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At The Mercy Of The Mexican Supreme Court: The Implications Of Party Capability On Indigenous People's Cases

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AT THE MERCY OF THE MEXICAN SUPREME COURT: THE IMPLICATIONS OF
PARTY CAPABILITY ON INDIGENOUS PEOPLE'S CASES

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Dedication

To the women in my life, who always empower me to fight harder against life's obstacles.

AT THE MERCY OF THE MEXICAN SUPREME COURT: THE IMPLICATION OF PARTY
CAPABILITY ON INDIGENOUS PEOPLE'S CASES

by

ALAN CARDENAS, B.A.

THESIS

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“While it is always best to believe in one’s self, a little help from others can be a great blessing.”

-Uncle Iroh, Avatar: The Last Airbender

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Abstract

Indigenous Peoples in Mexico have long struggled in securing their rights in colonizing states. Applying party capability theory, this paper seeks to empirically understand the Mexican Supreme Court's behavior in cases pertaining to Indigenous Peoples. This paper thus evaluates the degree to which the Mexican Supreme Court is indeed an impartial actor that produces "equal protection under the law" for everyone (Galanter, 1974). Specifically, this paper examines the questions: To what extent does the Mexican Supreme Court protect Indigenous Peoples' rights? Are Indigenous Peoples legally affected by the power disparity perpetuated by the inequality in the country? This paper thus seeks to fill the quantitative gap in scholarship on Indigenous Peoples and applies party capability theory to empirically examine how power disparities and the type of rights affect indigenous claims before the Supreme Court.

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Chapter One

Introduction

Indigenous Peoples remain one of the most vulnerable populations in Mexico. According to the *Organization for Economic Co-Operation and Development* (OECD), Mexico is one of the organization's most unequal nations (OECD, n.d.). Mexico is also one of the nations with the highest population of Indigenous Peoples (*Minority Rights Group*, n.d.). Indeed, 71% of the indigenous population—or 21% of the country's population—live in extreme poverty (Molina 2018). Inequality in Mexico places Indigenous Peoples at a great disadvantage, directly threatening their ability to survive as political entities and cultural communities. Today, 23 indigenous languages are in danger of extinction in Mexico (Escobar 2019). It is therefore imperative to scrutinize the efficiency of colonized countries' institutions at securing and promoting the rights of historically marginalized communities, who not only constitute a great percent of the country's population but who are also the original inhabitants of the territory on which every American lives.¹

While courts are frequently heralded as serving as impartial mediums through which marginalized communities can secure their rights, the relationship of courts and Indigenous Peoples remains under-examined. In light of the exploitative nature of colonial institutions towards Indigenous Peoples, I ask two related research questions: To what extent does the Mexican Supreme Court protect Indigenous Peoples' rights? Are Indigenous Peoples legally affected by the power disparity perpetuated by the inequality in the country?

Understanding the Court's behavior can help scholars, policymakers, and advocates for rights, better identify the systematic ways through which the Court issues decisions and their

¹ "American" denoting someone living in any country in the Americas, and not necessarily a United States citizen/resident.

effects on Indigenous Peoples. It is imperative to understand this role of the Court in order for Mexican institutions, the public, and media to better monitor and remedy governmental encroachment of power into indigenous affairs. Understanding the systemic factors in judicial decision-making further applies to all countries experiencing colonization—from the Americas, the Caribbean, Africa, and Asia. Indigenous Peoples and advocates in each of these regions would benefit from a better understanding of Court behavior to ensure appropriate governmental action when deciding the fate of indigenous communities.

This paper seeks to fill a quantitative gap in scholarship focusing on Indigenous Peoples (Pommersheim 2012) and applies judicial party capability theory to empirically examine how power disparities affect indigenous claims before the Mexican Supreme Court. In particular, this paper makes a significant contribution by producing an original dataset codifying the universe of publicly available Court decisions pertaining to Indigenous Peoples. The quantitative analyses supplement existing qualitative Mexican judicial scholarship, which focuses primarily on studies of salient cases and the Court's transformation (Hanrahan and Fugellie 2019; Vargas 1996; Cossío-Díaz 1998), as well as to advance scholarship on Mexican Indigenous Peoples since existing studies focus nearly exclusively on the San Andrés Accords (Cossío-Díaz 1998; Harvey 2015; Navarro 1995; Speed and Collier 2000). As such, this paper offers a novel theoretical argument that synthesizes existing quantitative and qualitative judicial scholarship.

Furthermore, the qualitative portion of this study offers an in-depth analysis of the type of cases and legal reasoning behind Court decisions. As such, it supplements the quantitative analysis by exploring the interdependent relationships between case issue areas, types of rights sought by indigenous communities, and court decisions. This section thus provides a more

nanced understanding of the factors that influence court decision-making as well as illustrates some of the needs of Indigenous Peoples in Mexico.

1.1 Colonization

The arrival of the Spanish in 1521 to what is modern-day Mexico, marked a new, transformative era for the territory. The transformation of Mesoamerica involved the establishment of New Spain, an American institution formed to serve her European colonizer through exploitative institutional techniques, such as mercantilism (Boyd et al. 2019).² The legal institutions and evangelization throughout colonized states, particularly in Mexico, additionally subjugated the original inhabitants of the territory, denying their right to jurisdiction, culture, and land (Smandych 2013). Colonialism did not end after the declaration of independence of the viceroyalty of New Spain (subsequently Mexico) from Spain (Churchill 2012). Rather, colonization evolved and now thrives in the veins of from its independence to the present, Andrés Manuel Lopez-Obrador's modern-day Mexico.³

After independence, Mexico suffered great political and economic instability. And Indigenous Peoples' communities were exploited and denied of any form of autonomy, from President Benito Juárez' assault on the Juchitec community that left seventy dead and burnt Juchitán to the ground (Rugeley 2012), to President Porfirio Díaz, who sent the Mexican army to subdue Mayan and Yaqui rebels (Leonard et al. 2012); to post-revolutionary Presidents Alvaro Obregón and Plutarco Elías Calles, who both subdued Yaquí resistance movements and denied any sovereignty for indigenous communities (Rugeley 2012). Even the consequences of President

² In New Spain, mercantilist practice took form in the extraction of gold, which would ship to the colonizing state, Spain; enriching the "mother" nation. Additionally, some scholars suggest that neocolonialism and mercantilist processes are still simulated in modern Mexico after the privatization of PEMEX, Mexico's national oil company, allowing foreigners to extract Mexican natural resources, many of which fall within indigenous territory (Boyd et al. 2019).

³ Manuel Lopez-Obrador (AMLO) is Mexico's 58th, and current president, taking office in December 2018.

Cardenas' institutional reforms which allocated more land, education, and resources in an attempt to promote the development of indigenous communities were unsuccessful, failing to unify and mobilize indigenous communities with the state (Fallaw 1997). Shortcomings include current Mexican President, Andrés Manuel Lopez Obrador (AMLO's), failed promises in advancing indigenous communities' rights (Infobae 2019), supporting the construction of a touristic train through indigenous territories, in spite of indigenous resistance (Ramos 2018).

Indigenous Peoples struggle in securing their rights in colonized countries (Correia 2018), such as Mexico. Governmental systems in colonized countries are mainly composed of the inherited social norms and legal constructions from their colonial past (Borah 2018). These colonial legal constructions were established by the colonizers (i.e. Spanish, British, and French crowns; and their descendants) to maintain the status quo among non-Indigenous, European elites to subjugates Indigenous Peoples and other minorities (Borah 2018). The goal of these colonizing institutions is to create national unity and prevent a pluralist society.⁴ Colonizing states perceive Indigenous (and minority) autonomy as a threat to national unity/the identity of a country, frequently failing to recognize their sovereignty, and self-determination (Idleman 2004; Sierra 2005). In the eyes of colonizing institutions, pluralisms seek to destabilize and challenge the power of the State (Muñoz, 2013; Sierra, 2005). However, Indigenous Peoples seek not to threaten the State but to co-exist through the recognition of autonomy through their self-determination (Sierra 2005).⁵ Colonizing principles thus created disparities between non-Indigenous people and Indigenous Peoples, who experience little protection from courts and colonizing governments.

⁴ By "pluralist society" I refer to the co-existence of multiple cultures within one country. Each culture co-exists with each other, living by their own set of beliefs, respecting one another. Hence, the colonizing institutions' will to limit pluralism to prevent the fractionalization of the State, maintaining national unity (Idleman 2004 Sierra 2005).

⁵ In the Mexican constitution, self-determination refers to indigenous communities' legal right to establish their own governing principles concerning their communities, in accordance to their *usos y costumbres* (uses and customs), which refers to their cultural traditions rooted in their civilizations that predate the arrival of the Spanish colonizers.

In modern times, minorities seeking protection of their rights tend to turn to courts, as they are often the only federal branch to which they have access (Reid and Curry 2019). Indigenous Peoples, in particular, rely on courts to protect their territorial jurisdictions, the sustainability of their livelihoods, and sovereignty rights. Indeed, courts are often the only viable mechanism for Indigenous Peoples to secure these rights. Because they reflect a social minority, Indigenous Peoples cannot easily impact elections or pressure executive branches for their rights, who prefer to focus on their majority (i.e. election-determining) constituents.⁶ The same principle applies to legislative branches, which are similarly not composed of many indigenous representatives. As of 2020, in the USA there are only 4 indigenous representatives of the 535 representatives in the legislative branch (Del Real 2019; Lockhart, 2019). In Mexico, there are only 13 indigenous representatives out of the 500 representatives in the legislative branch (El Financiero 2018). Without the ability to have legislative representatives support indigenous policy preferences and without the ability to decisively impact legislative elections, Indigenous Peoples remain vulnerable and subject to non-indigenous policies. The courts are thus often the only method by which Indigenous Peoples can seek institutional protections and remedy violations.

1.2 Mexican Supreme Court

The Mexican Supreme Court (*Suprema Corte de Justicia de la Nación*) is the highest court of the nation and the court of last instance. The Mexican Supreme Court has 11 Justices, each appointed for 15 years, and 1 Court president who serves 4 years (Grant et al. 2014).⁷ Although Court presidents may serve more than one term, they cannot serve consecutive terms (Grant et al.

⁶ In the case of Mexico, Andrés Manuel Lopez-Obrador, the current president, pledges to support indigenous communities. However, he has since pushed against the interests of indigenous communities, calling into question his commitment to indigenous communities (Mariscal 2019).

⁷ The years that Justices serve on the Mexican Supreme Court was established by the 1994 judicial reforms in an attempt to limit Justices who used the court as a stepping-stone for their career, quickly abandoning the position for other jobs (Finkel 2005).

2014). The court has two chambers or sections, called “*Salas*”. Each chamber adjudicates specific types of cases (Maccise 2013). The first chamber (*Primera Sala*) resolves criminal and civil matters. The second chamber (*Segunda Sala*) resolves labor and administrative matters.⁸ Lastly, both chambers come together (*Pleno*) comprising of all (or most) of the members of the first and second chambers, when a case involves overlapping matters (Maccise 2013).

While multiple types of cases arrive before the Mexican Supreme Court, the three principal types of cases that pertain to indigenous claims are *Atracción*, *Amparo*, and *Controversia Constitucional*. Attraction (*Atracción*) cases are those which ask the Supreme Court to “attract” a case that usually falls outside of its jurisdiction, arguing that the elements of the case present fundamental implications for the law. If the justices agree in attracting a case, then the court hears the appealed case (Staton 2010).⁹ Attracted cases are usually versions of *Amparo* cases.

Amparo is an old institutional feature that seeks to resolve cases involving potential assaults on individual constitutional rights (Borah 2018).¹⁰ If *Amparo* is granted, then the individual is provided with rights protection or some sort of redress, depending on the case. This mechanism was the only way for the court to provide redress on individual claims of constitutional rights violations. Unlike common law systems, *Amparo* remedies only apply to the party in the suit, and the Court must issue five similar *Amparo* adjudications to establish precedent, restricting the Court’s ability to ‘legislate’ (Gledhill and Schell 2012).¹¹

⁸ These matters usually involve federal government agencies.

⁹ This institutional feature is unique to Mexico. One of the most common arguments to attract a case under the bases that it has “fundamental implications for the law”, is that the case could *possibly* impact the entire nation (Castillejos-Aragón 2013).

¹⁰ *Amparo* is Spanish for “protection”.

¹¹ Supreme Courts in civil law countries do not usually have *stare decisis*, which is when courts use past rulings to adjudicate future cases. Because some perceive this as court legislation, civil law countries attempt to curtail this type of ‘legislation’ by limiting the national impact of most case outcomes. However, the Court sometimes refers to previously decided *Amparos* for reference when case issues are similar, though the Court is not obligated to adjudicate the case in the same way that a similar case previously was.

Finally, the 1994 judicial reforms created a new mechanism and case type called constitutional controversies (*controversia constitucional*). This mechanism permits elected government officials and representatives (not individual citizens) to file constitutional controversies on behalf of their constituents when a law or policy that is passed by state or federal legislative branches conflicts with constitutionally protected rights (Finkel 2005; Domingo 2000). Constitutional controversies establish precedent with the intention of maintaining legal consistency and applicability across the nation (Vargas 1996).¹²

The Court's main obligation is to apply the law securing the rights claimed in the cases presented to them, in which there could have been a possible violation. The Court's ability to set precedent is limited, however, and thus mostly determines specific case claims (*inter partes*) rather than automatically setting national policy in every case (*erga omnes*)—except for constitutional controversies. However, the Court is not only obligated to protect the constitutional rights guaranteed for indigenous people, but it also applies regional and international laws domestically. In particular, the Mexican Supreme Court is obligated to adhere to international law, such as those from the International Labour Organization and The Inter-American Court of Human Rights. Thus, while the executive holds the majority of the *de facto* authority on indigenous policy (Domingo 2000), the Court's role in protecting the rights of Indigenous Peoples is crucial as it remains the only mechanism directly linking Indigenous Peoples to the federal government and ensures their protection in the face of violations committed by the legislative and executive branches.

¹² If elected government officials file constitutional controversies, then the set precedent is not necessarily established just by the Court, but rather by an elected official(s) who *are* allowed to legislate. The established precedent, called "*Jurisprudencia*" if then used in whole, or in part, by the court in future adjudications. There are two types of "*Jurisprudencia*" binding and non-binding. See "Seminario Judicial de la Federación, Quinta Época, Vol. Fifth Epoch, Vol. CV, p. 1196" for more information.

The Mexican Supreme Court, nevertheless, was not always a major institutional player; rather, the Court was historically subordinate to the executive power, which held the majority of federal *de facto* power (Domingo 2000).¹³ In 1994, under President Ernesto Zedillo's Presidency, Mexico passed a series of constitutional reforms that restructured the Supreme Court, thereby expanding its institutional authority (Domingo 2000; Ríos-Figueroa 2007). The Court became more powerful and independent, with the new institutional features that bestowed upon it the authority to expand human rights in the country (Ríos-Figueroa 2007; Finkel 2005; Domingo 2000).¹⁴

¹³ Mexico was headed by many notable authoritarian executives, from Juárez, Díaz, to Calles, and Cárdenas, who institutionally subordinated the judiciary branch to the executive's power (Domingo 2000).

¹⁴ The court became more powerful, regardless of whether the PRI actually intended for the court's powers to be expanded for democratic reasons or not.

Chapter Two

Indigenous People, Party Capability, and the Supreme Court

2.1 Party Capability

Galantar's (1974) judicial party capability theory recognizes that courts are attractive for a category of people he calls the "have nots", so labeled because of their social and economic disadvantages. Party capability theory predicts litigant success based on the relative power disparities between the "haves" (those with relative resource advantage) and the "have nots" (those without those resources). Hence, the "haves" denotes a position of privilege, referring to litigants who have the financial resources to afford litigation and (better) lawyers, litigants whose laws favor them as a dominant social group, and litigants who have experience with the judicial system thus affording them a greater understanding of how to successfully litigate. On the other hand, "have nots" denotes a relative lack of privilege, referring to litigants with access to fewer economic and social resources as well as less litigation experience. As such, party capability theory suggests that the 'have not' litigants are less likely to win when facing more resourceful opponents before the Court.¹⁵

Indigenous Peoples generally fall into the "have not" category as they typically lack extensive litigation experience and live in extreme poverty (Calvo-González 2016). In 2016, the National Council for the Evaluation of Social Development Policy found that 3.2 million Indigenous Peoples in Mexico lack the economic means to purchase basic goods and fundamental nutritional food items (Rosas 2019). Additionally, only 50.3% of the indigenous population has obtained elementary education, and 50.3% of the indigenous population does not have access to basic services in their homes, such as a concrete floor, running water, and

¹⁵ Previous research has indicated that it is possible to generalize the implications of *Party Capability Theory* to other countries (Atkins, 1991).

electricity (Rosas 2019). Furthermore, Indigenous Peoples do not always speak Spanish, forcing them to rely on certified interpreters and translators for proper legal representation in court, since virtually every aspect of government functions, applications, law, and legal proceedings are written and conducted only in Spanish (Escobar 2019). While there are 68 distinct indigenous communities (*Pueblos*) in Mexico, there are only 24 certified attorneys that can legally practice, speak, and translate Spanish and at least one indigenous language—thereby leaving many indigenous communities without legal representation (Toribio and Reyes 2016).¹⁶ Hence, indigenous petitioners typically fall within the ‘have not’ category relative to most legal opponents because of these disadvantages in economic and legal resources.

Indeed, Indigenous Peoples frequently face more resourceful opponents before the Court—particularly the federal and state governments. The federal (national) government, relative to any subnational actor, has the ultimate economic resources to engage in lengthy and costly litigation and is the ultimate “repeat player”, with repeated experiences before the Supreme Court to grant it extensive knowledge in how to strategically litigate to win cases. These factors mean that when Indigenous Peoples, with substantially fewer economic resources and less legal experience, face the federal government in Court, Indigenous Peoples face severe disadvantages that may tilt the Court to favor the government position and issue a loss to Indigenous Peoples. Similarly, while state governments have substantially fewer resources than the federal government, they still have much more resources and legal experience compared to Indigenous Peoples. As such, party capability theory predicts that the Court will favor state

¹⁶ Furthermore, Indigenous Peoples are beholden to government recognition of their Indigenous identity and legal status. If a petitioner/respondent is granted recognition as Indigenous, the person can be afforded an interpreter/translator. Recognized indigenous tribes are also sometimes afforded protections under “*usos y costumbres*”, which seeks to defend certain Indigenous traditions that are otherwise illegal (Speed and Collier 2000).

government over Indigenous Peoples due to the relative imbalance of resources and legal expertise that disadvantage Indigenous Peoples relative to state governments.¹⁷

H1: When indigenous litigants face the federal or state government in Court, they are less likely to win, compared to when they face organizations and individual opponents.

2.2 Positive versus Negative Rights

Depending on the type of controversy presented to the Court, a case could be more threatening to the established governmental powers than others. For example, cases seeking the protection of negative rights are more threatening to (colonizing) governmental power than cases seeking positive rights.

Negative rights are those from which the government is restrained (and/or restrains others) from interfering (Currie 1986).¹⁸ Cases involving indigenous sovereignty, autonomy, self-determination, land ownership, and jurisdictional powers are representative of negative rights claims, where Indigenous Peoples are seeking to limit and reduce government authority to their own authority. Negative rights are thus threatening to the government because they inherently seek the limitation of government power. Cases about indigenous sovereignty, autonomy, and jurisdiction threaten established governmental colonizing power because they

¹⁷ A similar argument would extend to when Indigenous Peoples face corporations and organizations, as these legal actors would have more resources than Indigenous Peoples. However, there are very few cases where Indigenous Peoples face corporations, so I collapsed this category with individual opponents (which represents the most resource-balanced legal opponent). This introduces theoretical issues where individual and corporations are not equivalent in terms of resources, though both groups typically have access to fewer resources than the federal or state government. It is also possible, however, that some corporations have more financial resources than state governments, which future research should address.

¹⁸ I consider due process rights as a form of positive rights. While due-process rights are typically viewed as negative rights in that the constitution guarantees people with a right to due process with which no one is allowed to interfere (Hirschl 2000), due process rights are ensured and enacted by the government. In other words, the government must protect individuals from having this right infringed. Furthermore, most due process claims from Indigenous People in Mexico frequently involve the lack of a translator or interpreter. The right to a translator/interpreter is a right that the constitution obligates the state to provide Indigenous People, thus forming a positive right requiring government provision.

inherently undermine the legitimacy of established government power by seeking to limit that power over indigenous communities. For example, these cases may seek to limit government power by eliminating or reducing the government's ability to own and exploit indigenous land and resources. Similarly, the right of consultation¹⁹ is a negative right in that it compels parties of interest (including the government, third parties contracted by the government, and other corporations and organizations) to consult indigenous communities prior to engaging in any activity that relates to indigenous affairs. This right curtails government power by requiring indigenous consultation—and presumably consent—before implementing any policy or action that would affect indigenous communities. In other words, the right to consultation limits the ability of the government and third parties to act unilaterally, thereby limiting governmental authority.

In these cases, the Court faces a difficult situation, where it must adjudicate between indigenous rights and the government within which it serves. In essence, the Court must either support indigenous negative right claims, thereby undermining the legitimacy and power of the government within which the Court exists (thus undermining itself) or reinforce government power and legitimacy by limiting or rejecting indigenous rights. Furthermore, negative rights related to sovereignty and jurisdiction establish (or remind the government that there is) a competing sovereign authority: Indigenous Nations. These rights thus inherently threaten colonizing governments. It is against the government's interest to relinquish control over jurisdiction to indigenous communities or to otherwise protect competing sovereign authorities.

¹⁹ The right to consultation is a constitutionally protected right for all indigenous communities, through which the government and any other entity wishing to legislate or act in any way that would affect an indigenous community, must consult the indigenous community prior to carrying out their intended actions. This right is derived from the self-determination rights of indigenous people intended to preserve their autonomy, political participation, and to strengthen their institutions and cultures, by providing consent for said actions (Comisión Nacional de los Derechos Humanos, 2019).

Hence, cases pertaining to negative rights are the least likely to garner Court support for indigenous litigants.

On the other hand, positive rights are those in which the government acts, or compels others to act, to provide a right to individuals or groups. Hence, positive rights are sought in cases where Indigenous Peoples are relying upon government authority for the provision of these rights claims. Positive rights thus reinforce or expand government authority and power because they rely upon government power to ensure these rights. For example, claims seeking cultural and educational rights typically require government action in order to provide resources. Because indigenous communities are relying on government action, these cases reaffirm the underlying legitimacy and authority of the established (colonizing) government. These rights thus do not undermine government power; instead, they affirm, reinforce, and legitimize the sovereignty and power of the established government. Furthermore, positive rights reinforce institutional legitimacy, improve public support for the government when protected, and make individuals—including Indigenous Peoples—dependent upon the government for these rights. As such, cases on positive rights are more likely to garner a Court victory for Indigenous Peoples as these rights expand or reinforce colonizing government power rather than threaten established institutions.

H2: Indigenous Peoples are less likely to win cases pertaining to negative rights compared to cases involving positive rights.

2.3 Case Issue Area

The concept of the threat posed by rights cases can further include the case issue area. Indeed, the extension of positive versus negative rights can be alternatively evaluated by the case issue area. More specifically, I consider how case issue area can threaten established governmental power. This theoretical specification is similar to that of type of right (positive

versus negative right), but issue areas offer a more nuanced evaluation. In other words, analyzing both the types of rights and case issue areas, despite their similar theoretical expectations, allows me to evaluate which of these factors drives the perception of threat and thus Court outcomes.

The challenges that Indigenous People face encompass political rights, criminal rights, civil rights/liberties, community land rights, and environmental issues. Each of these issue areas can present different levels of threat to established governmental powers. For example, political rights cases relating to indigenous sovereignty and autonomy are threatening to established colonizing governmental power. These cases question or have implications that undermine the legitimacy of the established government power, seeking to limit that power. Political rights cases that pertain to rights of consultation may be threatening in that they seek to governmental infringement on indigenous communities' by forcing the legislative branch and businesses to consult with Indigenous Peoples before engaging in any policy or activity that would affect indigenous communities—which could threaten the viability of the policy (Rivera 2016). Similarly, communal land rights cases (including any dispute regarding property, communal land titles, and land jurisdictional issues)²⁰ seek to limit governmental power by eliminating or reducing the government's ability to own and exploit indigenous land and their resources, especially without indigenous consent, thereby threatening government economic interests by hindering policies and land concessions for the extraction of minerals (Carlsson 2017).

Thus, certain political rights cases and land cases pose a threat to government power and interests. The Court is thus placed in a difficult situation, where a verdict in favor of indigenous rights means the devolution and/or reduction of the power of the government—for which the

²⁰ Jurisdictional issues cases where two parties are claiming ownership/rights to of/an indigenous land. For example, case 119/2018 relates to the violation of indigenous jurisdiction after the state of Sonora established a new university within indigenous jurisdiction.

state has little to no incentive (Cleaver, 2001). In these cases, the Court is expected to be less likely to favor indigenous litigants relative to other case issue areas that are less threatening.

Less threatening cases include certain political rights cases, environmental cases, criminal, and civil liberties/rights cases. For example, political rights cases about due process would not be considered threatening to government authority since it relies on that authority to ensure these procedural processes. Amparo case 78/2014 illustrates this mechanism, where Indigenous Peoples asked the Court to check for due process violations regarding the language in which procedural material was delivered to a person who self-ascribed as indigenous. This person had requested the documents in their indigenous language but had received them in Spanish only. Cases like these thus rely on government power to ensure these rights. Thus this type of political rights case does not threaten government authority; rather it reinforces government legitimacy and power.

Similarly, while environmental issues and threats of environmental damage have frequently impacted Indigenous Peoples (Irland 2017), many cases rely upon the government provision and protection of environmental resources. For example, Indigenous Peoples may rely on the government to supply their community with potable water. In these scenarios, indigenous rights claims do not threaten government power, but rather rely on existing government power to secure these rights such that they reinforce and sometimes expand government authority. Thus, environmental cases pose to reinforce existing government legitimacy and power instead of threatening established authority.

Criminal rights cases are based on claims relating to a violation of the individual rights of the accused.²¹ Because criminal cases are primarily procedural, they apply only to the

²¹ Indigenous People are disproportionately incarcerated for criminal activity in Mexico (Álvarez-Ramos 2012). This may illustrate how criminal laws reinforce and expand government power where the government can expand

individual(s) in the specific case, and generally support broad government power as the legitimate enforcer of law and order, these cases are not threatening to government power. As such, the Court is less likely to face a dilemma between upholding indigenous rights over those of the government since these cases do not threaten government power or legitimacy.

Civil rights and liberties cases, such as protections for educational rights to secure instructional material for Indigenous People (Universidad Veracruzana 2016) and cultural rights, have similarly represented a frequent legal battle (Reyes-Godelmann 2014; Samson and Øyvind 2019). While important areas of contention, these issue areas do not generally threaten the underlying legitimacy and power of the government because they again rely on government power to secure these rights. Indigenous Peoples rely upon government provision of rights and liberties within the colonizing system so that any indigenous victories in court generally reinforce existing government authority and legitimacy.

In sum, these case issue areas are less threatening to the Court as part of government authority and less threatening to established government power. Therefore, Indigenous Peoples are more likely to receive support in these cases compared to the more threatening cases. I categorize each case issue area and identify which cases within each issue area are threatening, as I discuss in the next chapter. I distinguish threatening and non-threatening cases for all issue area categories, though threatening cases exist only in the political rights and land rights. No threatening case exists (in the data) for criminal rights, environmental rights, and civil rights/liberties issue areas. As such, political rights can include both threatening and non-

policing and convictions of Indigenous Peoples to minimize their threat to the state as a legitimate power. In other words, because the very existence of Indigenous Peoples undermines government legitimacy as the sole authority in the land (because it was taken through genocide), criminal laws are useful to shrink this population. Furthermore, the perpetual poverty and lack of socio-economic mobility Indigenous Peoples face create incentives that may force them to violate laws, thereby offering the government ‘reasonable’ authority to punish them. (The same is true in Australia, Canada, and other colonizing common law countries (Australian Law Reform Commission 2018) (Jacobs 2012).)

threatening cases, and land rights can include threatening and non-threatening cases. The following hypothesis summarizes this expectation of threat and Court outcomes:

H3: Cases pertaining to threatening political and land rights are less likely to receive support from the Court relative to cases pertaining to (non-threatening) political, land, environmental, criminal, or civil liberties/rights cases.

Chapter Three:

Data Collection & Methodology

3.1 Dataset Construction

I constructed an original dataset consisting of all indigenous-related cases using Mexican Supreme Court cases published on their website: <https://www.scjn.gob.mx>. This dataset consists of 125 cases from 2002-2019, which was coded and updated throughout the span of one and a half years. To locate indigenous-related cases, I used the case sentence finder and searched for the keyword “indígena” (Spanish for “indigenous”), which gave me a list of cases. The data thus include only cases with indigenous litigants (and representatives of indigenous communities). As such, all cases include indigenous litigants (and/or their legal representative) as either the petitioner or respondent.

However, the data publicly available on the Mexican Supreme Court website is not a comprehensive list of cases. For instance, Rivera (2016) notes that throughout the early 2000s more than 300 constitutional controversies were filed by various state representatives against congressional action regarding the limitations of the San Andrés Accords (where none of which were successful). Yet the data includes only 44 of the more than 300 constitutional controversies, with 43 cases determined in 2002 and 1 case determined in 2003. This implies that the available data is not exhaustive or likely not randomly selected since the Court publishes a limited number of cases. Furthermore, the criteria for publication online is unclear.

Even when a case is posted online, not every case that appears in the search results contains comprehensive information. That is, a complete case consists of the petitioning litigants' names (who were mostly anonymous indigenous individuals/communities), the date that the Court decided the case, the background information (i.e. facts) of the case, the legal

procedural history (i.e. lower court rulings), the legal consequences to take into consideration, the legal reasoning of the case, the holding, and the votes of the Court. Sometimes, when a justice filed a concurring or a dissenting opinion, the relevant files containing these opinions and their reasoning would be available; though, this was not often the case. However, some links to cases only contain the subject information and nothing else, and other case links did not include any information at all beyond the case number. The cases whose description included sufficient information detailing the petitioning party, the issue, the date, and verdict, were coded onto the dataset. Cases that did not include any information, or merely mentioned the case number, and year, omitting other details are, of course, omitted.

While the Mexican Supreme Court has made considerable effort to become a more transparent institution in recent years (Castillejos-Aragón 2013), the publication of specific cases online could be strategic. Without a clear explanation for the selection of case publication and the amount of information provided within each case, it remains unclear whether this is a lack of transparency, an error, or strategic selection. This could present validity issues to the results of this project, since the published cases may have been chosen to better represent the Court's interests. The available case files are, nonetheless, the only data available for public access, and thus the only medium through which to empirically examine the behavior of the Court and the judicial procedural processes of Indigenous Peoples' case law.

3.2 Descriptive Results

Table 1 shows the frequency of the type of cases (e.g. constitutional controversies, Amparo, attraction, etc.) in these data. The majority of the cases are constitutional controversies and Amparo cases, representing 39.20% and 40.80% of the data, respectively. This is unsurprising given that many constitutional controversies were filed in the early 2000s, and Amparo is an efficient type of case through which indigenous communities can seek protections for any infringed right.

Table 1. Frequency of the Types of Case

Type of Case	Frequency	Percent
Unconstitutional Action	1	.80
Amparo	51	40.80
Attraction	16	12.80
Resumption of Competence	4	3.20
Competency Conflict	1	0.80
Contradiction of Thesis	2	1.60
Constitutional Controversies	49	39.20
Recognition of Innocence	1	0.80
Total	125	100

Table 2 shows the number of cases filed by year. It shows that 35.2% of the cases are composed of the constitutional controversies of the early 2000s, particularly by those in 2002. Cases from 2002-2009 represent 44.7% of the data, while 55.3% of cases are from 2011-2019. Because of possible sampling bias, I cannot evaluate whether this increase in indigenous cases represents changes to the Court docket or merely changes in publication trends.

Table 2. Table of Cases by Year

Case by Year	Frequency	Percent
2002	43	34.40
2003	1	0.80
2007	3	2.40
2008	2	1.60
2009	7	5.60
2011	6	4.80
2012	8	6.50
2013	9	7.20
2014	5	4.00
2015	10	8.00
2016	6	4.80
2017	6	4.80
2018	15	12.00
2019	4	3.20
Total	125	100

Figure 1 shows the distribution of indigenous wins and losses throughout the observed years. The significant loss rate in 2002 represents the constitutional controversies that took place in the early 2000s, which sought to nullify laws passed by multiple states and by the federal government regarding indigenous communities and their sovereignty. More than 300 controversies were filed, but none won support from the Court (Rivera 2016). The figure further

shows that at least in the cases available publicly, indigenous litigants experience more wins than losses in several years. However, the number of indigenous claims heard by the Court appears relatively low, with no more than 10 cases determined per year. Due to the sampling issues, this illustrated win rate over time and proportion of docket dedicated to indigenous claims may or may not be accurate. The Court must provide more consistent records of cases as well as selection criteria for publication to ensure better scholarship.

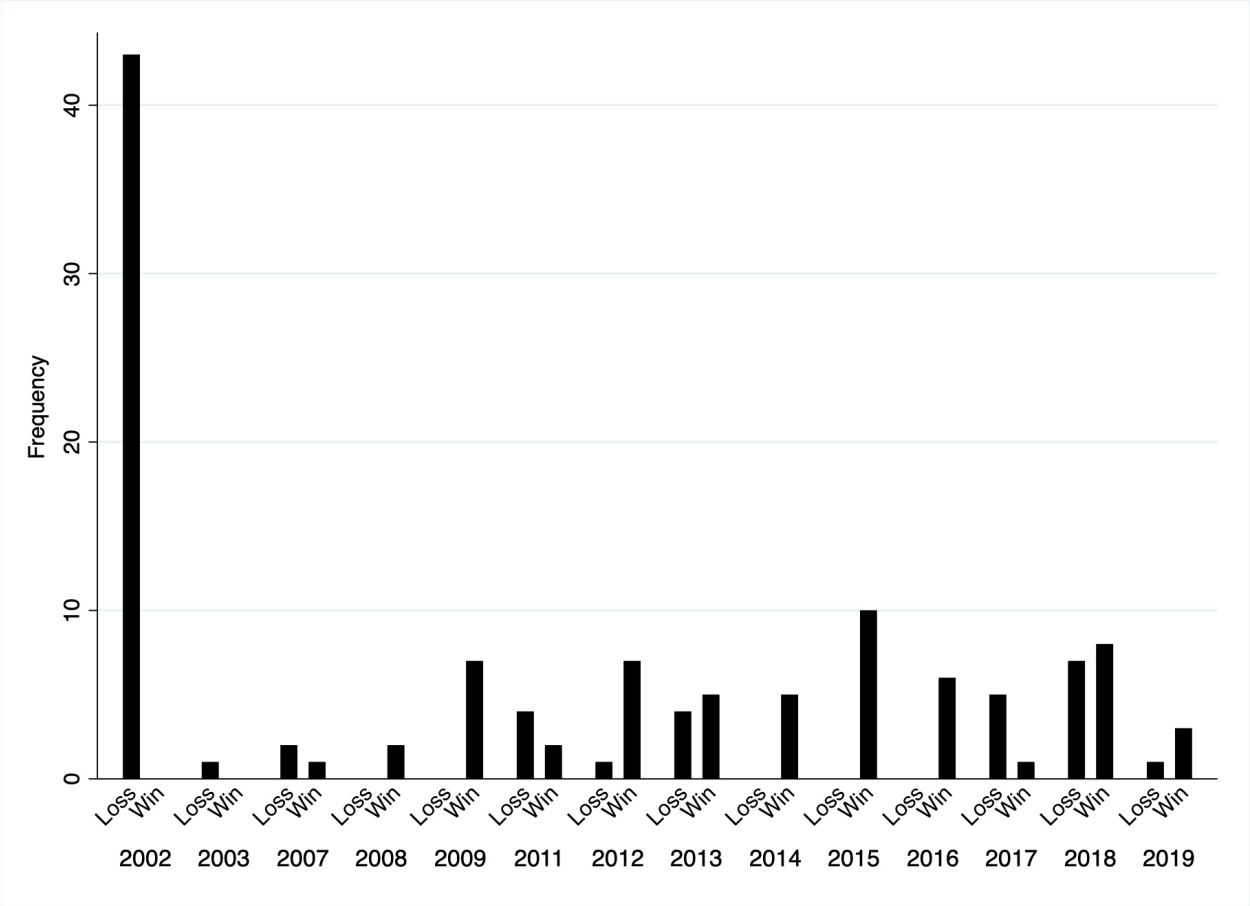


Figure 1. Distribution of Wins and Losses by Year

Table 3 shows the frequency of cases by state, revealing that the majority of cases are from Oaxaca and Chiapas—which is unsurprising given that these two states have the highest proportion of indigenous populations. Yet, there appears to be variation across states represented in these claims. In two cases, the state is listed as N/A to denote that the originating state’s identity is not

available in the case document. This happens in a contradiction of thesis cases, where the lower courts issue contradictory rulings so the Supreme Court must settle the legal interpretation to eliminate the contradictions (Serna-De la Gaza n.d.).

Table 3. Frequency of Cases by State

State	Frequency	Percent
Campeche	5	4.00
Chiapas	19	15.20
Chihuahua	3	2.40
Ciudad de Mexico	3	2.40
Estado de Mexico	7	5.60
Guanajuato	1	0.80
Guerrero	13	10.40
Hidalgo	7	5.60
Jalisco	4	3.20
Michoacán	5	4.00
Morelos	4	3.20
N/A	2	1.60
Nayarit	1	0.80
Oaxaca	37	29.60
Puebla	2	1.60
San Luis Potosí	1	0.80
Sinaloa	3	2.40
Sonora	2	1.60

Tlaxcala	1	0.80
Veracruz	3	2.40
Yucatan	1	0.80
Zacatecas	1	0.80
Total	125	100

3.3 Coding of Case Factors

I read each case (most of which exceed 100 pages in length) and extracted the relevant theoretical information to code for a variety of variables. The variables were coded onto an Excel spreadsheet, which was subsequently imported to STATA for quantitative analysis.

The dependent variable for the quantitative analysis is the case outcome. Cases decided in favor of the indigenous litigant(s) are coded as 1, while cases that represent losses to indigenous litigants are coded as 0. Most of the outcomes of the cases were clear losses and wins, with the exception of three remanded cases and one partial win. The remanded cases were recoded as losses, because these cases did not achieve anything in the Court, and thus depend on a lower court decision. The partial win case was coded as a win because the main premise of this case was an *Amparo* request of protection that was ultimately granted. I also coded “attracted” claims as losses if the Court decided to not take the case, which is a total of 16 cases. As such, my dependent variable of indigenous win or loss for each case remains dichotomous. The data consist of 57 wins and 68 losses, as shown in Figure 2, representing a roughly equal distribution. The relatively equal distribution in the sample suggests that the Court may not be publishing cases in order to make it appear more friendly to indigenous claims. This offers some relief to the issues of validity in this

paper’s analyses as the selection bias may not be directly related to the dependent variable of interest.

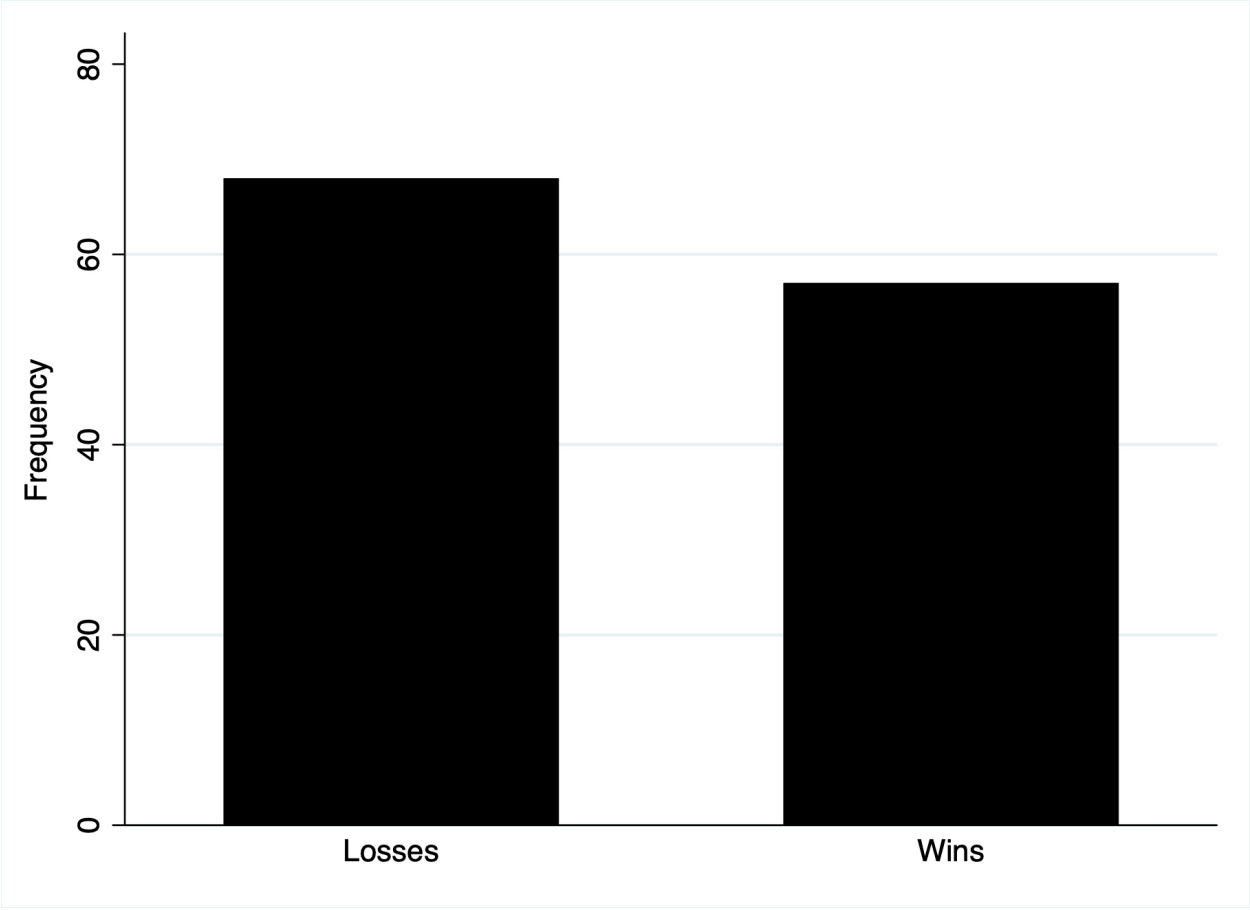


Figure 2. Distribution of Cases by Indigenous Win and Loss

To evaluate the impact of power disparities between indigenous litigants and their opponents, I coded each case as to whether the indigenous litigant was facing an individual, a business/corporation/organization, a state government, or the federal government. Figure 3 shows the ratio of indigenous victories in Court across each legal opponent. Overall, indigenous litigants tend to lose cases more frequently when facing the federal government, while winning more frequently when against state governments, organizations, and individuals.

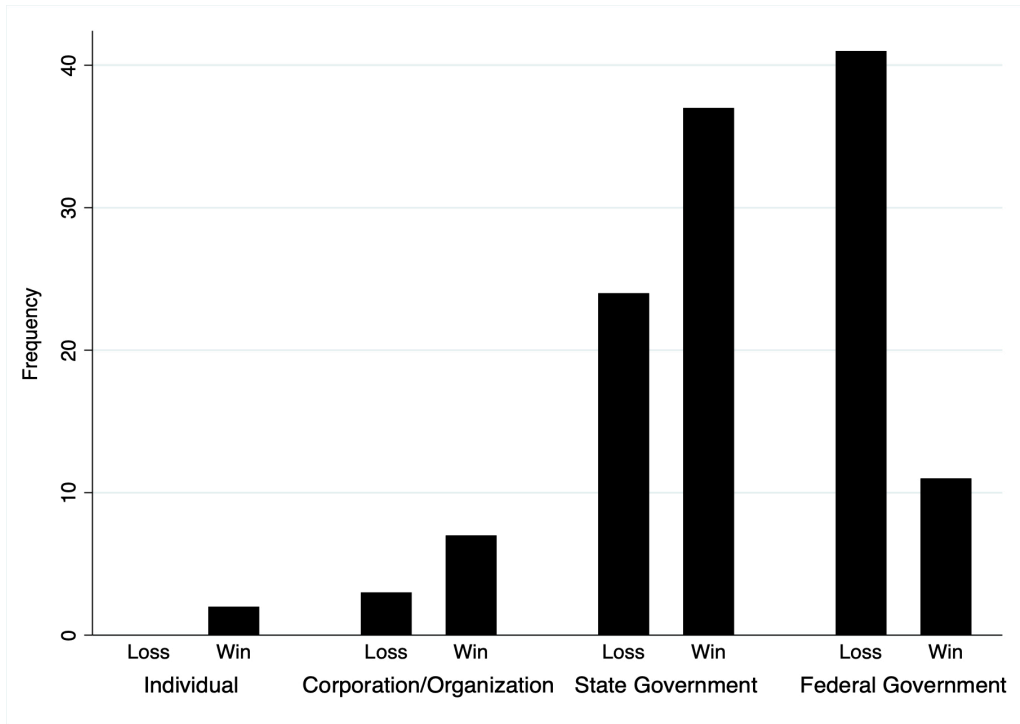


Figure 3. Distribution of Indigenous Wins/Losses by Opponent Strength

However, because of the few cases facing individuals and organizations (with 12 cases total), I collapsed these categories to create a single baseline category. I further created two dummy variables representing cases where indigenous litigants facing the federal government (*Federal Government*) and facing state governments (*State Government*). As such, these variables allow me to evaluate the effects of relative resource disparities on Court outcomes. Table 4 shows indigenous victories across these collapsed opponent categories. Indigenous claims lost 41 cases out of 52 total cases against the federal government, while indigenous claims lost 24 cases out of 37 when against state governments. Indigenous claims lost only 3 cases when facing organizations and individuals. Descriptively, these descriptive results offer some support for H1 in that indigenous claims occur least frequently when opposing the federal government. When facing state governments, the ratio of the wins to losses appears nearly equal, though there are more indigenous

victories than losses against states. Indigenous claims win most when against individuals and organizations.

Table 4. Indigenous Loss/Win by Opponent

Opponent	Loss	Win	Total
Federal Government	41	11	52
State Government	24	37	61
Organizations/Corporations	3	9	12
+ Individuals			
Total	68	57	125

To evaluate the impact of the type of rights, I created a dummy variable *Negative Rights Cases*, which distinguishes between negative rights (coded as 1) and positive rights (coded as 0). For example, cases that request the limitation of interference with indigenous affairs are considered ‘negative’, thus these are coded as 1. A case requesting the government to withdraw a government-granted concession into a third party within an indigenous community is, therefore, invoking a negative right to their jurisdiction and sovereignty, thereby limiting government authority. Positive rights cases are coded as 0, which are those in which the government compels or is compels to deliver protection of Indigenous People’s rights. For example, cases regarding the procedural review of a convicted criminal to see if the indigenous litigants were afforded a translator and interpreter are coded as 0. Figure 4 shows the distribution of positive and negative rights cases in the dataset, with a total of 79 negative rights cases and 46 positive rights cases.

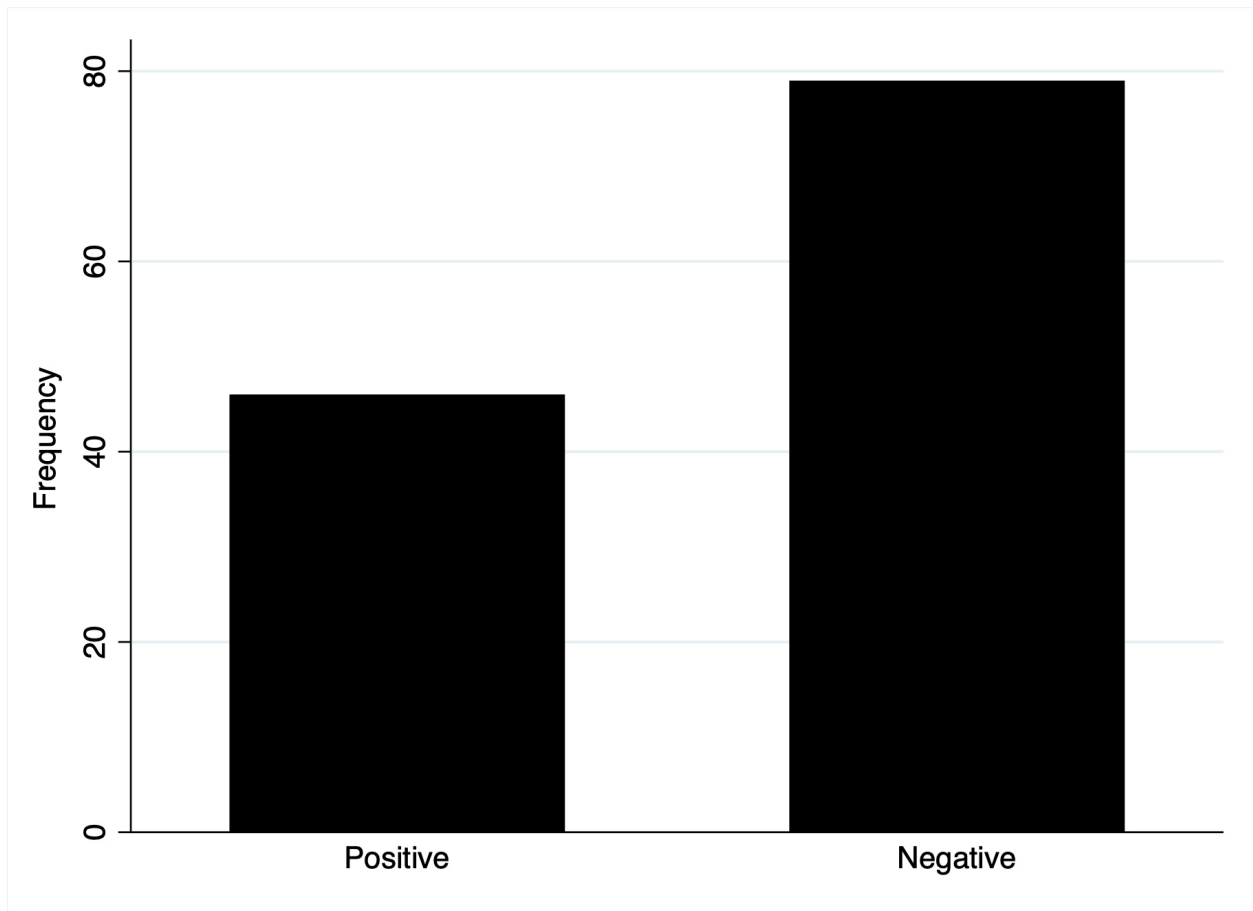


Figure 4. Distribution of Cases by Negative and Positive Rights

To capture the case issue area and threat, I first coded each case by issue area. The data consist of cases on political rights, land rights, environmental rights, criminal rights, and civil rights/liberties. Political rights cases concern those where an indigenous communities' political rights such as the right to sovereignty, consultation, and or any violation of self-determination or the procedural aspects of these are violated. Land rights are cases dealing with indigenous land ownership, the jurisdiction of land ownership, mining concessions, and expropriation of land are categorized. Civil rights/liberties cases are mainly those that relate to Indigenous Peoples claiming protection for their cultural rights, such as rights regarding language, education, and remunerations. Environmental rights are the cases in which Indigenous People's main claim to the Court concerns the natural/ecological damage of their land, such as the release of GMO soybeans

onto a communal indigenous land. Figure 5 shows the distribution of wins and losses across issue area. Interestingly, indigenous claims tend to win across all the issue areas except for political rights cases.

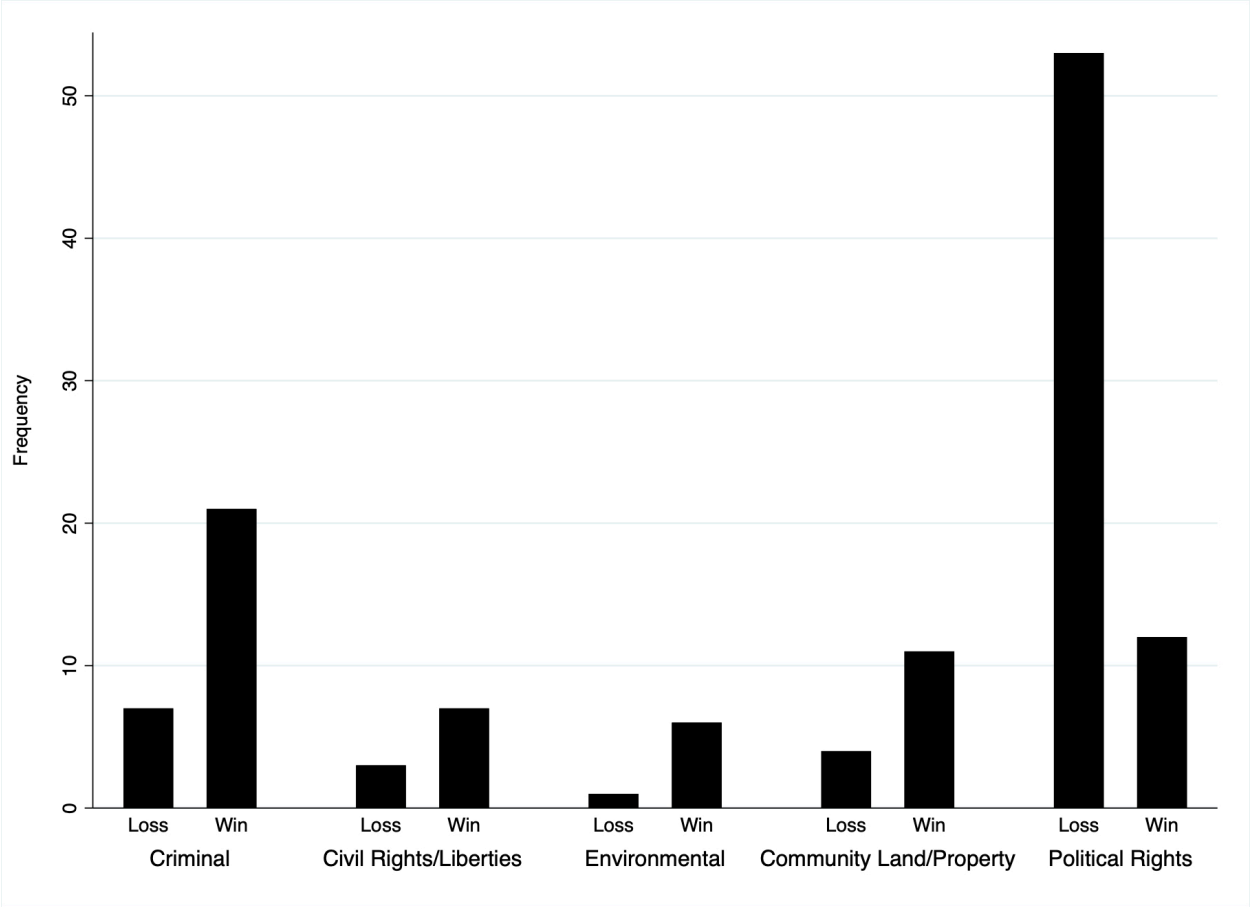


Figure 5. Distribution of Wins and Losses by Issue Area

I then went through each case issue area and determined whether each case threatened government power. A threat was considered present if a favorable verdict to indigenous litigants would have reduced government power and authority and/or reduced its ability to obtain their policy preferences (such as economic interests). *Threatening Cases* is thus coded as 1 when there is a threat present in the case and coded as 0 when there is no threat.

I further created a more nuanced measure of threat and issue area by creating dummy variables for threatening cases within each issue area: *Threatening Political Rights* and *Threatening Land Rights*. Hence, these variables represent threatening cases within each issue area (coded as 1), where the baseline *Political Rights*, *Land Rights*, *Environmental Rights*—as well as *Criminal Rights* and *Civil Rights/Liberties*—are coded as 0. There are no threatening cases within the criminal rights, environmental rights, and civil rights/liberties issue areas. For example, baseline *Political Rights* (not threatening) would include due process claims, that are not threatening to government authority since it relies on that authority to ensure these procedural processes. However, *Threatening Political Rights* includes cases pertaining to indigenous sovereignty rights, which undermine governmental authority. Within political rights cases, 9 cases are non-threatening (*Political Rights*) while 56 cases are threatening (*Threatening Political Rights*).

Similarly, I created a dummy variable for *Threatening Land Rights*, which are coded 1 when disputed claims relate to those of jurisdiction, and consultation, thus, involving devolution of power by the government. Non-threatening land rights cases are coded as 0 for *Threatening Land Rights*—though these cases are captured in the baseline *Land Rights* variable. For example, Amparo case 4393/2014 asked the Court to review the procedural process of the legal transfer and further sale of land between two related defendants. This case merely involves the procedural review of the land ownership, but it does not ask for devolution of power or expanded indigenous jurisdiction. Thus, cases like this one are more likely to gain support from the court since it is not threatening and are coded as “0” for *Threatening Land Rights*.

Finally, I added three additional dummy variables for issue areas: one for environmental issues, one for criminal rights, and one for civil rights/liberties issues. In these issue areas, no cases suggest a threat to the colonizing government's authority, and so all are non-threatening.²²

I control for Court ideology by using the party of the appointing president of the majority of the justices on the Court (Segal and Spaeth 2008; Goldman 1999; Zorn and Bowie 2010). The assumption is that a president strategically nominates justices who align with his policy preferences to minimize potential conflict between executive policies and Court support—thereby ensuring that the president's policies will go largely unencumbered by judicial intervention. As such, I use the party of the appointing president as a proxy for justice ideology.²³ Then I approximate Court ideology using the party of the majority of justices sitting concurrently on the Court for each case. For example, if the majority of the justices of a case were appointed by a PAN President, then the ideology of the Court for that case was coded as PAN. This control variable is labeled *PAN Court* (coded as 1), with a PRI-majority Court (*PAN Court* coded as 0) is the baseline.²⁴ I use PRI Courts as the baseline because the Court became more humanitarian thanks to the efforts by Justice José Ramón Cossío-Díaz, who was appointed by a PAN president and who

²² All of the coded environmental cases include the violation of the right to prior consultation. However, the claims in these cases did not relate specifically to the procedural violation of prior consultation (i.e. failure to consult the indigenous community), but rather the procedural violation of the consultation (i.e. consultation was carried out, but not correctly). Hence, these claims asked the government to remedy the inappropriate procedures, using its authority and power, so as to ensure protection from environmental damage. One civil right/liberties case includes consultation issues, but the primary claims focuses on possible cultural damages, seeking government aid in protection.

²³ In U.S. public law scholarship, this measure of judicial ideology is commonly employed because it has shown across various papers that there is an observable trend indicating that justices ideologically behave similarly as power that nominated them (Bailey 2017; Sisk and Heise 2005). Mexican Supreme Court justices are limited to serve fifteen-year terms (Finkel, 2015), which incentivizes justice voting in line with the ideology of the executive branch that nominated them and that will likely impact their career advancement.

²⁴ The ideology of the court was consistent throughout the plenary (both chambers combined) and each chamber separately in the specific timeframes that the cases in this dataset were adjudicated. In other words, when the Court majority is PAN, all chambers are similarly PAN majority across all years.

sought to define and protect Indigenous People's rights (Castillejos-Aragón 2013).²⁵ Therefore, when the Court's majority ideology is aligned with that of the PAN, they should be more likely to vote in favor of Indigenous People. None of the justices in the dataset were appointed by a Morena president.²⁶ Figure 6 shows the distribution of the ideology of the Court, a total of 68 cases are decided by a PAN Court while 57 cases are determined by a PRI Court.²⁷

²⁵ Prior to 2007, the Mexican Supreme Court had only a few human rights cases in its docket; Justice José Ramón Cossío-Díaz took the initiative to change this in 2007 by using the Court's power of attraction, and through the Fundamental Rights Program (Castillejos-Aragón 2013). Through these reforms, the Court increased human rights cases from circuit courts by exercising its power of attraction, a power that was rarely used during the PRI's regime (prior to 2000) (Castillejos-Aragón 2013). Through the fundamental rights program, Justice Cossío-Díaz increased its transparency, and the public and media's involvement in the Court's affairs. He achieved this through a series of forums in which the Justices interacted with the public, educational institutions, and the media. The impact is noted in two of the top law schools who established public interest clinics, whose purpose is to champion the social justice of human rights (Castillejos-Aragón 2013). This happened only after 2000, and once the PAN nominated and appointed justices to the Supreme Court.

²⁶ A variable for presidential ideology (*PAN President*) was originally created, however, this variable is highly correlated with the ideology of the Court (*PAN Court*). Therefore, this variable is dropped, as it is now captured by *PAN Court*. Keeping both of these will present multicollinearity. The correlation coefficient between *PAN Court* and *PAN President* is -0.812.

²⁷ When I originally controlled for the political party of the sitting president at the time of each case, I used both, the "PRI" and "Morena" as the baseline categories coded as 0, due to the lack of observations of cases adjudicated during the presidency of a "Morena" president (only 4 cases during his presidency). The PRI is a center-left party, and Morena is a leftist party (Eisenstadt 2003). Hence, I merge the PRI and Morena together, because these two parties share some similarities to the left, whereas the PAN political party is conservative/right-wing.

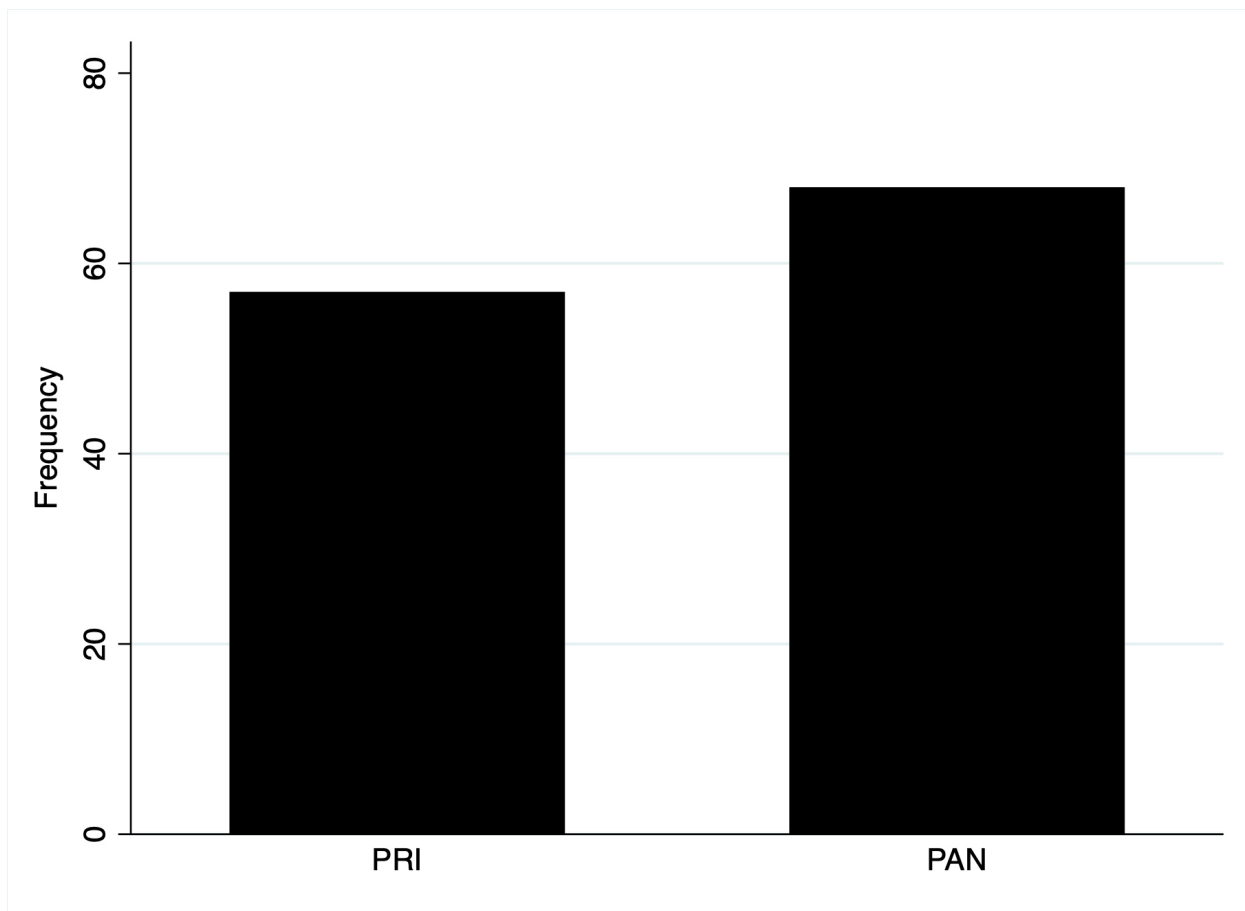


Figure 6. Distribution of Court Ideology

I further control for congressional ideology. The Court may take into account congressional policy preferences since they may experience court-curbing retribution from Congress in response to unfavorable decisions (Ríos-Figueroa 2007). In other words, Court decisions that Congress dislikes may earn the punishment via salary reduction and/or justice impeachment (Ríos-Figueroa 2007).²⁸ Furthermore, in the early 2000s, the Court eliminated some of its jurisdiction in a series of constitutional controversies filed by Indigenous Peoples. The Court determined that indigenous requests for the Court to evaluate legislative policies were best addressed by the legislative branch

²⁸ This recently happened with president Andrés Manuel Lopez Obrador's efforts to reduce public officials' salary, in an attempt to reduce what he considers 'unjust' remuneration (i.e. they earn too much). His efforts led congress to pass a bill to reduce public officials' salary including that of the Supreme Court Justices. This led to a dispute concerning judicial independence, and the consequences for democracy (Associated Press 2019).

and not the Court (Rivera 2016). This self-imposed loss of jurisdiction represents a shift in case types in the Court docket (but not influencing my study since the earliest cases in the data occur after this decision was implemented), and, more importantly, represents Court deference to congressional power. If the Court is willing to reduce its jurisdiction and thus power to defer to congressional preferences, then it seems likely that the Court would take congressional preferences into its decision-making when rendering decisions. I thus control for congressional ideological preferences by creating a dummy variable *PAN Congress* coded according to the majority of the Congress in each year a case was adjudicated. Hence, I coded the PRI and Morena party majorities for each year as the baseline category 0 and PAN congressional majorities as 1. While this dummy variable is an extremely blunt proxy for congressional ideology that both incorporates ecological fallacy and ignores congressional procedures and processes, I use this proxy to enable a consistent comparison of ideology between Congress and the Court. This way I can easily identify when congressional and judicial preferences are generally aligned or when they represent significant policy preference differences.²⁹

Since I have panel data that span multiple years and multiple states from which each case originates, I generate a cluster variable *state_year* that accounts for both temporal and spatial correlations (Abadie et al. 2012).³⁰ I include state clusters to capture dependencies within cases originating from single states. For example, a large proportion of my data consists of cases originating in two states: Oaxaca and Chiapas, which have large indigenous populations and

²⁹ The correlation between PAN Court and PAN Congress has a coefficient of 0.18.

³⁰ Ideally, a fixed effects logistic regression model would be the better option so as to address heterogeneity between clusters as opposed to just within-cluster correlation. Fixed effects would be especially useful for accounts for temporal variation in the data. However, the available data has limited observations with repeated and unequally distributed temporal variation and geographic variation. When FE models converge, using fixed effects on year only, then there is a significant decrease in observations (from 125 to 51)—threatening the validity of the results. Clustering the standard errors by state and year are thus the only feasible option given the limitations of the dataset.

unique local politics to accommodate these populations. As such, cases from these states may be substantially different from cases from other states, and cases derived from each state are likely not independent from each other. Because my dependent variable of case outcome (i.e. indigenous win) is dichotomous, I use logistic regression.³¹

³¹ A Hausman-test was conducted to test for model efficiency between the logit and probit models (Gujarati 2009; Hausman 1978). The probability chi2 was not statistically significant, therefore the logistic model was chosen.

Chapter Four:
Quantitative Analysis

Table 5 shows the logistic regression results for all five models. Model 1 represents a full model, including negative rights and threatening case issue areas. Model 2 evaluates only threatening case issue areas (thereby omitting negative rights). Model 3 evaluates only negative right effects, thereby excluding the case issue area. Model 4 includes both negative rights and all threatening cases, not distinguished by the case issue area. Finally, Model 5 analyses the effect of only threatening cases, not distinguished by issue area (and omitting negative rights).

Table 5. Logistic Regression Predicting Indigenous Wins in the Mexican Supreme Court

	MODEL 1	MODEL 2	MODEL 3	MODEL 4	MODEL 5
<i>Threatening Political Rights</i>	-1.087 (1.495)	-2.438** (0.922)	-	-	-
<i>Non-Threatening Political Rights</i>	-0.291 (1.602)	-.817 (1.008)	-	-	-
<i>Threatening Land Rights</i>	0.762 (1.341)	-0.393 (1.136)	-	-	-
<i>Non-Threatening Land Rights</i>	1.483 (1.512)	0.662 (1.259)	-	-	-
<i>Environment</i>	1.696 (1.880)	0.520 (1.723)	-	-	-
<i>Civil Liberties</i>	0.072 (1.003)	-0.075 (1.011)	-	-	-
<i>Federal Government</i>	0.215 (.821)	-0.008 (0.814)	-0.727 (0.879)	-0.706 (0.840)	-0.905 (0.845)
<i>State Government</i>	0.163 (0.850)	0.516 (0.937)	-1.151 (0.898)	-0.848 (0.830)	-0.267 (0.935)
<i>Threatening Cases</i>	-	-	-	-0.836 (0.978)	-1.73* (0.718)
<i>Negative Rights</i>	-1.665 (1.132)	-	-2.128** (0.741)	-1.481 (0.965)	-
<i>PAN Court</i>	1.311 (0.844)	0.987 (0.803)	1.912* (0.866)	1.588 (0.887)	1.150 (0.781)
<i>PAN Congress</i>	-0.000	-0.122	0.189	0.090	-0.055

	(0.373)	(0.301)	(0.443)	(0.459)	(0.393)
Constant	0.135 (1.275)	-0.187 (1.246)	0.626 (1.115)	0.801 (1.184)	0.568 (1.274)
Log likelihood	-56.412	-58.443	-60.755	-59.904	-62.548
Pseudo R ²	0.35	0.32	0.29	0.30	0.28
N	125	125	125	125	125
% Correctly Classified	77.60%	77.80%	72.00%	77.60%	75.20%

*** p < 0.001 ** p < 0.01. * p < 0.05

Note: Robust clustered standard errors in parentheses. Criminal issue area cases are the baseline category for Model 1 and Model 2. The baseline for Model 3 is positive rights (regardless of issue area). The baseline category for Model 4 and Model 5 is all non-threatening cases (combining all issue areas).

Model 1 reveals null results, where no variable achieves statistical significance. Model 2 shows that *Threatening Political Rights* are statistically significant, where these cases are significantly less likely to result in an indigenous win at Court (relative to criminal cases). However, *Threatening Land Rights* fails to achieve statistical significance, and in neither model does the power disparity of facing a state or federal government systematically impact the likelihood of an indigenous legal victory. Model 2 thus offers partial support for H3, while neither model offers support for H1.

Model 3, which excludes the case issue area, shows that cases pertaining to negative rights are statistically significant, where these cases are significantly less likely to produce an indigenous victory. It also reveals that indigenous wins are significantly more likely under a PAN-majority Court. These results offer support for H2 but not for the Court ideology control.

Model 4 offers null results, and Model 5 shows that threatening cases (regardless of issue area distinctions) are significantly less likely to produce an indigenous victory before the Mexican Supreme Court. Thus Model 5 offers empirical support for H3 in terms of threat to government power.

In sum, these results suggest that cases that threaten government power, authority, and legitimacy are less likely to receive support from the Court. When threatening cases are measured as negative rights cases or threatening cases, the results are supported. Political rights cases that threaten government authority may be driving this result, as these cases are significantly less likely to receive judicial support in favor of indigenous claimants.

However, party capability theory fails to receive empirical support in any model. This may be due to limits in the data and lack of sufficient variation across opponent categories. It may also represent the types of cases that reach the Supreme Court (as opposed to lower courts). Still, these results do not show any systemic effect of the power and resource disparity between indigenous and non-indigenous litigants.

Because logit coefficients are not easily directly interpretable, Table 6 shows the predicted probabilities for the variables that are statistically significant in Models 2, Model 3, and Model 5. The predicted probabilities are calculated from minimum to maximum, using Gary King's Clarify (Tomz Wittenbery, and King 2003). The predicted probabilities for Model 2 show that threatening political rights cases are 50 % less likely to receive support from the Court, compared to the baseline criminal rights cases. In Model 3, negative rights cases are 46 % less likely to receive support from the Court (compared to positive rights cases), and when indigenous victories are 41% more likely when the Court has a majority of PAN-appointed justices (compared to PRI and Morena appointed justice majorities). Finally, Model 5 indicates that cases that threaten government authority are 35% less likely to receive support from the Court, compared to non-threatening cases.

Table 6. Predicted Probabilities for Indigenous Wins

	Model 2	Model 3	Model 5
Threatening Political Rights	- 50 %	-	-
All Threatening Cases Combined	-	-	- 35 %
Negative Rights Cases	-	- 46 %	-
PAN Court	-	41 %	-

Note: Only the coefficients for statistically significant variables are reported.

4.1 Quantitative Conclusions

Overall, these results fail to support judicial party capability theory. In no model does the opponent type statistically affect the likelihood of indigenous success before the Mexican Supreme Court. I do not suggest that these results prove there is no legal effect of the power and resource disparities between indigenous litigants and legal opponents. Instead, I suggest that more transparent and comprehensive data need to be made available and that party capability theory needs additional theoretical development. In particular, traditional methods of evaluating party capability in judicial scholarship, via categorizing opponent type, are extremely blunt proxies. This method ignores the substantial variation that could exist between litigants within each opponent type, and the method ignores the possibility that businesses, corporations, and organizations could have more litigation experience and financial resources than state governments. In short, scholarship needs to better measure relative power disparities through more specific, accurate data rather than generalized assumptions.

These results, however, do support my novel theory of how certain rights claims can threaten government authority and power. Threatening cases and cases pertaining to negative rights, both of which identifying cases that seek to limit or undermine colonizing government authority and legitimacy, are significantly less likely to be decided in favor of indigenous rights. In particular, negative rights cases are 46 % less likely to receive support from the Court, compared to positive rights cases. Threatening cases are 35% less likely to receive support from the Court, compared to non-threatening cases. These results may be driven mostly by threatening political rights cases. Taken as a whole, these results suggest that the Court actively affirms the established (colonizing) government over indigenous political rights claims that seek to limit, curtail, or reduce government authority over indigenous affairs. In other words, when indigenous rights threaten government interests, then the Court systematically rejects these rights claims in order to preserve colonizing governmental authority.

Chapter Five:

Qualitative Analysis

One of the limitations of quantitative analysis, such as that presented in the previous chapter, is that it cannot evaluate the possible synergic effects of the type of rights and issue area. Qualitative analysis, however, can offer a more nuanced, in-depth perspective of how the type of right and issue area synthesizes to threaten colonizing government power. It further offers additional insights to the types of rights and claims made by indigenous litigants that reach the Mexican Supreme Court, as well as illustrates the legal reasoning behind each decision. As such, I offer a qualitative analysis of Court decision-making to further evaluation of how threats to government power can impact Court outcomes.

In particular, this chapter addresses the possibility that a threat can arise from both the case issue area and negative/positive right. Because of the lack of variation and multicollinearity between these variables in the quantitative data analysis (which excluded the possibility of using a meaningful interaction term), the available dataset cannot adequately address the combined effects of threat. Qualitatively, however, I can more fully explore how threats derived from both sources, simultaneously, could impact Court decisions. Table 7 shows the theoretical expectations for the likelihood of indigenous legal victories across both issue areas and the types of rights threats.

Table 7: Relative Likelihoods for Indigenous Victory Based upon Threat Level

Issue Area	Threat Level	Positive Right (Not Threatening)	Negative Right (Threatening)
Threatening Political Rights	High	Low	Minimal (0)
Non-threatening Political Rights	Low	High	Low

Threatening Land Rights	High	Low	Minimal (0)
Non-threatening Land Rights	Low	High	Low
Environmental	Low	High	Low
Criminal	Low	High	Low
Civil Rights/ Liberties	Low	High	Low

Specifically, Table 7 shows that threatening case issue areas, such as threatening political and land rights cases, are obviously more threatening than non-threatening cases (as shown in the second column). However, the second two columns (from the right) show the expected likelihood of indigenous success when combining these cases with positive and negative rights. In particular, threatening and negative rights cases both suggest reduced (i.e. low) likelihoods of indigenous success at Court. Combining threatening case issue areas and negative rights produces the least (minimal) likelihood of indigenous victory, as combined threats from both sources are expected to be more dangerous to the Court relative to threats from only one source and relative to non-threatening cases.

For example, threatening political rights cases (such as those relating to sovereignty) are a high threat to the Court, thus the positive rights claims have a low chance of securing a victory in court, while negative rights cases have a minimal chance. Non-threatening political rights cases (such as those relating to due process rights) are less threatening to the colonizing government, thus the probability of securing a victory in court in positive rights cases is high while low in negative rights cases. Similarly, positive rights cases regarding threatening collective land issues have a low probability of securing a victory in court, and the negative

rights cases has a minimum probability of securing a victory. On the other hand, non-threatening positive land rights cases pose a low risk to the government, thus these are highly likely to secure a victory, and the negative rights counterpart have a low probability of securing the victory. Environmental issues pose a low threat to the colonizing government's authority, thus the positive rights related cases to environmental issues have a high probability of securing a victory in court. The environmental negative counterparts have a low probability of securing a victory for indigenous people. Similarly, criminal, and civil rights issue areas pose a low risk to the colonizing government's authority, consequentially, the positive rights cases related to these are highly likely secure a victory, and the negative rights cases have a low probability of securing a victory in court.

In sum, Table 7 offers a conceptual map of how the source of threat can impact Court verdicts. Table 8 translates this conceptual map to the dataset, showing the frequency of cases in each category of issue area threat and positive/negative rights distributed across win/loss verdict. I expect the lowest number of wins to occur when issue area and negative rights *both* serve as sources of threat to the government, that is categories: a) threatening political rights and negative rights and b) threatening land rights and negative rights. I expect the greatest number of indigenous wins to occur when *neither* issue area and positive right threaten the government, specifically in the categories: a) environmental and positive right, b) criminal and positive right, and c) civil rights/liberties and positive rights. The remaining categories should be in a moderate, or medium, category of wins as they include one source of the threat, either via issue are or via negative rights.

Table 8: Number of Cases by Right, Issue Area, and Win/Loss

Issue Area	Threat Level	Positive Right (Not Threatening)	Negative Right (Threatening)
Threatening Political Rights	High	2 wins 0 loss	5 wins 49 losses
Non-threatening Political Rights	Low	2 wins 3 losses	4 wins 1 loss
Threatening Land Rights	High	1 win 0 losses	5 wins 3 losses
Non-threatening Land Rights	Low	2 wins 0 loss	2 wins 1 loss
Environmental	Low	0 wins 0 loss	5 wins 1 loss
Criminal	Low	21 wins 7 losses	0 wins 0 losses
Civil Rights/ Liberties	Low	7 wins 1 loss	1 win 2 losses

Table 8 descriptively offers some support for these expectations. When negative rights combine with threatening political rights, the number of cases is the highest (in total) and indigenous litigants overwhelmingly lose. Indeed, indigenous litigants lost 49 cases compared to winning only 5 cases before the Court. However, combining negative right with threatening land rights occurs only in 8 cases, where indigenous litigants win more frequently than lose (5 victorious cases to 3 case losses). This contradicts my expectations. Regarding the categories where I expect the greatest number of indigenous wins (where *neither* issue area and positive right threaten the government), Table 8 shows that a) environmental and positive rights cases do not exist in the dataset, b) criminal and positive right cases generally produce indigenous wins, with 21 wins and 7 cases lost (and is the second most populated category overall), and c) civil

rights/liberties and positive rights typically ensure indigenous legal success, with 7 wins and only one case lost by indigenous litigants. The categories where one source of threat exists, show a roughly equal distribution of indigenous successes and losses before the Court.

However, these descriptive results do not indicate the legal reasoning or variation in case types within each category that can impact Court decisions. As such, I offer a qualitative analysis of case briefs for each indigenous success and loss before the Court within each category.

5.1 Methodology

To select cases to qualitatively examine, I focus only on the cases that have implications for Indigenous Peoples as communities. The reason for this is three-fold: 1) the vast majority of cases that would affect only individuals were criminal cases, 2) cases that have implications for the livelihoods and rights of Indigenous Peoples as communities are of substantive interest in terms of threats to government power (as well as normatively so as to improve the survival of these Peoples as Nations), and 3) eliminating cases pertaining only to a single individual reduces the possibility that idiosyncratic factors determined case outcome. Table 9 outlines the randomly selected case briefs I analyze within each category. I randomly selected cases³² from within each category, comparing cases that achieved indigenous victory to those resulting in a loss for indigenous litigants, as shown in Table 9. Because of the multiple categories to examine and limited time frame, I examine only two cases per category, where one case represents an indigenous win and one represents an indigenous loss. Of course, because some categories only have one case, whether one win or one loss, I examine these cases by default. Similarly, for categories with no observations within the dataset, I cannot include briefs. Table 9 notes which categories are missing in the dataset. Additionally, case 601/2018 is an incomplete case as the

³² I used Microsoft Excel to attribute numbers to each case and used a random number generator to select cases to examine within each category.

information regarding this case is only partially available, including only the case topic, holding, and votes are recorded. As this case lacks information on legal reasoning and case facts and is the only case for an indigenous loss in non-threatening land rights and negative rights category, I omit this brief from the analysis.

Table 9: Randomly Selected Cases by Right, Issue Area, and Win/Loss

Issue Area	Threat Level	Positive Right	Negative Right
Threatening Political Rights	High	Win: (637/2017) Loss: None Available	Win: 32/2012 (Done) Loss: 41/2015 (Done)
Non-threatening Political Rights	Low	Win: 78/2014 Loss: None (No Community Cases)	Win: 306/2018 Loss: None (No Community Cases)
Threatening Land Rights	High	Win: None (No Community Cases) Loss: None	Win: 23/2014 Loss: 86/2017
Non-Threatening Land Rights	Low	Win: None (No Community Cases) Loss: None	Win: 563/2014 Loss: 601/2018 (Incomplete information)
Environmental	Low	Win: None Win: None	Win: 499/2015 Loss: 552/2018
Criminal	Low	None	None
Civil Rights/ Liberties	Low	Win: 622/2015 Loss: 1898/2018	Win: 781/2011 Loss: 156/2011

Each case brief breaks down the selected cases by facts, the issue (or question), the holding, and the legal reasoning. This break down of the cases provides an examination of how threats inherent within issue area and the type of rights (positive/negative rights) affect the legal reasoning and thus verdict of the Court’s decision-making.

5.2 Qualitative Results

Threatening Political Rights and Positive Rights Cases

The issue of sovereignty is directly the most hostile of the issue areas because it is directly asking the government to devolve its power, while positive rights are non-threatening since it reinforces government power. As such, this category represents a threat from the issue area but not in terms of the type of right. The issue area can be threatening in nature, but the Court can still instate a law, or a protective decision, which could positively protect a threatening right, by allocating control to the government. There are no observed losses in this category, in this dataset. As such, the following case will be studied in comparison to the negative rights cases.

Win: Case 637/2017

In Attraction 637/2017, an indigenous petitioner filed for Amparo (which was forwarded to the Supreme Court) requesting for protection against the local government of an anonymous municipality of Oaxaca for failing to create a regulatory law for indigenous communities. According to the federal constitution, every governmental entity must have a regulatory law, after reforms in 2001. The petitioner's locality did not create any regulatory law, and it is not required by the municipal constitution, thus failing to comply with the federal constitution. Hence, the claim, in this case, is the failure of the local government to act positively by creating a law that the federal government constitutionally obligates other entities to create. Unsurprisingly, the Court attracted the case, citing the necessity in establishing guidelines regarding local constitutional compliance with the federal constitution; thus, creating the groundwork for future adjudication of similar cases. It is of little surprise that the Court attracted the case because their goal is to prefer positive rights, through which the government can

regulate indigenous communities. Therefore, if a state fails to comply, the Court would want to establish guidelines on how to proceed when local municipalities do not comply with the positivist elements of the constitution.

Loss: None

Threatening Political Rights and Negative Rights Cases

Issues relating to the sovereignty of indigenous communities are by definition less likely to succeed in court because these threaten the colonizing power's authority. There were more than 300 constitutional controversies filed in the early 2000s regarding such rights, none of which were supported in favor of indigenous communities (Rivera 2016). However, there was one, and only one case in which the Court clearly supported Indigenous People's sovereignty. In the losing cases, the court removed standing and does not recognize violations of indigenous customs for their specific case and community. Furthermore, attraction cases are willing to subject the indigenous community to public law-which could expand indigenous communities' sovereignty, or not.

Win: Case 32/2012

The only clear exception (at least in this available dataset), in which the court provided support for the autonomy of an indigenous community-supporting devolution of power, is constitutional controversy 32/2012. This constitutional controversy was filed by the indigenous community of Cherán, in the state of Michoacán, asking the court to review violations possible violations of the indigenous community's right to sovereignty after the state passed electoral reforms concerning their community, without prior consultation of the community. The Court supported the indigenous community's claims citing not only the constitutional obligation to

prior consultation, but also international institutions' laws, and precedents compelling prior consultation of the communities. This judgment made this case salient in the media because it is one of the few to allow such devolution of power to an indigenous community; it also involved the court checking-and-balancing the legislative branch-a decision that directly contradicts what the court previously decided when adjudicating the constitutional controversies of the early 2000s (Rivera 2016). This decision only came, however, after the community's long battle with the government for such autonomy.

Loss: Case 41/2015

Constitutional controversy 41/2015 is a negative rights-related case in which indigenous members of the city council of San Juan Juquila Mixes (an indigenous community) were removed from office by the governor of the state and replaced them with members of his own political party, PRD and PRI. The court found that the destitution of members did not violate any procedural norms because this was carried out as a citizen assembly. Furthermore, the court holds that the defendants do not even have standing because constitutional controversies can only be filed by government officials, a title they do not have, anymore. This judgement supports the colonizing government and its partisanship over Indigenous People's autonomy, not only by supporting the appointment but also by removing standing from the petitioners-by nature denying the entire controversy regardless of any violation of the electoral procedures of the indigenous community.

Non-threatening Political Rights and Positive Rights Cases

Although there are no cases to compare the negative rights of political (due process) rights, there are two that can be compared regarding positive rights.

Win: Case 78/2014

Amparo 78/2014 involves the request of an indigenous petitioner against the Human Rights Commission of the State of Hidalgo after the commission failed to provide the petitioner with information concerning his legal status in his native Hñähñu language. The petitioner was processed criminally, and thus solicited his information in a language that he can understand. The institution, however, only provided him with the information in Spanish; claiming that the petitioner did not need the documents translated because they spoke Spanish. The Supreme Court holds that Indigenous People have the authority to request documents in their native language and that the responsible institutions must provide them, even if the petitioners speak Spanish; this is a part of the constitutional protections for indigenous people. Thus, the court provided positive protection for Indigenous People by affording them translators and translated documents, regardless of the languages that they speak. This is not a threatening case (it is also positive rights related), making it easier for the government to support.

Loss: None

Non-threatening Political Rights and Negative Rights Cases

Win: Case 306/2018

Attraction 306/2018 is a positive rights case in which attraction was requested from the court to review an Amparo claim by indigenous communities regarding the construction of a road through their jurisdiction, and without prior consultation, after a company delivered concessions of land to convey the project-concessions that fall within an indigenous territory. The court attracted the case to its jurisdiction holding that it by adjudicating the Amparo, it will decide how to proceed in cases relating to possible violations of indigenous community rights

when construction of a project is already in an advanced stage within an indigenous community's jurisdiction. Furthermore, the court seeks to establish positive laws by creating a criterion limiting the actions of administrative and jurisdictional authorities when indigenous community rights are involved. The attracted case does not provide any redress, much less establish precedent; but the Amparo case to be resolved, as a result, will further help define the procedural elements of the right to consultation with regard to the construction within indigenous communities' jurisdiction. The reviewal of the process could lead to more protections for the indigenous communities, through the protections are positively provided, which in turn affords the government the authority to control indirectly over the protections, and the process of consultation.

Loss: None

Threatening Land Rights and Positive Rights Cases

Depending on the facts of the case, community land/property rights cases can threaten the authority of the colonizing government. Although these cases tend to be conflictive, they are a bit less threatening than sovereignty political rights cases; with few overlaps between the two issue areas. Unsurprisingly, there are no winning observations in this category, as collective land positive rights are rarely an issue for communities since the main issue with communities is jurisdiction, ownership, and concession expropriation. Furthermore, the only observed cases in this category are losing positive rights cases-which is also expected since the issue area itself is threatening to the colonizing government's power. Because the issues are negative rights cases, these cannot be fairly compared to the cases in the other categories; however, this issue area in the negative rights category has more observations from which to discern the Court's behavior.

Threatening Land Rights and Negative Rights Cases

Win: Case 23/2014

Case 23/2014 in this dataset is a petition for the resumption of competence, asking the court to resume original jurisdiction to review an Amparo (Amparo 167/2014). In this case, the petitioning indigenous community requested information from the state of Guerrero concerning the transfer of a mining concession to the defendants, with the goal to see if any jurisdictional violation against the indigenous community had taken place in the concession. Upon reviewing the document, they found that there had indeed been a jurisdictional violation, thus filing Amparo 167/2014, claiming that the defendants seek to exploit and extract natural resources from their community without conducting a prior consultation for the indigenous community. The act is further aggravated by the permission granted to the defendants to exploit and extract resources from said mining concession in the indigenous jurisdiction. Although the first instance court agreed with the indigenous community, an appeal was filed to the appellate court, who forwarded the case to the Supreme Court, as it relates to a conflict between mining legislation and the constitutional rights of indigenous communities. The Supreme Court resumed its original jurisdiction citing the importance to reassume competence as “the mining concession could threaten indigenous cultural integrity”. Initially, this seems as the Court is interested in protecting the rights of indigenous communities, however, they further cite the importance for the court to, “define prior consultation in cases regarding mining concessions, and the exploitation and extraction of resources within indigenous communities, as this is unprecedented”. The Court clearly has the intention to control the jurisdiction of indigenous people (a negative right), by defining not only the jurisdiction of this community, but how the

law is applicable to the communities' self-governance and jurisdiction in relation to the concession, and thereafter, extraction and manipulation of resources of their land. I do not have access to Amparo 167/2014, but based on the theory, it is unlikely that the Court supported the indigenous community. If they did support the indigenous community, either they successfully provided provisions to further protect communities from the vulnerabilities concessions as shown in this case, or they placed limitations for the community's negative rights.

Loss: Case 86/2007

Constitutional controversy 86/2007 consists of a dispute over the state of Chiapas establishment of the municipality of Belisario Dominguez within what the state of Oaxaca claims as its own jurisdiction. The state of Oaxaca argues that this is a jurisdictional violation by the state of Chiapas, providing historical evidence of the indigenous populations that live in the area and fell under Oaxacan jurisdiction since Mexico was New Spain. They further provided information about the uses and customs of the indigenous communities. The Court holds that the state of Oaxaca did not provide sufficient evidence to prove that the territory in question falls within Oaxacan jurisdiction, rejecting the constitutional controversy. In this instance, the case involves a dispute between two states. Thus, the government is not necessarily at risk of devolving power to indigenous communities. The state of Oaxaca, claims jurisdiction over the territory, further claiming jurisdiction over the indigenous communities that the state claims inhabit their territory for centuries, ignoring the self-autonomy of indigenous communities. I suspect that to prevent any possible claims from indigenous communities regarding their own jurisdiction (which is supposed to be independent of Oaxacan and Chiapan jurisdiction), the case ignored implicating indigenous communities, their thoughts, opinions, and if and how they are impacted.

Ultimately, in the available cases for community land, the court's behavior supports the theory. The only available positive rights case involving community land was attracted with the intention to positively define, and establish legal criteria concerning the procedural elements with regards to indigenous communities' rights to prior consultation, and construction over indigenous land. The losing negative right case saw Oaxaca using Indigenous People as a medium through which to support their control over the territorial boundaries between itself and the state of Chiapas. Refusing to recognize indigenous sovereignty (regardless of state jurisdiction), and the implications of the chartering of a municipality within the disputed boundaries affect the communities. It is almost as if the state of Oaxaca sought to impersonate an indigenous community and claim jurisdiction over the disputed land, knowing that there would not be a devolution of power from the government while strengthening its influence over indigenous communities. Whether that is positive for the communities or not, is subject to an entirely different paper. But in this case, the court was not convinced by the argument provided by Oaxaca. Lastly, the court support for the negative rights case was only provided after the discovery of irrefutable evidence that the petitioners are indeed representatives of the ejidos in question. However, the judgement merely reinstates the procedural process, and the courts may either confirm the Amparo delivered by the first instance court or deny it in the future proceedings.

Non-Threatening Land Rights and Positive Rights Cases

Like collective land (threatening) positive rights cases this issue area does not have any observed community wins or losses within this dataset. This is expected as, again, most of the communal claims are more rooted in the right to jurisdiction, concession expropriation, etc. by

virtue of the conflicting nature of the issues (as they mostly require devolution of power) most are threatening cases and negative rights; reflected by the data itself. The lack of communal observations in this category impedes a fair comparison of cases.

Non-threatening Land Rights and Negative Rights Cases

Win: Case 563/2014

Attraction 563/2014 is a petition filed by an anonymous Tarahumara community in the state of Chihuahua against an anonymous mercantile society for the illegal acquisition of land that was sold to them. The indigenous community cites their right to autonomy through their *usos y costumbres*, through which they have the right to rule themselves according to their traditions and customs. It is their tradition and custom to only acquire land through inheritance or marriage. The original court found that the land does not fall within indigenous jurisdiction declining their request for Amparo, but the Supreme Court decided to attract the case to “establish, review and consolidate relevant criteria regarding Indigenous Peoples and indigenous community rights”. This case is minimally threatening for the government, as Indigenous People are seeking the legitimacy of the transfer of a claimed land. It would be easier for the court to reaffirm the lower court’s ruling without risking devolving the colonizing government’s power to the indigenous communities, however, as theorized, the Court is seeking to “establish, review, and consolidate” the law regarding Indigenous People and communities. Although the Amparo case is not available for further scrutiny; the Court could have chosen to grant Amparo, establishing a criterion to respect ancient indigenous documents regarding Indigenous Peoples’ *usos y costumbres* and the transfer of communal landownership; or they may have limited the criteria to favor the state or a mixture, or not. It is hard to tell how the court behaved without the

subsequent Amparo file. Regardless, the Court, thereby the government, now has the control to regulate a negative right; and with little incentive to promote indigenous communities' laws regarding the transfer of property, it is theoretically unlikely that they supported the community, though not impossible.

Loss: Case 601/2018

Amparo 601/2018 is an incomplete case whose case file only includes vague information regarding the relevant controversy. According to the case file, this case allowed the first chamber to define how the right to consultation is applied in an ongoing construction project, and whether this right was violated in any way at any point in the development of any given project. The request for Amparo is denied. With only one justice voting against the decision, and another justice filing a concurrent opinion. The context of their opinions is not available either. Based on the available information, the court denied Amparo in a case regarding the consultation of an indigenous community. Without specific information regarding the facts of the case, it is impossible to know what exactly about this case failed to compel the court to support indigenous communities.

Environmental Rights and Positive Rights Cases

Even though, the right to the environmental well-being of indigenous communities is a positive right (as the government is compelled to ensure the communal ecological health of Indigenous Peoples, there are no cases in this issue area category in the dataset. This is because although the acts claimed in these cases involve damages to communal environments, the cases involve the right to consultation, and redress of expropriated land, both of which are negative rights (right to consultation and jurisdiction).

Environmental Rights and Negative Rights Cases

Win: Case 499/2015

Amparo 499/2015 is a prominent case in which multiple indigenous communities filed for protection against the General Directorate of Food, Agriculture, and Fisheries and the General Directorate of Environmental Impact and Risk. The indigenous communities claim that the General Directorate of Food, Agriculture, and Fisheries released genetically modified soybeans resistant to herbicides-citing harmful environmental repercussions. From the General Directorate of Environmental Impact and Risk, they claimed the invalidity of the issuance of such permit to release the GMO soybeans onto their communal lands, thus threatening their cultural integrity, and overall communal well-being. In addition, the organizations failed to properly consult all of the affected indigenous communities. The court of the first instance, the district court, granted federal protection for all of the indigenous communities on the grounds of the violation of indigenous communities' right to prior consultation. Upon appeal, the Supreme Court only partially supported the lower court's ruling. Instead, the Supreme Court holds that the principle of relativity³³ in Mexico limits the lower court's ruling granting federal protection, from protecting the indigenous communities who were affected, but who, nevertheless, are not present as litigants in the lawsuit. Furthermore, the court upheld the violation to the communities' right to consultation, although the consultation was held prior to their actions, the Court holds that there was a lack of appropriate consideration for the communities' cultural well-

³³ Mexico's principle of relativity states that adjudications only apply to the petitioning parties, and not to other petitioners, even if the same constitutional rights were violated-that is, if a community/individual wants protection, then he/she/they must file for the protection and/or join a lawsuit with other parties.

being, and thus the consultation must be carried out; lastly the Court denied any environmental damages to warrant federal protections.

Although the Court decided to afford protection for this negative right, it is not threatening to their sovereignty like a political rights (sovereignty) case asking for support from the Court in the allocation of funds and resources with the purpose of carrying out institutional reforms to secure/strengthen indigenous sovereignty. Therefore, the Court more predictably granted protection, but still limited the application of its decision, failing to provide comprehensive reparations for the indigenous communities in the spirit of legal consistency with the principle of relativity.

Loss: Case 552/2018

Attraction 552/2018 asks the Supreme Court to attract an Amparo filed by an indigenous community who cited damages to their community as a result of the expropriation of a part of their territory to construct a hydraulic dam “El Cajón”. The construction project caused ecological damages that resulted in the displacement and eviction of Indigenous Peoples living on the affected land. The district court dismissed the request citing a lack of standing of the petitioning litigants as representatives of the communities. The Collegiate Court forwarded the case to the Supreme Court to consider for attraction, mentioning the possible constitutional implications of the case. The Supreme Court did not attract the case, citing a lack of jurisdiction in the matter of land expropriation in this case, and furthermore, mentioning that no new groundwork would need to be established in deciding the case. The cited reasons by the Supreme Court to not attract the case indicates that the Supreme Court prefers to ignore a negative rights case involving the displacement of the Indigenous People, considering that previous groundwork was laid out; but denying a new adjudication of an Amparo case in favor of indigenous

communities, and their negative right protecting them against displacement, amounting to further support from the Court, which after five similar adjudications, would establish a precedent.

Civil Rights/ Liberties and Positive Rights Cases

Win: Case 622/2015

Amparo 622/2015 involves an indigenous poet, actor, and journalist who is requesting protection from the Court against Article 230 of the Federal Telecommunications and Broadcasting Law, which holds that radio stations must make use of the national language (indicating this to be Spanish) when emitting content. The petitioner cites the dismissive nature of the article, ignoring Indigenous Peoples and their native languages, which predate the presence of Spanish in the territory. The Supreme Court holds that there is a positive obligation to protect indigenous linguistic rights, as they pertain to their cultural rights. Furthermore, they find that the article ignores the pluricultural composition of the country, nullifying and voiding article 230 requiring radio transmissions to make use of Spanish. Notice how the Court recognizes the pluricultural composition of the Country in this less threatening issue area, but hardly places any weight on this fact when considering supporting Indigenous Peoples' right to autonomy. The granted support, however, now established the groundwork for the protection and promotion of Indigenous Peoples' linguistic rights.

Loss: Case 1898/2018

Amparo 1898/2018 relates to a claim made by the President, Secretary, and treasurer of the Commissariat of Communal Assets of the Indigenous Community of Ixtlán de Juárez in Oaxaca, against an adjudication issued by the Tenth Metropolitan Regional Chamber of the Federal Court of Administrative Justice. Originally, the petitioners sought Amparo against a

decree that imposed the same percentage of tax rates on their communities and ejidos as that of rich corporations. The communities explain that this is unfair, because their ejidos do not make the same amount of profits that corporations make, and imposing an equal tax is a violation of equity, because it leaves indigenous communities with fewer resources after tax than it leaves corporations. The petitioners sought the tax authority to issue a decree, through which they would change this, to no avail. Thus, the petitioners asked the courts to issue an Amparo judgement eliciting a decree to change the process. The Tenth Metropolitan Regional Chamber of the Federal Court of Administrative Justice found that it does not have the jurisdiction and authority to provide redress before damage was actually done. The Supreme Court, however, holds that although it does have the jurisdiction to resolve the issue, it does not have the authority to give resolution to this case, citing a lack of authority to judicially trigger a presidential decree to provide redress for the community. The court decided to not provide the positive right, equity, citing a lack of authority to trigger a presidential decree. This seems like a genuine lack of authority by the court to provide redress for the indigenous community. It perhaps would have been more appropriate for the court to strike down and nullify the issued presidential decree, however, doing so would damage private interests, and could be a violation of their authority, since that is not necessarily what was originally asked that the court do.

Civil Rights/Liberties and Negative Rights Cases

Win: Case 781/2011

Amparo 781/2011 is about an indigenous community in chihuahua who filed Amparo against the Barrancas del Cobre Trust and development project organized by the secretariat of tourism. The community cited the exploitation of their land and the lack of consultation for the

development of the project and consequentially, the *remunerative implications*. The court supported the indigenous community through Amparo, but the Amparo was only afforded in recognition of the lack of proper prior consultation for the indigenous communities. The court further holds that the community did not provide sufficient evidence showing that damage was done to their territory, hence the dismissal of that part of the claim. This decision further supports the theory, as the court provided restitution for the communities in accordance with a procedural violation, a protection that is constitutionally guaranteed for the indigenous communities.

Loss: Case 156/2011

Amparo 156/2011 was filed against The National Commission for the Development of Indigenous People (CDI) and other organizations for failing to recognize the petitioners' (who are Hñähñu/Otomí) municipality, as indigenous, citing a violation on the community's right to self-determination, which includes the right of recognition as indigenous. The Supreme Court does not support the case, citing that the state of Hidalgo already recognizes the municipality as indigenous, citing a decree made by the state governor, thus lacking a need to interpret any federal law. This is all in addition to not meeting the formal requirements to actually hear the case, thus declaring itself legally incompetent to adjudicate the matter regardless. It is noteworthy that the Court does not support the negative and cultural right to recognition, which carries a risk of possible eventual devolution of power to the indigenous community/municipality, citing instead that the state law already recognizes the community as such-ergo indicating that there is no present issue with the status quo, thus the claim is not worthy of adjudication; once again, refusing to consider a matter that possibly involves devolution on the usual grounds indicating lack of jurisdiction, relevant issue, authority, etc.

5.3 Qualitative Conclusions

The qualitative analysis shows that the nuances across the issue areas and types of rights, compel the court to do one of two things with each case: place limitations indigenous rights/autonomy, or they define indigenous rights/autonomy, with only a few exceptions to these rules. Limitations happen through constitutional controversies and Amparo cases, while definition mostly happens by attraction and resumption of competence (eventually, leading to Amparo). Naturally, attraction cases seek to explore an area of law that has not been explored before, as the case has implications that are of national interest. However, the Court mostly attracts negative rights cases to define these; by defining the negative rights the Court is exerting non-indigenous institutional influence over the indigenous communities' constitutionally guaranteed negative rights. As such the following I draw the following conclusions about the Court defining and limiting indigenous communities' rights.

In three of the attracted cases, one Amparo, and the only resumption of competence case, the Court sought to define indigenous communities' rights. By attracting cases 306/2018 and 23/2014 the Court sought to define the consultative process by establishing when consultation must take place, and how to proceed once a construction project on indigenous communal land has already begun; in addition to the consultative process regarding the concessions by the government for the extraction and exploitation of the mining areas. This is a clear display of the power of the colonizing government over the indigenous communities by seeking to control and regulate the process of consultation, a negative right, which is derived from indigenous communities' right to self-determination. If indigenous communities are to determine their own rights by exercising their right to autonomy, why is the Court deciding how the legal procedures of consultation should take place? Thus, clearly, the colonizing government is limiting

indigenous communities' sovereignty. The only other case, Amparo 607/2018 regarding consultation, does not include complete information (though it mentions a violation of the right to consultation), and it was a loss, indicating that the Court did not support the claim.

Nevertheless, the Court's behavior with this case still supports the general conclusion that the Court is limiting indigenous institutional sovereignty, by denying any wrongdoing in this process of consultation.

An even more evident example of the colonizing Court defining and limiting indigenous autonomy is attraction 563/2014, in which the Court holds that it is necessary for it to define land acquisition procedures; this means that the Court is subjecting indigenous rights to its opinion as a colonizing government institution, when there is no need to do so, given that indigenous communities already have their own sets of principles defining the procedural process of land acquisition. However, the non-indigenous institution is overseeing these, choosing to define this for the indigenous communities, instead; perhaps to regulate the process minimizing any possible threat to the authority and/or jurisdiction of the colonizing government.

The Court limited mostly negative rights, through constitutional controversies, and Amparos. By limiting Indigenous Peoples' negative rights, the court minimizes the risk of devolving power to indigenous communities by refusing to protect assaults on their negative rights to sovereignty, consultation, and thus associated protections, and recognition. In other words, the dismissal of the constitutional controversy 41/2015 regarding the destitution of indigenous members from their City Council without following the established procedure is a clear limitation on the communities' right to sovereignty and political procedures. Similarly, in Amparo 499/2015 the Court's support regarding the failure of carrying out proper consultation for the indigenous communities prior to releasing GMO soybeans, limited the protection granted

for the indigenous communities who had a representative as a petitioner, leaving the rest of the communities vulnerable. Not only is this a clear limitation of indigenous communities' negative rights to consultation, but it also ignores the resource disparities that exist between indigenous communities. Some communities may not have much to contribute in terms of resources for legal representation, limiting their party's capability, and thus joining forces with other communities to increase the likelihood of success, as Galanter's (1974) party capability theory suggests; only to be curtailed by the Court. Furthermore, recognition, a threatening matter for the colonizing government, is unsurprising, the Court refused the claim of the self-ascribed indigenous municipality, such recognition; on the grounds that they already have the recognition through a decree issued by the corresponding state's government in Amparo 156/2011. The colonizing government is recognizing that the status-quo is legally acceptable as is, and thus, the present controversy is not null and void- ignoring the grievances of the community about the status quo. However, the colonizing government is not willing to address these issues, if it involves further *de facto* and especially, *de jure* devolvement of power to the indigenous municipality.

Only one case in which the Court limited indigenous community rights is a positive right related. This case, Amparo 1898/2018, in which an indigenous ejido requested the Court to compel action regarding the tax authority placing the same tax rate on indigenous ejido communities like those on rich corporations. An act that violates the positive right of the government to provide equity. However, the Court did not support the claim a lacking lack of authority- unsurprisingly. Without nullifying the law or taking any action to positively protect indigenous ejidos positive right to equity. Affording equity could further threaten the colonizing government by allowing a fair share of resources to the marginalized indigenous communities.

With resources, comes more power. It is not surprising, thus, that the colonizing government supported this case, given the low incentive for the colonizing institution to provide such change.

Three positive rights and two negative rights cases clearly gained support for the protection of indigenous communities' rights. Though, these cases pose little to no threat against the authority of the colonizing government, with the exception of one negative rights case.

Amparo 622/2015 provided indigenous communities as a whole the ability to transmit content through the radio in their own native languages, nullifying an article that limited this ability to the transmission of content in Spanish, only. This was clear protection and decolonization through nullification of a discriminating article; though this victory is not one that threatens the sovereignty of the colonizing government, merely one of the cultural and artistic implications, and not autonomous implications. Another clear example of this is Amparo 78/2014, which affords Indigenous People the right to request documents in their native language from procedural institutions even if the person/community speaks Spanish.

Attraction 637/2017, a positive rights case, provides limited support to the proposed conclusion above. Although the case is asking the Court to compel the creation of legislature as a consequence of a local constitution's failure to comply with the national, the government is merely exerting a more positive influence in regulating the constitutional rights of Indigenous People- providing more support for the theory of the colonizing government's influence over the first nations indigenous communities.

The only negative rights case in this last category providing clear support for Indigenous Peoples is Amparo 781/2011, a negative rights case, in which the Court protected an indigenous community in the state of Chihuahua against a touristic project that was developed within their land without proper consultation, resulting in harmful remunerative implications for the

indigenous communities. Since this case does not relate specifically with land and jurisdictional dispute (though support for jurisdictional ownership by the community was provided), and given the issue area, cultural rights and ramifications, the Court provided support. As opposed to the previous consultation-related cases, where procedural violations and a dispute of land concessions were at the center of the dispute; possibly involving devolution of power.

Lastly, there is only one clear win for Indigenous Peoples concerning their right to autonomy and self-determination: constitutional controversy 32/2012. In this case, the Court overrode the legislature by nullifying and voiding the electoral reforms passed by state legislature regarding the indigenous community/municipality of Cherán in Michoacán. Furthermore, requiring that legislatures consult the indigenous community whenever legislation implicates the community. The colonizing government through the Court could have granted support for the community as a result of the problematic history in the community regarding violence, and the power struggle between Indigenous People, the criminals, and the government. It could be that the colonizing government sought to grant the community full sovereignty by devolving the power, but still maintaining influence over the community through the fact that the community still receives funding from the federal government, and thus still has some limited leverage over the community. The colonizing government may simply prefer this over further insurrection, or risk of creating yet another fraction like the Zapatistas. Ultimately, this decision is subject to further scrutiny.

Lastly, constitutional controversy 86/2007 is a unique outlier amongst the cases. This dispute involved the state of Oaxaca battling the state of Chiapas over territorial control of the disputed land. The state of Chiapas chartered a new municipality within that territory. Oaxaca claims the jurisdiction on the grounds of the indigenous communities that have inhabited the

territory for centuries. Although the indigenous communities are a part of the claim Oaxaca makes through attribution, the case actually ignores the sovereignty of the indigenous communities and their right to independent jurisdiction from both Chiapas and Oaxaca. The Court refused to support the constitutional controversy, nevertheless, refusing support not only for Oaxaca, but for the indigenous communities, by default, by not even considering their explicit consent or communal opinion for that matter.

In conclusion, the qualitative portion shows us that the colonizing government, through the Court prefers to support positive rights cases in which the risk for devolution of power is low. Furthermore, the colonizing government limits and defines mostly negative rights cases, as a medium through which they can still exert influence on rights from which they are supposed to refrain themselves from interfering. There is only one clear exception where the colonizing government's Supreme Court supported devolution, but the reasons are unclear. Regardless, the results suggest that the Mexican Supreme Court prefers to support indigenous rights when they do not pose as a threat to established, colonizing governmental power.

Chapter Six:

Conclusions

This research project's goal comes in two questions. First, to what extent does the Mexican Supreme Court protect Indigenous Peoples' rights? Secondly, are Indigenous Peoples legally affected by the power disparity perpetuated by the inequality in the country? According to the quantitative portion, the Mexican Supreme Court is more likely to protect Indigenous Peoples' rights when their claims are related to positive rights (less threatening), and whose issue areas (i.e. environmental, civil rights, and criminal rights) are less threatening to the colonizing government's authority. Further support for this was found in the qualitative chapter, where it is shown that the Court prefers limiting and defining negative rights cases, to exert influence over these, especially when the issue area is threatening (or conveys possibly threatening elements); while more readily providing support for non-threatening positive rights cases. Essentially, the colonizing government seeks to assert its authority over the entire country, ignoring the pluricultural aspect that composes the nation, particularly regarding the original inhabitants of the Americas. That is, the Mexican Supreme Court defends Indigenous Peoples' rights only when colonizing authorities are not threatened.

Indigenous Peoples seek to co-exist with the federal and state governments, and not destroy these institutions. However, it is difficult for indigenous communities to co-exist with colonizing governments when these constantly limit and define their right to self-rule/autonomy/sovereignty/etc. Ultimately, indigenous communities are at the mercy of the Mexican Supreme Court, which serves as part of the colonizing government that hinders indigenous communities' ability to rule themselves, to thrive, and to survive without being forced into assimilation through displacement or other mediums of neocolonial subjugation.

With this research project, I hope to contribute something to academia regarding this understudied research topic. Academics need to focus more on indigenous communities, especially because anyone living in a colonized country as we are living in territory that rightfully belongs to indigenous communities. Notice, I did not say just the Americas; but colonized governments in general. This includes territories and countries that some may forget were colonized, such as countries in Africa, Oceania, Asia, and Europe. The Sámi People of Norway, Finland, Sweden, and Russia are some of these countries' Indigenous Peoples, who are also subjected to colonial institutions. An increase in awareness of Indigenous Peoples and their struggles in securing their rights is one of the principal goals of this research project.

More specifically relating to Mexico, this paper contributes to the understanding of Mexico as a colonized institution. Mexico may have gained its independence from Spain in 1821, but clearly, the old institutional framework and ideas that stripped indigenous inhabitants and communities of authority, jurisdiction, and power are still thriving within the veins of modern-day Mexico. It is important to understand these concepts, so that future research starts focusing on producing the most efficient methods through which we can decolonize our countries' institutions and mindsets.

Additionally, I hope that this research paper promotes some form of accountability. According to the *World Justice Project*, the most effective forms of checks-and-balances in Mexico are delivered by civil society and the media (World Justice Project 2019). Civil society and the media take action in Mexico to hold public officials accountable for their actions. If this study is replicated, or paralleled in conjecture with other types of human rights, and/or further places the Court's under more scrutiny regarding transparency, the public could take action and hold public officials in all three branches, in protest of egalitarian and equative rights across all

marginalized communities in Mexico, especially for indigenous communities, who are the most vulnerable. This information could in turn place greater emphasis on the judicial independence of the Courts allowing them to support minority rights without fear of retaliation if support results as an inconvenience to the colonizing government. The generation of this new knowledge can then be used by the institutions established by former Justice José Ramón Cossío-Díaz, to allow the public, academic scholars, and media to interact more with the Courts through the channels that he opened to allow greater discussion with regards to Indigenous Peoples' rights, and other human rights in general (Castillejos-Aragón 2013). Increasing the democratic interaction of a country whose population is severely struggling to obliterate its authoritarian tendencies is crucial.

To this extent, I suggest that advocates of indigenous rights increase political-institutional engagements to more efficiently decolonize these by voting against/vetoing any colonizing framework and reforms proposed, especially when there is little incentive for the current status quo to carry out such deeds. Additionally, I suggest that advocates place drafted/passed legislation under scrutiny in relation to their *usos y costumbres*, and self-determination rights, and if the legislation violates indigenous rights (or the process through which the legislation was passed), then incite a judicial process against the case; and take into consideration the threatening issue areas/positive/negative rights elements of the case facts (the results of this paper) so that the litigating parties craft their arguments in a way that increases the likelihood of a victory for Indigenous Peoples in Court.

Possible future expansion of this study includes expanding the quantitative analyses to include state court behavior, when and if the data is made publicly available by state governments. Further coding and analyses of federal case files, as they become available. A

separate research project to calculate a judicial ideology index of the Court, that would provide a less statistically biased way to measure the effects of judicial ideology on case outcome. Lastly, the same type of research needs to be quantified and established throughout colonizing governments in the Americas, Africa, Oceania, and Asia. Indigenous communities are after all the original inhabitants the colonized territory, but even in a modern, ‘sophisticated’, globalized world, indigenous communities are still struggling to co-exist with the colonizing governments and their subjugating institutions. After all, it is a cosmic challenge for the “have nots” (the indigenous communities) to assert their rights, when the “haves” (colonizing institutions and those on whom indigenous communities depend for the allocation of power) have the power to lose and minimal gains against their colonizing status quo.

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Vita

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