE 3.



here that no matter whether PS is located in the space between E and L, or to the right of L (PS' and PS'' in Figure 3, respectively), the court will move JSQ to C. However, this does not mean that PS is irrelevant in conditions of divided government. As Gibson and Caldeira argue, "diffuse" public support is a necessary condition for the effective judicial control of a state's constitution (Gibson and Caldeira 1995), and it (plus other conditions such as transparency) is crucial for compliance with judicial decisions specially when they go against the preferences of E and L. In other words, it is less costly for politicians not to comply if the public does not oppose these actions (Helmke and J. K. Staton 2011; J. K. Staton 2010; Vanberg 2005).[19]

CONSTITUTIONAL JURISPRUDENCE ON MILITARY JURISDICTION IN COLOMBIA, 1958-2010

In this part, I illustrate the role of constitutional courts as mediators analyzing the decisions of the Colombian constitutional judges on the scope of military jurisdiction, which essentially answer the question: Who can be judged in military courts, and under what circumstances? Judicial answers can be placed, in general terms, within seven categories ordered from the widest to the narrowest scope of military jurisdiction: (i) military personnel and civilians, under any circumstance; (ii) military personnel and civilians, only during emergency situations;

[19] For the particular topic of this paper, i.e. decisions on the scope of the military jurisdiction, alternative conceptualizations include what can be called the "net diffuse public support" for the court, defined as popular confidence on the court minus popular confidence on the military. Yet another possibility is to conceptualize PS as the court's assessment of the costs of restricting military jurisdiction in terms of popularity of the decision; or also as specific support of general people or of military personnel for restricting military jurisdiction.

FIGURE 4. Scope of Military Jurisdiction in Colombia and Mexico: Who Can Be Judged in Military Courts, and When?

WHO? / WHEN?	Military Personnel and Civilians Always	Military Personnel and Civilians Emergencies	Military Personnel Always	Military Personnel Service-related crimes	Military Personnel Military crimes only	Nobody Crimes against humanity	Nobody Never
1941-1945		33					
1946-1950							
1951-1955							
1956-1960							
1961-1965							
1966-1970		30,31,32	29				
1971-1975		23,24,25,26,27,28					
1976-1980		19,21,22	20				
1981-1985		18					
1986-1990		16		15, 17			
1991-1995		14					
1996-2000				11,12	10,13		
2001-2005				8		2,3,4,5,6,7,9	
2006-2010					1		

NOTE: Numbers refer to court cases cited in the references section. The dotted arrows refer to jurisprudential tendencies in Colombia. The shaded area refers to the response that Colombian constitutions (1886 and 1991) give to the question of who can be judged in milirary courts, and when.

(iii) only military personnel, under any circumstance; (iv) only military personnel, only when crimes were committed during service; (v) only military personnel, only when strictly military crimes are involved; (vi) not even the military personnel when crimes against humanity and human rights violations are involved; (vii) nobody never, that is the military jurisdiction is abolished.[20]

[20] While the extreme situations are theoretical possibilities that don't take place as such in reality, there are actual cases that are closer to them. For instance, Chile under the military regime expanded the scope of the military

The scope of military jurisdiction is a key element of the degree of autonomy granted to the armed forces by civilian governments. In places with a history of military interventions the armed forces get used to a wide scope of military jurisdiction and they prefer to keep it that way. After the transition to democracy, the elected civilian authorities prefer a more limited scope of military jurisdiction. It is not clear what is the right scope of military jurisdiction under democracy, and uncertainty over this is one of the causes of conflict between civilian governments and the military. Constitutional cases on the scope of military jurisdiction contribute to finding its right scope given the specific circumstances of the country. The type of cases on the scope of military jurisdiction, and compliance with the court's decisions on them, also reveal how willing the civilian government is to recognize and honor the *sprit the corps* of the military and to accept specific nature of the military missions and their consequences. On the other hand, these cases also reveal how willing the military is to carry out its missions under the principles established in the democratic constitution.

Long-Term Jurisprudential Patterns on Military Jurisdiction in Colombia

Military jurisdiction in the Colombian Constitution of 1886 was specified in Article 170 that literally states:

> Article 170.- Crimes committed by military personnel in active service and related to such service, will be heard in military tribunals according to the prescriptions of the criminal military code.

The shaded area in Figure 4 highlights the answer that Article 170 gives to the question "who can be judged in military courts, and when?"[21] Figure 4 also shows a summary of the jurisprudential histories on military jurisdiction in Colombia according to the seven ordered responses to that question. Each number represents a case that is cited (with the same number) in the references section. Cases are ordered from the most recent case on military jurisdiction decided by the constitutional court (number 1), to the oldest case on the same topic in our sample (number 33, decided by the Colombian Supreme Court in the 1940s).[22] The arrows show the patterns of constitutional jurisprudence on military jurisdiction in Colombia since the 1940s. There are basically two clear patterns. The first in the period from 1958 to 1987 during which the Colombian Supreme Court held a consistently wide constitutional interpretation of military jurisdiction. The second pattern, from 1987 — more clearly from 1991— to the present, is marked by an incremental and consistent jurisprudential move towards a narrower interpretation of military jurisprudence.

During the first period (1958-1987) the Colombian Supreme Court did not play the role of cooperation-building mediator between the armed forces and the civilian government. There are three main reasons behind this pattern: (1) At the starting point of this period the preferences of the civilian government and the armed forces over

jurisdiction to include many ordinary crimes (Bovino 1998). On the other end, there are cases such as Costa Rica where the army itself was abolished, and also cases like France or Germany that have disappeared the military jurisdiction within their borders and accepted it only in cases of war abroad or aboard military ships (Pedroza de la Llave 2011). Notice that in the intermediate categories where only military personnel can appear before military courts the difference is that in (iii) any type of crime, as long as it was committed by a member of the armed forces, is admitted in military courts; in (iv) only service-related crimes are admitted thus limiting not the type of crimes but the circumstance under which they take place; and in (v) only military crimes such as cowardice, insubordination, or treason are admitted in military courts.

[21] As we will see later, there was a slight change in the Constitution of 1991 regarding the scope of the military jurisdiction but arguably it did not change the basic answer to the legal question on the scope.

[22] The sample of cases analyzed in this chapter does not include cases on military jurisdiction decided by the Colombian Supreme Court or by the *Consejo de Estado*, the highest administrative court, after 1991 (the year in which the Colombian Constitutional Court was created).

security policies and military jurisdiction were very similar; (2) The period starts with the appointment of the whole court by the outgoing military regime, thus the preferences of the court were aligned with those of the armed forces and diverged very slowly over time; (3) By the time when the preferences of the court, the executive, and the civil government were clearly distinct, in other words when the court gained independence and there was disagreement between civilians and the military, the judicial review powers of the court were limited and so it was its capacity to provide relevant information to incentivize cooperation. During the second period (1991-2010), all the previous three factors changed and thus an independent and powerful constitutional court could play the role of cooperation-enhancing mediator.

1958-1987: The Court as an Arbitrator Not a Mediator

Notice that in Figure 4 the Colombian jurisprudential line starts in the 1960s not in 1886. Some context is necessary to explain that starting point. The Colombian Constitution of 1886 was in force for over a hundred years, until 1991, when it was replaced by the current constitution. During this long period the country enjoyed a limited but stable democracy that mostly revolved, in political terms, around two parties: the Conservatives and the Liberals. Since the enactment of the 1886 constitution and until about 1930 successive Conservative governments dominated Colombia. From 1930 and until about 1946, successive Liberal governments ruled the country. The tensions between these two main political groups led to an undeclared civil war in the second half of the 1940s and the 1950s (called *La Violencia*). This violent period was ended by a brief military government (1953-1957) led by General Rojas Pinilla, which facilitated a pact between the two groups that crystallized in a series of constitutional reforms in 1958.

In political terms, the reforms of 1958 sealed the so-called National Front (*Frente Nacional*) of 1958-1974: a pact for Conservatives and Liberals to share all positions of power equally for sixteen years. Regarding the justice system, the reforms transformed the appointment of Supreme Court judges from a method where a congressional majority selected one of three candidates proposed by the executive, to a self-appointment, or *cooptation,* method. Interestingly, it was the government of General Rojas Pinilla that appointed the first set of judges to the Supreme Court after the reform of 1958. While the cooptation method of appointment made Supreme Court judges quite independent from the political parties represented in the elected branches, it also made them deferential towards the military. Some critics suggest that the military decided to remove the elected branches from the appointment process because they wanted to prevent a possible trial against them (Uprimny 2006).

The Colombian Supreme Court cases analyzed in this paper –that come from the 1960s-- actually upheld a quite expansive interpretation of military jurisdiction, previously set by a 1945 decision (Colombia Case # 1). The 1945 decision upheld the constitutionality of a presidential decree that allowed for the expedite creation of war tribunals to process military and civilians suspected of having participated in attempted *coup d'état* against then president López Pumarejo (Barreto Rozo 2011, 36-8). Notice that this interpretation implied a wider scope of military jurisdiction than that arguably established by Art. 170 of the 1886 Constitution. The Colombian Supreme Court from the second half of the 1960s until 1987 basically upheld that both civilians and military personnell could be judged in military tribunals under emergency situations. In some decisions, the justification for this expansive interpretation is the celerity with which military courts can proceed in times of emergency (Colombia Case # 22 and # 30). The main problem with this criterion is that Colombia during those years practically lived under emergencies and declared "states of exception".

During the National Front years three elements emerged that are still part of the Colombian political landscape: guerrillas (such as the Revolutionary Armed Forces of Colombia (*Fuerzas Armadas Revolucionarias de Colombia*, FARC) and

the National Liberation Army (*Ejército de Liberación Nacional*, ELN)); illegal drug processing and trafficking; and the paramilitary phenomenon (see Gutiérrez Sanín 2007). From the end of the National Front and throughout the 1980s, the country's situation became extremely difficult with the government's declaration of a "war against drugs," the closeness of the Colombian political system, and the power of the drug cartels to produce a spiral of violence and narco-terrorism. To deal with this situation, Colombian presidents constantly declared a "state of exception" (they could do that unilaterally), which not only implied the delegation of legislative powers to the executive but also limited the scope of civil rights and, as we said, expanded the military jurisdiction. In fact, of the 42 years between 1949 to 1991 Colombia spend thirty five (83 percent of that time) under "state of exception" (Uprimny 2006).

During those years, the Supreme Court automatically reviewed the constitutionality of the declaration of states of exception, and the decrees issued under them, but very rarely restricted the government. In fact, the Supreme Court limited itself to check whether such declarations were procedurally correct. Regarding military jurisdiction, the Supreme Court consistently upheld that both military personnel and civilians could be judged by military tribunals under emergencies (Colombia Cases #30-18. See Ariza 1999; Barreto Rozo 2011; Cabarcas Maciá 2011). The Supreme Court during this period, therefore, did not act as a cooperation-building mediator. At the beginning of the period, the court shared the preferences of the armed forces and upheld a wide scope of military jurisdiction. When judges lack independence their jurisprudence very likely reflects the interests of those who directly or indirectly control the judges. Lack of independence, in turn, implies bias making non-credible the information that the court is able provide. Moreover, the court had limited powers of constitutional review and access to it was also restricted so most of the information it received on the performance of the armed forces and the situations of emergency came from either the military of the government themselves.

With time the preferences of the court, military, and government slowly diverged but the court basically continued to uphold a wide scope of military jurisdiction. Things began to change in 1987 when the Supreme Court issued a historical decision (Colombia Case # 17, and also # 15) stating that "the judging of civilians by military personnel is more than a simple transfer of competencies, it actually amounts to a substantial alteration of the equilibrium of powers and a radical change of the idea of administration of justice"[23]. One of the motivations of the historical jurisprudential change in 1987 was the death of several members of the Supreme Court and the Council of State in November of 1985 during the assault to the *Palacio de Justicia* perpetrated by the M-19 guerrilla group (Barreto Rozo 2011, 63). The military handled very poorly the response to the assault and many members of the judiciary, and part of the public opinion, considered that the military did not keep in high regard the life of the judges. This was an isolated decision not part of a general change of vision of the court regarding the scope military jurisdiction. It was not useful, thus, to ameliorate the tense relations between the civilian governments and the military.

In sum, during the period 1958-2001 the Colombian Supreme Court acted more as an "arbitrator" than as a mediator in the disputes between the armed forces and the civilian government regarding the scope of military jurisdiction. In the legal jargon, "arbitration" is method of dispute resolution where the disputing parties involved present their disagreement to one arbitrator who determines the outcome of the case, simply adjudicating responsibility based on the record and "solving" the conflict. Parties in arbitrarion "are confined by traditional legal remedies that do not encompass creative, innovative, and forward-looking solutions to disputes" (Sgubini, Prieditis, and

[23] The sentence also includes that: "Military tribunals are competent to judge crimes committed by military officers in active service and related to such service. And it bears repeating that there is no explicit constitutional Article or clause within Article 121 that assigns to military tribunals the capacity to judge civilians".

Marighetto 2013, 2).[24] The Colombian Supreme Court did not facilitate an agreement between the parties, providing innovative or creative solutions under the constitution that both parties in the dispute could agree on. This is, however, what the Colombian Constitutional Court started doing very soon after it was created in 1991.

1991-2010: The Court as Cooperation-Building Mediator

The attack on the Justice Palace was only one of several tragedies that took place in Colombia during the 1980s, that included the assassination of two ministers of justice, of the owner of a national leading newspaper, of four presidential candidates, and several terrorist attacks to public buildings. In the difficult political context of the second half of the 1980s, Colombian presidents Virgilio Barco (1986-1990) and his successor César Gaviria (1990-1994) managed to convene the constituent assembly that produced the Constitution of 1991: a transformative document that opened the political arena to previously marginalized actors, created a complex machinery of checks and balances, and in general terms brought the government and the state closer to citizens.

Interestingly, one thing that practically did not change in 1991 was the constitutional article that defines the military jurisdiction. In fact, the new Article 221 is literally the same as Article 170 of the 1886 Constitution, and this is why the shaded area in Figure 4 remains in the same cell after 1991. An important difference, however, is that the new Article 213 states that "in no case civilians can be investigated or judged in the military jurisdiction". The jurisprudential change of 1987, therefore, was constitutionalized in 1991. Arguably, then, the very first determinant of constitutional interpretation of the scope of military jurisdiction, and of any other topic indeed, namely the constitution itself, has in general terms remained constant for more than one hundred years.[25] As is clear in Figure 4, however, constitutional jurisprudence on military jurisdiction has changed. Something other than "the law" is behind the jurisprudential movements.

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, the powers of constitutional review of the newly created court were expanded considerably with the creation of the *tutela*, 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. 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.[26] In sum, since 1991 Colombian constitutional judges focus on interpreting a new constitution to which they are linked

[24] This is clearly different from mediation, a method where "a neutral and impartial third party facilitates dialogue in a structured multi-stage process assisting the parties in identifying and articulating their own interests, priorities, needs and wishes to each other", helping the parties reach a conclusive and mutually satisfactory agreement (Sgubini, Prieditis, and Marighetto 2013, 3).

[25] Other articles changed in the Constitution of 1991 that may impact how the judges interpret the scope of military jurisdiction. For instance, Art. 93 explicitly incorporate the international human rights law, and Art. 214 restrict the possibility to suspend basic rights and liberties. However, notice that it takes a sophisticated kind of judge –the kind of judge I think is consistent with the mediator role- to use those other articles and a "systemic" interpretation of the constitution in order to decide cases that fall squarely in the scope of the military jurisdiction.

[26] In 2000 there was a decree on the "*Competencia de tutelas*" that established that not all tutelas go directly to the constitutional court anymore. Specifically, tutelas related to some relatively minor administrative cases and other relatively unimportant issues no longer go directly to the constitutional court.

by birth, so to speak, they have many opportunities to assert their preferences, have a lot of new information on how is operating the military jurisdiction provided by thousands of litigants, have discretion to chose cases (*tutelas*), and have themselves crafted their decisions modulating their effects.

In a nutshell, since 1991 the Colombian Constitutional Court is independent and powerful enough to become a coordination-enhancing mediator, ie to credibly provide information that can reduce the uncertainty surrounding the relations between the civil government and the armed forces. It is important to note that since 1991 the governing party does not a super majority in the legislative branch of government, that the country has enjoyed relatively high levels of stability in economic terms, and that the Colombian Consititutional Court enjoys relatively high public support (Rodríguez-Raga 2011; Wilson 2009). In other words, Colombia since 1991 operates under favorable socio poltical conditions making the institutional incentives that affect the independence and the powers of constitutional judges more likely to be more effective.

It did not take the new Constitutional Court long to begin to interpret the new constitution creatively, and to start functioning as a cooperation-building mediator. As early as 1992 the Court decided that it was its duty to check the constitutionality not only of the procedimental requirements but also of the content of the executive´s declarations of "states of exception." In open contrast with previous jurisprudence on this issue, the constitutional judges adopted a series of decisions establishsing that they could evaluate: (1) whether the events invoked by the executive actually required the temporary suspension of certain constitutional features; (2) whether the measures adopted by the executive are proportionate to the dangers specified in the declaration; and establishing that (3) the executive decrees issued during the emergency but not directly connected to it should be unconstitutional (Uprimny 2003).[27]

Interestingly, in its first decision on the topic of states of emergency (C-004/1992) the Court upheld the state of emergency. However, in that same decision the court announced in its reasoning that restrictions on executive's discretion to call a state of emergency and the scope and extent of the measures taken under it will follow, as mandated by the constitution. In this way, the court began to reduce the uncertainty regarding the accomodation of the interests of both the civil government and the armed forces that would be acceptable under the new constitution. When new cases on the issue of states of emergency arrived to the court (from 1995 to 2002), it started to actually delimit the proper bounds of the states of emergency, limiting both actors and trying to conciliate their views. This "strategic [juris]prudence" (Rodríguez-Raga 2011) is one way in which the Court reduces the uncertainty of the actors involved in a dispute.

The jurisprudence of the new Constitutional Court on military jurisdiction also started to change sooner rather than later. Right in 1993, the court again announced its new ideas about military jurisdiction. That year, the Court reviewed an executive decree that allowed civilians to be judged in military tribunals (Colombia Case # 14). The court hold the constitutionality of the decree, despite the letter of Article 213, but included in the sentence clear argumentation of the very exceptional nature of this case, in a way prudently announcing what the government could expect in this regard for future cases. In this instance, the Court again announces its reasoning first in order to reduce the uncertainty of the actors about what is the range of acceptable solutions to the problem of the scope of military jurisdiction under the new constitution. At

[27] The effect of this change in interpretation was quite dramatic: from 1992 to 2002, from a total of twelve declarations of state of exception, three were declared unconstitutional, and four partially unconstitutional. Because of this Colombia was in a state of exception less than 20 percent (rather than 80 percent) of the time (Uprimny 2006).

the same time, the court avoids outright non-compliance recognizing that a change of the magnitud it is requiring takes time.

The Constitutional Court issued a crucial decision in 1997 narrowing the scope of military jurisdiction beyond prohibiting that civilians be judged in military courts: the court also clearly argued that not even military personnel can be judged in military courts when human rights are violated (Colombia Case # 13).[28] In order to reduce the uncertainty of the armed forces about the extent of the reduction in the scope of military jurisdiction, in a series of decisions following the 1997 case, the Court started to distinguishing carefully what does it mean for a crime to be "service-related". In 2000 (Colombia Case # 10), the Constitutional Court discusses the requirements that need to be fulfilled for a crime to be considered as part of the military service. For instance, the Court argued that not all activities performed by members of the armed forces can be considered "related to service", but only those that are directly tied to the function and goals that the constitution establishes for the armed forces (Colombia Case #10).

Careful distinctions continued in a series of cases (Colombia Case # 3-12), building step by step a simple but powerful argument: the ultimate mission of the armed forces is to defend the country and its constitution; the constitution of the country is grounded upon universal principles and human rights; therefore, human rights violations of human rights by military officers, even if they take place under a specific service, sever the link between the armed forces and their ultimate mission (Colombia Case #13, #8). The conclusion is clear: human rights violations do not belong, under any circumstance, to the military jurisdiction. The Constitutional Court, therefore, gradually and progressively established the acceptable limites of the scope of military jurisdiction, recognizing the legitimacy of the positions of both the civilian government and the armed forces.[29]

The jurisprudence of the Constitutional Court on military jurisdiction has made a huge impact, although it has not been easy for the Court to handle the reactions of other actors to its decisions (Revenga Sánchez and Girón Reguera 2004). For some years, the decisions by the Constitutional Court were resisted, and some actually ignored, by the military tribunals and by the Judicial Council, the organ in charge of deciding conflicts of competence between the civil and military jurisdictions. However, for different reasons, among which is the persuasivness of the Court's argumentation, as time passed the criteria established by the Court was progressively adopted not only by the Judicial Council, but also on the Highest Military Court that has already sent voluntarily some cases to the civil jurisdiction (Ariza 1999; Cabarcas Maciá 2011). The Court then has progresivelly produced cooperation among institutions in the civil government and the armed forces.

The ongoing internal security crisis in Colombia, however, still produces conflict between the civilian government and the armed forces that still continue to be called in to fight against guerrillas, drug cartels, and paramilitary groups. The scope of military jurisdiction is one of the elements

[28] This is considered a key sentence by specialists in the topic (Ariza 1999; Cabarcas Maciá 2011). However, it should be noted that footnote 1 in this sentence includes a series of precedents upon which it is built. It reads: "several decisions by the Supreme Court and the Constitutional Court have argued that military jurisdiction has an exceptional and limited character. See sentencia del 4 de octubre de 1971, M.P. Eustorgio Sarria, Gaceta Judicial CXXXVIII, p. 408; auto del 22 de septiembre de 1989, M.P. Edgar Saavedra, proceso 4065; sentencia del 14 de diciembre de 1992, M.P. Dídimo Páez, proceso 6750; sentencia del 7 de julio de 1993, M.P. Gustavo Gómez, proceso 7187; sentencia del 26 de marzo de 1996, M.P. Jorge Córdoba, proceso 8827. Entre la jurisprudencia de la Corte Constitucional ver el auto 012 de 1994, M.P. Jorge Arango, y las sentencias C-399 de 1995 y C-17 de 1996, M.P. Alejandro Martínez Caballero".

[29] In this way, the Colombian Constitutional Court avoided to produce too restrictive/expansive decisions too fast that can either humiliate the civilian government or the military. According to Barany (2012), this is what occurred in Argentina where the military jurisdiction was altogether eliminated by a judicial decision.

of conflict because in the armed forces some claim that the constitutional court reduce it too much, creating legal insecurity for its members. During 2012 there was actually a negotiation to create a new legislative framework for military justice in Colombia. For the purposes of this paper, it is noteworthy that negotiations took place in the shadow of creative and serious constitutional jurisprudence of the constitutional court, which framed the discussions between the military and the civilian government.

In particular, the armed forces pushed for a reform to military jurisdiction in order to both deal with scandals such as the "false positives"[30] and to provide legal security to the military men that participate in internal security affairs. To deal with this demand, and to find an agreement acceptable to all the parties and institutions involved, the government created a High Commission formed by experts, civilian and military. Interestingly for the argument of this paper, some of the civilian members of the commission are the very former constitutional judges who drafted some of the most important decisions limiting the military jurisdiction.

The process of reform is finished and has been criticized on a number of grounds by NGOs and colombian analysts. However, the innovative proposals generated by the High Commission and the negotiation between the armed forces and the civilian government are noteworthy. For instance, both actors agreed upon a list of crimes that do not belong under any circumstance to military jurisdiction (informed by constitutional jurisprudence) and they also agreed that difficult cases be heard in a committee with ordinary and military judges that would decide to which jurisdiction the case belongs.[31] As former constitutional judge and member of the Commision, Manuel José Cepeda, put it these proposals reflect a bargain between the Armed Forces and the civilian authorities that creatively balances the clashing aims of protecting human rights by limiting military jurisdiction and providing legal security and procedural rights to the members of the armed forces that participate in risky and dangerous missions.[32]

In sum, in contrast to the period from 1958 to 1991, the strategic, gradual, and careful jurisprudence developed by the Colombian Constitutional Court since 1991 has reduce the uncertainty of both the civil government and the military regarding what is expected from each other under the new constitution. Specifically, by rejecting claims of the military/government that a certain case should belong to military/ordinary courts the court provides information to both actors regarding the acceptable limits to the scope of military jurisdiction. Reactions and compliance to court decisions have also revealed the willigness of each actor to play by the rules of a democratic regime.

CONCLUSION

The legacy of military interventions in Latin America has produced the unstable democracies that characterize the region. A distinctive feature of this legacy is the prevalence of a system of military justice that, in practice, became a forum for legalizing impunity and arbitrariness. Democratically elected governments try to reduce the autonomy of the armed forces, including military justice, but the armed forces resist such encroachments, resulting in conflictive civil-military relations that hollow out democracy. Two types of uncertainty cause, in part, conflict between

[30] "False positives" are innocent victims in military operations against guerrilla and drug-trafficking groups that are deliberately misreported as members of such groups. Around 3500 military officers are reported to be involved in this practice. See Colombia Reports, 02/18/2012, http://colombiareports.com/colombia-news/news/22286-colombia-withdraws-controversial-military-justice-proposal.html

[31] See *Revista Semana*, 05/22/2012, available at http://www.semana.com/politica/senado-no-amplia-fuero-militar-para-combatir-bacrim/177573-3.aspx

[32] *El Espectador*, February 25, 2012. Available at http://www.eltiempo.com/justicia/ARTICULO-WEB-NEW_NOTA_INTERIOR-11221141.html

civilian governments and the military: uncertainty about the range of acceptable solutions regarding the degree of autonomy for the military, and uncertainty over each actor's willingness to cooperate in building the democratic regime.

Because uncertainty partly causes conflict in civil-military relations, constitutional courts, by and large an institutional innovation of the last round of transitions to democracy, can help in building cooperation between these two actors if they play the role of third-party mediators. In particular, unbiased (ie independent) and accessible courts with discretionary powers (ie powerful) can credibly provide relevant information that reduces the two types of uncertainty that sorround civil-military relations, transforming their conflictive relationship into a cooperative one and contributing to democratic quality. When these conditions are not met, constitutional courts tend to uphold and even expand an old jurisprudence of impunity and lack of accountability of the military jurisdiction.

The empirical implications of the argument of this paper are illustrated with the case of the constitutional jurisprudence on the scope of military jurisdiction in Colombia from 1958 to 2010. In particular, from 1958 to 1987 the co-optation method for selecting supreme court judges, coupled with the fact that General Rojas Pinilla made the appointment of the first set of judges after leaving power, produced that the court shared the preferences of the military regarding a more expansive response to who can be judged in military courts, and when. As the preferences of Court diverge from those of the executive and the armed forces', the limited powers of judicial review made the court be more an arbitrator than a mediator. In other words, until 1991 the Supreme Court merely adjudicated responsibilities between both actors but did not engage in creative and forward-looking jurisprudence. It acted more as an arbitrator than as a mediator.

A institutional change in 1991 altered the incentives on the independence and the powers of constitutional judges. After the institutional change in 1991 Colombian constitutional judges have made considerable progress in approaching the ideal type of third-party mediators by building a careful and prudent constitutional jurisprudence that has progressively bring near the civil government's and the military's prefereces over the scope of military jurisdiction. The Constitutional Court has done so by weighing in and mixing both actors' points of view in its reasoning, which has promoted deliberation between –and understanding of-- both actors, reducing the uncertainty surrounding their relationship that causes them conflict.

APPENDIX

Sample of Cases Used in the Paper (Starting with Most Recent)

Colombia

1.- C-533 de 2008
2.- C-228 de 2003
3.- T-932 de 2002
4.-C-802 de 2002
5.- C-1024 de 2002
6.- C-251 de 2002
7.- C-1214 de 2001
8.- SU-184 de 2001
9.- C-361 de 2001
10.- C-878 de 2000
11.- C-368-00 de 2000
12.- T-298-00 de 2000
13.- C-358 de 1997
14.- C-034 de 1993
15.- Corte Suprema de Justicia. Sentencia del 15 de diciembre de 1988
16.- Corte Suprema de Justicia. Sentencia del 26 de mayo de 1988
17.- Sala Plena. Corte Suprema de Justicia. Sentencia 20 del 5 de marzo de 1987
18.- Corte Suprema de Justicia. Sentencia 57 del 3 de julio de 1984
19.- Sala Plena. Corte Suprema de Justicia. Sentencia del 30 de octubre de 1978
20.- Corte Suprema de Justicia. Sentencia del 3 de marzo 1978
21.- Sala Plena. Corte Suprema de Justicia. Sentencia del 27 de enero 1977
22.- Corte Suprema de Justicia. Sentencia del 2 de diciembre de 1976
23.- Corte Suprema de Justicia. Sentencia del 31 de julio de 1975
24.- Corte Suprema de Justicia. Sentencia del 10 de julio de 1975
25.- Corte Suprema de Justicia. Sentencia del 23 de septiembre de 1973
26.- Corte Suprema de Justicia. Sentencia del 5 de abril de 1973
27.- Corte Suprema de Justicia. Sentencia del 19 de octubre de 1971
28.- Corte Suprema de Justicia. Sentencia del 31 de marzo de 1971
29.- Corte Suprema de Justicia. Sentencia del 19 de agosto de 1970
30.- Corte Suprema de Justicia. Sentencia del 13 de agosto de 1970
31.- Corte Suprema de Justicia. Sentencia del 6 de noviembre de 1969
32.- Corte Suprema de Justicia. Sentencia del 30 de octubre de 1969
33.- Sala Plena. Corte Suprema de Justicia. Sentencia del 12 de junio de 1945

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