

**Judicial Decision in Hostile Environments:
Judges, Executives, and the Public in Argentina
(2004-2010)**

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Abstract

The central argument of this work is that the level of aggression of judges sitting in vulnerable courts is a function of their attempt to protect the institutional security of such courts. I argue that in contexts characterised by a lack of a culture of judicial independence, by high levels of judicial delegitimisation, and a high level of public visibility of judicial affairs, judges will attempt to simultaneously construct public support and avoid political conflicts with the Government. As a result, judicial decisions are driven by judges' calculations of both the public's reaction and the Government's reaction to their rulings. I claim the level of aggression of judges' interventions will increase when the Government's tolerance to decisions against its preferences was is higher and the public appears to be more supportive.

I empirically test this theory using the case of Argentine Supreme Court Justices between July 2004 and September 2010. The findings confirm the theoretical expectations according to which judges are simultaneously concerned with the construction of public support and the avoidance of conflicts with the Government. In addition, my study shows three relevant patterns in terms of judicial behaviour. First, the Justices increased their level of aggression by using different modes of involvement when the public appeared to be more supportive and the Government's tolerance higher during the period under study. Second, the decreased level of aggression occurred by altering the features of the same remedy in response to the political conditions in which decisions were issued. Third, existing legal constraints prevented Justices from being more aggressive.

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To Fer and Male

To La Ciega

To Andhes

To the memory of Estratón

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Introduction

At the end of the twentieth century a small group of political scientists, and an even more marginal number of legal scholars, began studying the political relevance of judiciaries. Many studies offer empirical evidence that courts and judges have been playing an increasingly relevant role in the political life of Western democracies (Gloppen et al, 2004; Guarnieri and Pederzoli, 2002; Shapiro and Stone Sweet, 2002; Sieder *et al*, 2005; Tate and Vallinder, 1995). This phenomenon has been called the global expansion of judicial power (Tate and Vallinder, *Ibid*). Nowadays, judges not only settle disputes among private parties but also solve matters that other political agencies are unable or unwilling to deal with effectively. In this regard, authors such as Hirschl (2004: 1) have argued that over the past few years the world has witnessed an astonishingly rapid transition to what may be called *juristocracy*.

As a result, the political involvement of courts has become a relevant component of current Western politics. As Shapiro and Stone Sweet (*Ibid*) point out, the social and political significance of courts makes it difficult for scholars doing empirical research on government to avoid encountering a great deal of law and courts. In particular, analysing the political involvement of courts requires treating them like other political actors and subjecting them to the same research questions, such as: how do judges and courts intervene in public policymaking or interact with other political actors? Why do they sometimes fail or succeed in politics? How do their political or policy preferences affect their decisions? In answering these questions, the literature of the field has shed light on many aspects of the phenomenon through insightful comparative and in-depth case studies. In general terms, we have some knowledge of the institutional and political conditions facilitating this phenomenon, the role of strategic and ideological considerations accounting for it, and the salience of contextual factors such as the power of government and public support of courts as factors enabling and constraining judicial political involvement.

Yet we still know little about the different ways in which judges decide to involve themselves in politics and what explains the variations within and among their jurisdictions. Studies of Latin

American courts have directed their attention mainly to whether judges perform their constitutional mandate vis-à-vis the government. For example, in the most recent edited volume about judicial politics in the region, the editors (Helmke and Ríos-Figueroa, 2011: 5) requested that contributors address two crucial questions: to what extent courts in Latin America are willing and able to both protect individual rights, and to what extent they are willing and able to arbitrate inter-branch disputes that affect the separation of powers. Similarly, in their introduction to the first volume on judicialisation of politics in the region, Angel *et al* (2005:2) remarked that one of the aspects characterising the judicialisation phenomenon is the citizens' use of the judiciary to assert their rights and hold governments and politicians accountable.

In studies of this kind, the study of courts is subsumed to the study of whether judges rules against governments or not. This view, however, overshadows the complexities of judges' involvement in the political arena. Indeed, a decision against a government can take different forms and, thus, judicialisation occurs through different ways. A decision against the interest of the governments may affect all or part of a public policy. Also, the effects of the decision may be limited only to the parties to the case or the citizenry in general. In addition, a decision against a government may go beyond the mere invalidation of a policy but include a request to implement another specific policy. In these cases, some judges spell out the content of policy thoroughly while others prefer to limit their intervention to just request the implementation of a policy in general terms, leaving the design of the specific policy to the elected officials. Furthermore, judges' involvement in the political arena sometimes occurs when they prefer not to decide on the merits of a case.

These different modes of judicial intervention in the political arena are included in several studies in the field. What the literature has failed to do, however, is distinguish between them. This is probably due to one of the most common failings of the judicial politics literature in general: the emphasis on decisions outcomes at the detriment of the analysis of legal opinion written to explain

and support outcomes¹. The outcome of decisions might say little about the decisions themselves. Some decisions are meant to have individual effects while others have collective ones. Also, some contradict the desires of a government by modifying or inserting a new policy in the political process; others validate the position of the government. The enforcement of these different types of involvement also varies in terms of the cost of implementation for the government. Some require the investment of bureaucratic, economic, and political efforts, while others are fairly cost-free. Consequently, these different forms of involvement vary in their level of aggression, which refers to the intensity of the judicial involvement in the political arena. One can learn almost nothing of these aspects by looking only at the outcome of a decision.

Thus, a more nuanced account of the judicialisation of politics is necessary to advance our knowledge of the field. We need to ask when the involvement of courts represents aggressive examples of involvement and how they impact on the political process. Similarly, we need to ask why judges choose different types of involvement and what circumstances account for their decisions. The aim of this thesis is thus to fill this gap by asking the following question:

What explains the different forms of involvement of courts in the political arena?

In the broadest sense, I wish to suggest that, to understand why judges choose different modes of involvement in the political realm, one must first turn their attention to the constraint that judges face when exerting their authority in Latin America. One must also consider the fundamental problem of judicial policymaking, which undermines judicial independence and threatens constitutionalism. In Latin America, as I discuss later in this introduction, judges seats in courts are vulnerable given the lack of a culture of judicial independence and constant political pressure, as well as a low level of public support. As a result, they need to protect their courts in order to achieve their goals. Once we understand how this problem can be solved, an explanation of judicial aggression emerges: the level of aggression of judges sitting in vulnerable courts is a function of

¹ In a very persuasive piece Friedman (2006: 261) identified three problems in the positive judicial politics literature: the lack of a normative framework in this type of works; the lack of attention to the norms of the law, i.e., how law and legal institutions; and, the sometimes inappropriate data collection methods used in these studies.

their attempt to protect the institutional security of such courts. In short, I propose that in contexts characterised by the lack of a culture of judicial independence, high levels of judicial delegitimisation, as well as by a high level of visibility of judicial affairs, judges calculate both the public's and the government's reactions to their rulings. I claim that the level of aggression of judges' interventions increases when the government's tolerance is higher and the public appears likely to be more supportive. In this introduction I discuss why protecting the institutional security of their courts is a crucial matter for Latin American judges. I then discuss two alternative mechanisms which judges can resort to in order to protect their courts. I highlight the limitations of these mechanisms to effectively achieve such protection currently in Latin America. In the third section I present an overview of my argument. Then I discuss different elements of the research design of this work and the methodology used to collect my data. Finally, I introduce the structure of this thesis.

Latin American Courts and the Lack of Institutional Protection

For sure, the claim that judges around the world have incentives to protect their courts does not exclusively apply to Latin America. The protection of their courts might be motivated by institutional and/or personal motives. From an institutional perspective, one can claim that as actors affiliated and embedded in their own institutions, judges are expected to engage in issues of institutional maintenance (Gillman, 1999: 89). Meanwhile, the protection of their courts might be motivated by judges' desires to acquire reputations, protect their salaries, influence policy making, or to progress in their professional career (Helmke 2005). Notwithstanding these common concerns affecting judges all over the world, the particularities of the environment in which judges operate in Latin America make the protection of their courts a crucial matter for judges in the region. Certainly, Latin American courts can be regarded as vulnerable institutions for two reasons.

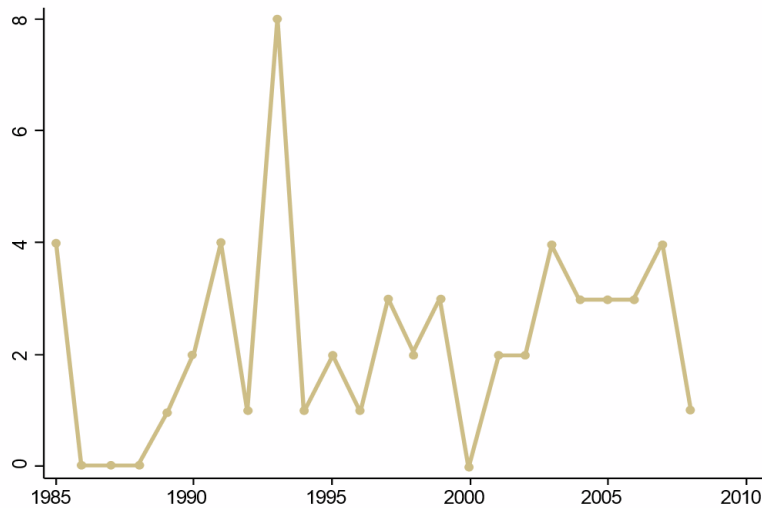
First, the lack of a culture of judicial independence can be seen throughout the region where courts have been systematically subjected to political attacks. The political instability that marked most countries during more than two thirds of the twentieth century resulted in judiciaries being the casualty of regime change, with judges resigning *en masse* whenever dictators displaced

democrats and vice versa (Verner 1984: 469–70). For example, in Bolivia, Castagnola and Pérez-Liñán (2011; 284-85) show that political instability under military rule led to the reshuffling of the Supreme Court seventeen times over four and half decades (1936, 1940, 1941, 1944, 1946, 1948, 1952, 1957, 1961, 1964, 1967, 1972, 1974, 1978, 1979, 1980, and 1982). Meanwhile, the consolidation of democracy in the region has not represented a substantive change for judges in terms of institutional security. Aníbal Pérez-Liñán & Andrea Castagnola, (2009: 106) affirm that “the advent of democracy may have accelerated the race to control courts, rather than reducing it.”

In fact, cases of overt attacks against courts abound. Helmke and Staton (2011: 310) identify more than fifty threats of attacks on the survival of high-court judges in thirteen countries in the region between 1985 and 2008 as presented in Figure 1². They show that judicial crises are still a regular phenomenon in the region even as democracies otherwise consolidate. Indeed, they found that the number of crises involving courts jumped nearly three times in the late 80s to fourteen in the early 90s. As Table 1 illustrates, since 1995, the average number of attempted attacks has been roughly stable at eleven every five years (*Ibid*: 309). The scenario is more worrisome if one considers that the rate of success of attacks against courts has actually risen over the last decade: judicial attacks succeeded just 40 percent of the time from 1995 to 1999, but their success rate rose to 57 percent in the first five years of the new millennium, and reached 83 percent from 2005 to 2008 (*Ibid*).

²The chapter is drawn on the Institutional Crises in Latin America (ICLA) Dataset compiled by Helmke (*Ibid*: 402). The dataset covers eighteen Latin American countries (Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, Venezuela) from 1985 (or from the year of the country’s most recent transition to democracy) through 2008. It was built using information from the Latin American Weekly Report. Three operational rules for identifying attacks against courts were employed: 1) the executive or legislative branch takes actions that threaten the survival of justices on the supreme and/or constitutional court; 2) these threats affect the majority composition of the court (e.g., court packing, multiple impeachments, forced resignations); and 3) the attacks are politically motivated. (Helmke 2010: 401).

Figure 1 - Political Attacks against Courts by Year



Source: Adapted from Helmke and Staton (*Ibid*: 310)

A second aspect of the Latin American context is the permanent low level of public confidence in judiciaries across the region. As I discuss below and at length in the subsequent chapter, public support is considered to be an effective protective mechanism for judges. If citizens value judicial independence and regard respect for judicial rulings as important, a decision by elected officials to resist a judicial ruling or to launch attacks on a court may result in a loss of public support. Consequently, where voters are willing to tolerate noncompliance or political efforts to discipline active courts, judges lack the leverage necessary to exercise meaningful authority. However, this protective measure seems not to be available for judges in most countries of the region. In their analysis of Latinobarometro surveys,³ Helmke (2010: 398-400) and Helmke and Ríos-Figueroa (2011: 2-4) show that on average the percentage of people reporting that they had “a lot” or “some” confidence in the judiciary has varied between a high of just 38 percent to a low of 20 percent between 1995 and 2008. Moreover, the average levels of confidence actually

³ Latinobarómetro is a public opinion survey conducted annually for several Latin American countries by the Latinobarómetro Corporation, based in Santiago, Chile (<http://www.latinobarometro.org/lat.jsp>).

seem to have declined over time, as illustrated in Figure 2. During the late 90s, around 60 percent of those surveyed had “little” or “no” confidence in the judiciary, but in the new millennium, that percentage has risen over 70 percent. Although cross-national variation is observed, only Brazil has had positive approval ratings consistently above 30 percent (Helmke and Ríos Figueroa *Ibid*). As Helmke (*Ibid*: 398) contends, such figures clearly contrast with the American public’s image of the United States Supreme Court. Drawing on a Gallup poll cited by Friedman (2009), she shows that 69 percent of the public reported trust in the judicial branch. Furthermore, while the judiciary is the most trusted branch of government in the United States, in Latin America the judiciary routinely scores only slightly higher than the legislature and slightly lower than the executive branch (Helmke 2010: 398).

Figure 2 - Average Approval of Courts by Year



Source: Reprinted taken from Helmke 2010: 309

The brief discussion of the salient features of the context in which judges operate in Latin America suggests that they have clear reasons to be worried about protecting their vulnerable courts. Whether they are institutionally motivated or pursue ideological, professional, or careerist preferences, they need to shield their vulnerable courts from likely political attacks. In such a context, this concern is likely to have an important impact on the way judges decide their cases, and, consequently, the level of aggression of their intervention in the political arena. In the following section I will discuss two theoretical approaches aimed at explaining how judges protect

themselves from political attacks. I will particularly discuss why the mechanism proposed by these approaches faces serious limitations in giving judges the protection they seek.

Protecting Courts from Political Attacks

How do judges protect their courts and themselves from political attacks? Both the *fragmentation of power* approach and the *public support* approach offer insightful accounts of how judges should strategically behave in order to achieve institutional security. Despite theoretical soundness and empirical confirmation in the region in the case of the fragmentation of power mechanism, I discuss in this section how these perspectives have serious limitations in explaining judicial behaviour in present-day Latin America. These limitations call for alternative views on how judges might achieve protection in the region.

Political Fragmentation as a Protective Mechanism

A substantive body of the recent literature on judicial politics in Latin America has revolved around the fragmentation hypothesis derived from the separation of power approach (Helmke and Ríos-Figueroa 2011). The central claim of the standard separation of power approach is that judicial decision-making is interdependent. Two of the most salient scholars applying this approach to the Latin American context, Helmke and Ríos-Figueroa, (*Ibid*: 14), maintain that judges have preferences over certain policy outcomes but are aware of the need to make their decisions palatable to other actors. Insofar as judges perceive that the institutional security of their courts or their own tenure is at risk, they have incentives on occasion to uphold policies to avoid conflict with powerful governments, no matter how constitutionally-suspect the policies may be.

This type of strategic judicial deference is likely when the political branches find it relatively easy to coordinate a response to unfavorable resolutions (Helmke 2005; Ríos-Figueroa 2007). When a government is divided, however, coordination is difficult, and space is created for independent judicial review. The central empirical hypothesis that emerges from this approach is that divided governments facilitate judicial independence, whereas unified governments undermine it. As three prominent proponents of this approach (Chavez, Ferejohn, and Weingast 2011: 220) explain, the term *unified* is used when the legislative and executive branches have largely similar

policy preferences, which often, though not necessarily, occurs when the legislative and the executive branches are controlled by a single, relatively homogenous majority party. Meanwhile, they argue (*Ibid*), divided governments can arise when the control of the executive and legislative branches is in the hands of ideologically distinct parties or coalitions, either when a majority party controls the political branches but is ideologically heterogeneous, or when fragmentation is produced constitutionally through the requirement of special majorities for certain kinds of legislative acts. In all the cases, what constrains the ability of governments to sanction judges is how the political powers is distributed among the different institutional actors. Thus, as Staton (2010: 12) highlights, inter-branch models characterise judicial power as constrained, and the boundaries are regulated by the fragmentation of government. Judges exercise their power when the state is divided in ways that shield the judiciary from political retribution. In this light, the advice for judges seeking institutional protection would be to avoid ruling against governments in situations of unified government, and rule in this direction in situations of fragmentation.

The fragmentation of powers hypothesis has found support in many studies in the region. A rich body of literature on Latin American courts found that judges refrain from issuing anti-governmental rulings when power is unified across the executive and legislative branches.⁴ However, as Hemke and Staton (2011 308-310) remark, the core implications of the fragmentation models do not fit with important developments in the region. One important implication of the fragmentation hypothesis is that sanctions against judges will remain essentially unobserved under this approach (*Ibid*). When governments are incapable of coordinating a punishment, judges will be free to decide independently without exposing themselves to political attacks. When governments are capable of carrying out sanctions, judges will be strategically deferential *ex ante*, and thus politicians should have little need to sanction them *ex post*. However, as discussed above, political attacks against judges abound in the region. In fact, there are many instances in which attacks occurred when the government was divided. For example, Castagnola and Perez Linan

⁴The most influential works of this kind discussing judicial behaviour in Latin America are Chavez (2004); Helmke (2005); and Ríos-Figueroa (2007). More recent works confirming the fragmentation hypothesis were authored by Scribner (2011), and Chavez, Ferejohn, and Weingast (*Ibid*) which are included in the latest edited volume on judicial behaviour in Latin America.

(2011) show that despite President Morales' lack of a congressional majority, he has managed to make both the constitutional tribunal and the Supreme Court inquorate. In a similar vein, as discussed in more detail in chapter three of this work, President Duhalde impeached all the judges of the Argentine Supreme Court in 2002 notwithstanding the fragility of his governments. In this light, the fragmentation of power mechanism seems to be less effective in protecting judges than expected.

Another implication of this approach is that judges should be prudent; that is, they should strategically avoid ruling against the government. Helmke and Staton (*Ibid*) point out that while there is strong evidence to suggest that Latin American judges are often strategic in precisely the way standard theories would predict, sometimes judges engage in quite risky and bold decisions. Conversely, under this theoretical approach judges will likely rule against governments in situations of divided government. However, Helmke and Ríos-Figueroa (2011:17) argue that one of the core lessons that their co-edited volume emphasises is that fragmenting political power is not always sufficient for judges to exert constitutional control. In this light, Brinks (2011) and Kapisweski (2011) contend that the fragmentation of political power has had little impact in Brazil where judges sitting in the *Supremo Tribunal* seemingly fail to fully exploit their independence, particularly in cases dealing with executive authority. This indicates that judges are not always resorting to the fragmentation of powers mechanism as proposed by proponents of this theoretical approach. In the same vein, it seems that the distribution of power is insufficient for judges to engage in decisions against governments.

These observations suggest that although the fragmentation hypothesis has contributed greatly to the understanding of judicial politics in the region, it does not seem to explain important developments in the region. Certainly, as Helmke and Ríos-Figueroa (2011: 6) highlight, there is enough evidence to conclude that Latin American judges are strategic actors seeking to maximise their utility and that the fragmentation of power theory is the linchpin theoretical approach in the region. However, the developments discussed above suggest that the fragmentation of power mechanism might not be the most reliable mechanism judges can resort to in order protect

themselves. Latin American judges are constantly exposed to political attacks, even in context of divided government. The ability of politicians to sanction judges is not necessarily constrained by the distribution of power among different political actors. Also, sometimes in situations of a unified government, judges seem to feel protected, which suggests that the fragmentation of power might not be the only factor shielding them from political attacks. Finally, even when the power is distributed among different political actors, some judges prefer to engage in deferent decision-making rather than exert their authority against governments.

The failure of the fragmentation hypothesis to explain these important developments calls for alternative explanations. However, the enormous contribution of this line of inquiry to our understanding of judicial politics in Latin America invites us not to reject it wholesale. It is plausible to think that judges indeed take into consideration how power is distributed among formal actors. But it is also plausible that this is not the sole variable they take into account. In fact, emergent literature proposes that judges take into consideration a wide range of considerations. For example, Kapiszewski (2012) proposes that judges balance multiple considerations and that they engage in a tactical balance when deciding cases of political relevance. Under this view, judges' calculus of the power of the government is one of several factors judges consider in their decisions. My work endorses this line of thought. However, a more detailed explanation of my theoretical approach should wait until chapter one.

Public Support as an Alternative Protective Mechanism

Under the fragmentation approach, the government's ability to sanction judges is regarded as mainly limited by the power of other formal actors. However, other scholars propose that constraints on the government's ability to sanction judges might come from outside the formal division of power, particularly from the public. As Staton (2011:13) remarks, scholars in the behavioural tradition have proposed that the key to inducing compliance with judicial decisions is a deep belief among a population regarding the court's legitimacy. Put simply, inter-branch pressures are largely irrelevant if courts enjoy widespread legitimacy. Where voters are willing to tolerate political attacks against courts, judges will lack the leverage necessary to exercise their power. In

such environments, where judges are constrained, we ought to expect judicial decisions to be linked tightly to the preferences of the elected branches (Staton: *ibid*). In order to put these mechanisms to work, judges must enjoy sufficient public support, and the public must be sufficiently informed about the decisions they are purportedly enforcing.⁵

Unfortunately, it is not possible to empirically assess the explanatory power of this mechanism in Latin America. There are almost no studies analysing whether public support works as a defensive mechanism. Indeed, one can certainly expect that the mechanism has not worked in the past since most courts in the region fails to meet the first condition: judicial legitimacy. However, the current low level of popular confidence in courts across the region does not necessarily mean we should disregard the claim that it might be a valuable protective mechanism in the region. It might be possible that, despite not having been able to use this mechanism yet, Latin American judges have been engaged in the process of building it. Indeed, perhaps the lack of public support of courts suggests that judges are still unsuccessful at building public support rather than being uninterested in building it. Getting public confidence is not an easy task for judges. Time is crucial in this respect. Take the case of the US Supreme Court, a court with an undeniably high level of public support, in which the passage of time was essential for the construction of public support. In this case, Friedman (2009: 376) remarks that:

“It has taken the Court and the public some time to learn how their relationship might work; now that it is understood, violent upheaval is no longer necessary. . . . It took the Court quite a while to understand the limitations that motivated public opinion imposed on its freedom of movement. By the same token, it took the public several iterations to assess how it felt about disciplining the court, and in what ways.”

In this line, from a theoretical point of view, it is plausible to think that Latin American judges are interested in constructing public support. Indeed, a key implication of using public support as a

⁵ I discuss in more detail how public support works as a protective mechanism for judges in the following chapter.

defensive mechanism is that, judges sitting in courts, particularly new or recently reformed ones, subject to low levels of support will have incentives to build such support, especially if they operate under constant political threat. As Alba Ruibal notes in her survey of the main issues discussed in the literature on judicial legitimacy in the region, the matter of consolidating the legitimacy and institutional authority of the court has become a common concern and one of the main challenges for constitutional review organs in Latin America.

Before going further and theoretically considering whether public support might work as an effective defensive mechanism, it is worth briefly assessing whether there are empirical grounds to suggest, at least speculatively, that judges are interested in constructing public support in the region. This aspect has also been scarcely explored in Latin America. In one of the few studies on the region linking public perceptions to judicial behaviour, Huneus (2010) argues that Chilean lower judges care about public views and that such views influence their behaviour. In particular, she found that “*many judges view prosecution of Pinochet-era cases as the means to redeem the judiciary from its perceived past complicity and from its low public ratings*” (*Ibid*: 101). As a result, she affirms, criminal prosecutions for crimes against humanity committed under authoritarian rule should be understood as motivated by the judges’ desire to atone for the past wrongs of judicial negligence and complicity (*Ibid*). Although not strictly related to the judges’ use of public support as a defensive mechanism, this work indicates that judges are indeed attentive to public views and even eager to reverse the origins of popular distrust towards them. More relevant to the discussion at hand, Staton shows that judges sitting on the Mexican Supreme Court are conscious of the importance of “going public” and strategically communicating their decisions to build supportive constituencies, which can potentially protect them from political attacks.

Are there more elements suggesting that judges care about public support beyond Chile and Mexico? Three aspects of current Latin America point towards a positive, yet cautious, response. Some evidence, although still anecdotal, suggests that the public is actually able to mobilise against political attacks on courts. One might think that it is unlikely that the public will react against such attacks in Latin America, where attacks have been routine and judges are highly

discredited. Moreover, voters care about a lot of different issues that are perceived to be of immediate urgency, such as the economy, crime and political stability, among other issues. However, one can find instances of public mobilisation against political attacks on courts in the region. The cases of Ecuador and Argentina are particularly emblematic examples of mobilisations against such attacks. As Helmke (*Ibid*: 407) explains, Ecuador and Argentina are countries in which multiple judicial attacks occurred over the last two decades and in which public support to courts is gravely low. However, in these countries the public reacted against political attacks of their national supreme courts. In 2005, President Lucio Gutierrez's attempt to pack the court with politically-aligned judges provoked massive public street demonstrations. As Helmke (*Ibid*: 408) describes, Gutierrez himself was eventually forced to resign. As I discuss in more detail in chapter two, public reactions in Argentina to the Executive's alleged manoeuvre to block the normal functioning of the Court triggered extensive popular outcry. As a result of the impeachment process and resignations that occurred between 2003 and 2005, six vacancies became available on a nine-seat bench. President Kirchner filled only four of those six.⁶ Thus, only seven Justices sat in a Court governed by the decision-making rules of a nine-justice court. Although the government legally had the faculty to either appoint two new loyal Justices or to reduce the size of the Court, it did not act for more than one year. This situation represented an actual obstacle for judges to arrive at a decision in highly divisive cases. The Court's decision-making rule required a majority of at least five judges to hand down a decision, even when there were only seven seated judges. The government's inaction was perceived as a strategy to prevent the judges from deciding on controversial issues in which its interest might have been affected. This provoked opinion leaders to express negative views on the government's position, which were extensively covered by the media. Furthermore, influential civil society organisations coordinated a campaign requesting the government to avoid appointing new Justices and, at the same time, to reduce the size of the Court immediately. Eventually, the government passed a law in November 2006 reducing the Court size to five seats progressively and changed the rule of majority according to the seats occupied. Certainly, in these examples there was no diffuse public support for the Judiciary to dissuade a

⁶ See chapter two for a discussion on these developments.

potential attack, but when the attack occurred people responded in just the way they might in a situation where the court enjoys high legitimacy. These developments would suggest that popular reactions in these cases have more to do with popular dissatisfaction of the governments' perceived illegal strategy than it does the public's adherence to the Court. However, what is important for this analysis is that, for whatever reasons, the public reacted against political attacks and was able to block such attacks.

In addition, Latin American judges sitting in high or supreme courts have developed institutional strategies to increase the visibility of their courts, a crucial element to both construct public support and to make it work as a protective mechanism.⁷ Staton (2010: 4-5) shows that such judges have developed particularly aggressive public relations strategies. The author observes that all but one of these courts makes final rulings directly available to the media via their websites, and 72 percent of these courts alert the media as to their resolutions through press releases. Of the courts that issue press releases, 92 percent of them do so selectively. As Staton (*Ibid*: 5) remarks, this data, contained in Table 1, reflects a systematic effort to influence the quality and quantity of information about the courts' working. Based on these grounds, he claims that there can be no doubt that high court judges are trying to get their public relations right (*Ibid*: 5).

Table 1- Public Relations Summary for Constitutional Courts or High

⁷ The importance of increasing visibility to construct legitimacy and make it work as a defensive mechanism is discussed in detail in chapter one.

	Make Decisions Available on Publicly Accessible Web Site	Announce Decision through Press Release	
		Selective Promotion	Universal <u>Promotion</u>
Argentina	✓	✓	
Bolivia	✓	✓	
<u>Brazil</u>	✓		
Chile	✓	✓	
Colombia	✓	✓	
Costa Rica	✓	✓	
<u>Dominican Republic</u>	✓	✓	
Ecuador	✓	✓	
El Salvador	✓		
Guatemala	✓		✓
Honduras	✓	✓	
<u>Mexico</u>	✓		
Nicaragua		✓	
<u>Panama</u>	✓	✓	
Paraguay	✓	✓	
<u>Peru</u>	✓		
Uruguay	✓	✓	
Venezuela			

Source: Reprinted from Staton (*Ibid*: 5)

Turning to the case of the Supreme Court of Mexico, Staton (*Ibid*: 1999) found that:

“[The] Court, during a period of democratisation, sought to ensure the transparency of its decisions by creating media coverage. Its public relations office waged a battle for “good” coverage, attempting to develop a narrative about the court that is conducive to enhancing its legitimacy. It also promoted the outcomes of particular cases, especially when it appeared that the media was unlikely to cover a decision.”

In line with these findings, Huneus (*Ibid*: 125) claims that media exposure was a key factor in protecting lower judges from pressure by the government and the Supreme Court in Chile. In particular, she found that the judges investigating crimes against humanity committed during the most recent authoritarian government had consciously and successfully engaged with the media. Such public attention, she argues (*Ibid*), “had the effect of empowering individual judges, vis-à-vis the Supreme Court and government, by providing them with a stage on which to voice their own views and garner support for their actions and ideas, and to denounce illicit pressures by the Supreme Court or government.”

Finally, there is also evidence showing that high levels of confidence place some constraints on politicians’ ability to sanction courts. Indeed, low levels of legitimacy appear to

have more explanatory power than several other intuitively plausible causes of judicial instability. Helmke combined data from her dataset on political attacks against courts and data collected by Latinobarometro about level of public confidence on courts (Helmke 2010). She (*Ibid*: 402-3) found that:

“[...] countries with the highest frequency of crises are also those that tend to suffer from the lowest public approval ratings: Ecuador, Bolivia, and Paraguay, Argentina. Likewise, judiciaries with the highest public approval ratings have had the fewest attacks (Costa Rica, Colombia, Brazil, El Salvador, Panama, Uruguay, and Dominican Republic).”

Further, Helmke (*Ibid*: 404-5) conducted a statistical study to compare the impact of public approval of courts to a host of other possible causal factors of judicial crises, including political fragmentation, constitutional protections, judicial power (measured by the number of legal instruments for judicial review that judges can employ), and level of economic development.⁸ She found that “decreasing legitimacy from the maximum to the minimum increases the chances of a political attack on the courts from 2% to 29%” and “the level of public support correctly predicts the data about 57% of the time.” Second, she also found that none of the other variables ever achieved statistical significance, nor do they have an even remotely meaningful substantive effect on determining the probability of institutional instability as it occurs. Interestingly, she observes that legitimacy may be important for the courts’ stability but it is only part of the story, given that low levels of public support are able to correctly predict only a little over half of the cases, and that constant terms in the regression models are consistently significant. These findings allow us to think, at least preliminary, that legitimacy places some constraints on politicians’ ability to retaliate.

These developments suggest that it is theoretically and empirically plausible to think that Latin American judges might find some interest in building public support. Judges operate in a

⁸For details of the logic regression models she carried out and a more detailed discussion of this exercise and its results, see Helmke (2010: 403-8).

context in which the public, under certain conditions, seems to be able to mobilise when politicians attack courts, where judges are engaging in public relations to make their work more visible, and where high levels of confidence seem to partially constrain politicians' ability to attacks judges.

Having established that it is plausible to think Latin American judges are interested in using public support as a defensive mechanism, I can turn to the limitations of this mechanism in the Latin American context. If the core tenet of the public support approach is correct, the central implication for judges who are both publicly discredited and subject to regular political attacks is to build public support in order to use it as a protective mechanism. In order to do this, judges need to increase the visibility of their work to show the public that they behave impartially, among other tasks.⁹ But increasing the transparency of the decision-making process is not enough to make the public perceive judges as impartial. Judges also need to publicise the outcome of their decisions in order to be perceived as impartial actors (Staton: 15).

However, the use of this mechanism currently in Latin America puts judges in a difficult position. Building public support may expose them and their courts to political attacks. Discredited judges aiming to build public support will have to show the public that they behave impartially, which includes but is not exclusively restricted to ruling against governments.¹⁰ However, ruling against governments is a delicate matter in Latin America, where political attacks on courts abound and judges are still not able to use judicial legitimacy as a protective mechanism. Thus, judges in the early stages of their attempt to get public support might put their court at risk. Furthermore, even when publicly discredited judges gain some level of public support the risk of attacks increases. Helmke and Staton (2010 *Ibid*) argue that as the public support increases up to a certain point, the likelihood of a political attack actually increases. They (*Ibid*: 319) contend that with middling chances of a public backlash against sanctioning politicians, judges may be sufficiently

⁹ For a discussion on the concept of judicial impartiality and its relations with public support see Staton (2010).

¹⁰ Here I follow the definition of judicial impartiality proposed by Staton (2010: 132). Under this definition, a judge is considered impartial if he renders decisions according to her sincere evaluation of the policy's constitutionality. If presented with identical constitutional questions, an impartial judge's resolutions to those questions must be invariant to changing litigant identities, partisan or otherwise, or changing extrajudicial pressures.

convinced that they are protected, while governments may be sufficiently convinced that they can get away with an attack. At lower levels, judges are dissuaded from making bold decisions, whereas at higher levels, politicians are dissuaded from attacks. Consequently, as Helmke (*Ibid*: 410) further points out, the result is that judges find themselves with an unenviable trade-off. In other words, by behaving strategically in the short run they can avoid political backlash, but to the extent that the public is aware of what the court is doing, judges' legitimacy suffers in the long run.

As with political fragmentation, the public support mechanism is not able, by itself, to solve the challenges judges face in Latin America. Relying on the formal distribution of power does not seem to be the most reliable mechanism to protect their courts. Latin American judges are under constant political pressure, even in front of fragmented political power. Moreover, in certain instances judges are able to rule against the government without risk of retaliation in situations of a unified government, which suggest that other factors might play a role in protecting them from political attacks. Equally, the public support mechanism might have a negative effect on discredited judges who deliberately aim to build public support. Constructing support might expose courts to political attacks well before they have gained such support. Judges might frustrate their desires to protect their courts. Consequently, judges will have to engage in more sophisticated strategic behaviour in order to achieve institutional protection. These limitations notwithstanding, the core theoretical tenets behind these mechanisms should not be totally discarded. The fragmentation hypothesis has largely contributed to the understanding of judicial politics in Latin America. Likewise, the public support mechanism, still hardly explored in the region, has proven to be an important factor in the protection of courts elsewhere. Thus, rather than rejecting wholesale these alternative views, I propose an argument that builds on these insightful theoretical perspectives and follows an emergent literature proposing that judicial decision-making is determined by judges' complex calculations of several types of considerations.

Overview of the Argument

The central argument of this work is the level of aggression of judges sitting in vulnerable tribunals is a function of their attempt to protect the institutional security of their courts. I argue

that in contexts characterised by the lack of a culture of judicial independence, and by high levels of judicial delegitimation as well as a high level of public visibility of judicial affairs, judges sitting in vulnerable courts will attempt to simultaneously construct public support and avoid political conflicts with the government. As a result, judicial decisions are driven by judges' calculations of both the public's reaction and the government's reaction to their rulings. I claim that the level of aggression of judges' interventions will increase when the government's tolerance is higher and the public appears to be more supportive. More precisely, I propose that attempts to attain institutional security lead judges to behave strategically. On the one hand, judges seek to shape and anticipate the reaction of opinion leaders who are able to both shape mass public views on the general image of a court (diffuse support), and to influence mass public reactions to decisions over socially-sensitive rulings (specific support). On the other hand, judges calculate the government's tolerance to decisions contrary to its own interests. They anticipate that the risk of retaliation decreases if they avoid ruling against powerful governments on issues of particular salience to the official agenda.

I found empirical evidence supporting this argument. I test my theory using the case of the Argentine Supreme Court Justices (hereinafter Judges or Justices) between July 2004 and September 2010. The findings confirm the theoretical expectations according to which judges are simultaneously concerned with the construction of public support and the avoidance of conflicts with the government. In terms of public support, I revealed that the Justices saw public support as a defensive mechanism and they attempted to create the conditions under which it is more likely to work as such. In fact, the Justices managed to build public support through their decisions and to enhance the images of independence and activism. In addition, the Justices not only anticipated public reactions but also attempted to shape them. They sought to control the type and content of information covered by the media as a means to influence opinion leaders' reactions to their decisions. This was complemented with the strategic release of rulings aimed at tempering their negative impact on either the public or the government. Likewise, I found support for the theoretical claim that the protection of the institutional security of their court leads judges to

calculate the risk of retaliation. The Justices avoided ruling against the government on issues salient to its agenda in most of the cases.

Remarkably, I found that the Justices' concern with constructing public support and avoiding political conflicts with the government determined the use of the three types of remedies. Overall, the level of aggression exercised by Justices increased when the public appeared to be more supportive and the government's tolerance was higher. This can be observed through the development of three relevant patterns of behaviour. First, the Justices increased their level of aggression by using different modes of involvement when the public appeared to be more supportive and the government's tolerance interval was higher. A second pattern of behaviour observed, although not extensively, is the decrease in the level of aggression that occurred by altering the features of the same remedy in response to the political conditions in which decisions were issued. The third pattern revealed that existing legal constraint prevented Justices from acting more aggressively.

Surely, my argument builds on the core tenets of two apparently mutually-exclusive theoretical models, the fragmentation of power and public support models. However, it seeks to overcome their limitations in explaining extant developments in Latin America. Certainly, in line with the fragmentation of power hypothesis, I propose that in protecting their courts judges calculate the power of governments to launch retaliations. However, my argument proposes that judges also take into consideration the salience of the issues at hand. Further, I also propose that the calculus of the government's political power is not the sole factor determining judicial decision. I propose that judges in vulnerable courts also attempt to build public support. Thus, I propose a new bivariate, integrated perspective in which the two variables are (a) the Court's standing with the public and (b) the government's tolerance interval.

In this regard, I place my thesis in a body of literature proposing that it is perfectly logical to think that multiple motivations shape judicial decisions (Baum 2006; Feldman 2005; Tamanaha 2009, Kapiszewski 2012). It seems likely that judges ruling on different types of cases in different

areas of law, in different policy realms, or involving different parties, respond to different external impulses or combinations of impulses (Kapiszewski 2011). My argument proposes that judges' ultimate goal of protecting their courts leads them to balance their decisions on their desire to avoid political conflicts and build public support.

In addition, my argument suggests that judges have a certain level of control over the expansion of their own power. I claim that in building public support, judges can *do something* else to merely calculate the public's reactions to their decisions. They can influence, or shape, public perceptions through different activities. They can set the tone of a decision through skilful writing techniques, they can choose when to issue their decisions, to develop strategic public relations with opinion leaders, and to find other alternatives that seek the public's approval. In this regard, my argument is in line with an emergent literature on judicial politics, which proposes that judges have some measure of control over the boundaries of their authority. As such, they are not only dependent on lucky arrangements of political interests. Staton (*Ibid*: 16) has argued that "the boundaries of judicial power are neither fully exogenous to judicial choice nor only characterised by the fragmentation of government [...] Instead they are endogenous to judicial behaviour and influenced importantly by societal beliefs in judicial legitimacy".

Related to this point, my argument suggests that formal institutional judicial reforms process are not enough to create powerful courts, that is, courts able to resist political attacks. Over the past three decades, Latin American countries have embarked on processes of judicial reform in which the empowerment and independence of constitutional review institutions is the preferred outcome (Kapiszewski and Taylor 2008). I argue here that apart from formal empowerment, the construction of courts able to resist political pressures necessitates that judges do something in this regard. Judges are key actors in the process of courts' institutional empowerment, playing a salient role in the construction of public support as a protective mechanism.

Furthermore, my argument implies that the public plays a crucial role in judicial affairs, particularly when judicial affairs are subject to public scrutiny. On the one hand, the public enables

judges to achieve their goals through the construction of public support. Insofar as government will incur popular backlash for launching political attacks, their ability to sanction such attacks is limited. On the other hand, the public also constrains judges. If judges care to build public support and increase the visibility of their workings, their ability to strategically defer to governments, or other actors, will be narrowed. In that regard, my argument brings the public to the centre of the judicial decision-making process which is said to be dominated by legal principles, political or legal ideology, or personal interests.

Research design and methodology

I responded to my research question by carrying out an in-depth qualitative analysis of the Supreme Court's behaviour between July 2004 and October 2010, focusing on a reduced but highly selective number of cases. Although research based on quantitative analyses of large N of rulings has contributed to deepening our understanding of judicial behaviour, some crucial aspects of judges' behaviour can only be fully grasped by taking a different approach. An in-depth qualitative study is required to assess how judges respond to the constraints and opportunities posed by the political context in which they operate. It is first necessary to identify the most publicly salient cases, as the assessment of judges' decisions is only possible when public attention to court activity is high, as occurs with salient cases. Then, it is essential to carefully analyse the content of those cases, not only to look at whether they are for or against the government, but also to evaluate their key elements, which constitute different levels of aggression. In addition, public reactions to each ruling need to be grasped in order to determine their impact on diffuse and specific support. Finally, it is crucial to assess judges' decisions in light of the government's tolerance to decisions contrary to its own interests.

By focusing on the Argentine Supreme Court I attempt to further our understandings of how judges behave in a region that is still under-studied, namely Latin America. In spite of the fact that both the global expansion of judiciaries is a common feature of contemporary democracy and its occurrence might adopt different forms in different countries, most of the studies in the field have focused on the particular case of courts in the United States (U.S.). As a consequence, the

field has been dominated by the models, methodologies and hypotheses applied to these courts, thus meaning there has been a lack of systematic study about how, when and why courts politically intervene in contexts that are different from the U.S. More precisely, the peculiarities of Latin American courts call for a revision of some of the main assumptions of the literature on courts and politics. For example, the lack of a culture of judicial independence observable in most of the countries of the region raises doubts about the explanatory power of judicial behaviour models that take judicial independence for granted. Also, Latin American legal systems share a characteristic that makes them unusual. Although most Latin American legal systems, including the Argentine one, are participants of the *civil law* tradition, they acquired peculiar characteristics that differentiate them from those in Europe or elsewhere in the civil law world (Clark and Merryman, 1978). Latin American legal systems were created under the twofold influence of the codifying trend of the French Revolution and the prototype of rigid constitutions embodied in the US Constitutional legal tradition (Lambert 1967 in Merrymans, *Ibid*). The confluence of two differing legal traditions has produced a subtype within the civil law family¹¹. The peculiar institutional characteristic of these legal systems is relevant for the study of judicial behaviour as the literature grounded in pure civil law, common law or the U.S. constitutional system has found that institutional settings both constrain and free judicial behaviour.

In this light, the study of the Supreme Court of Argentina is an excellent opportunity to advance our knowledge of why and how courts involve themselves in the political process. Since 1983 Argentina has experienced a process of “judicialisation” of conflicts and of “juridification” of social interactions (Smulovitz, 2010: 1). In fact, as is shown in the analysis of rulings conducted in chapters five to seven, this process was reflected by the period under study in which the Supreme Court had a transcendent role in resolving politically- and socially-sensitive issues. For example, indigenous peoples’ organisations resorted to the Court requiring judicial intervention to secure

¹¹ According to Clark and Merrymans (*Ibid*) the predominance of the *civil law* tradition in Latin American legal systems is observable, among others, in the structure of codes, in the roles assigned to legislators, scholars, and judges in the legal process, in the patterns of legal training and legal profession, and in the style of the legal scholarship. On the other hand, the US Constitutional tradition is apparent in the structure of the checks-and-balances division of power, the idea and nature of constitutions, and the judicial review of legislative and administrative acts, among other aspects.

implementation of policies to uphold their constitutional rights, such as rights to education, property and healthcare; middle class citizens used the Court to redress government policies, such as thousands of plaintiffs claiming access to bank savings; civil society groups turned to the Court to request the implementation of policies in different areas including, but not limited to, environment, prison conditions, and juvenile crime; and even politicians took their political disputes to the judicial arena. These examples indicate a society that increasingly resorts to the Judiciary to resolve issues previously reserved, or supposedly reserved, for the political governmental agencies. Responding to this phenomenon, the Court has played a leading role involving itself in the solution of these types of issues. In doing so, it played a proactive and salient role in Argentine politics between 2004 and 2010.

The Court's political involvement can be divided into two categories of rulings. First, the Supreme Court has declared the constitutionality or unconstitutionality of administrative acts and laws. As many other courts do in Western democracies, the use of its judicial review power has allowed the Tribunal to intervene in the political arena by either limiting or validating national and provincial governments' policies. Second, the Court has included innovative remedies in its jurisprudence. Instead of setting limits on state intervention as most courts in liberal democracies would do, the Court uses these remedies to request state agencies to implement public policies in order to solve structural situations provoking violations of rights, and has used them to appoint itself as the agency in charge of monitoring the implementation of such policies. Here, studying the case of the Argentine Court allows us to study the use of different modes of judicial involvement in the political arena.

In addition, studying the Argentine case is an opportunity to analyse how judges decide their cases in contexts marked by a lack of a culture of judicial independence, low levels of public confidence toward the judiciary, and high levels of public scrutiny. As I discuss in chapter two, the Argentine Court was traditionally regarded as an illegitimate institution by society at large due to its poor performance as a guardian of the division of powers and constitutional rights. In the 1990s, allegations of management corruption, collusion with political actors and economic groups, lack of

independence, poor technical skills and a deeply conservative jurisprudence in terms of fundamental rights protection discredited the Court's image. During the country's economic and political crisis in 2001 and 2002, which ended in a social insurrection against the entire political elite, the Tribunal was one of the most discredited institutions. Social protests were directed at the Court as co-responsible for the country's breakdown. Second, the Court's behaviour has largely been constrained by unfriendly political dynamics towards independent and proactive salient courts. Since 1946, most democratic and military governments sought to control the Tribunal. Towards that end, executives have not only nominated and appointed friendly justices for open vacancies through secretive and discretionary procedures, but they have also influenced procedures when vacancies emerge. As a result, most administrations, both democratic and dictatorial, were able to shape a new Court majority with their own appointees. In the meantime, as I discuss further in chapter two, an increase in the public scrutiny of judicial affairs has taken place in the country. Indeed, as I address in chapter four, this scrutiny is a consequence of judges' attempts to publicise their work.

My thesis is outcome-oriented and outward-looking and, thus, treats the Argentine Supreme Court as a unitary actor. I propose that judges in vulnerable courts care about protecting their courts, and that this preoccupation leads them to adopt a strategic approach to decision-making. In this sense, my work is in line with studies in which the strategic environment under study is external to the court (Herrero 2008 Staton *Ibid*). For this reason I do not look at the internal dynamics of collegial decision-making. In this sense, I treat courts as if they were unitary actors. The assumption that collective actors such as constitutional and high courts, as Epstein *et al* (2001:128) noted while ago, have a unique policy preference point is, of course, a simplifying assumption. Institutional actors consist of groups of individuals who may differ among themselves in their preferences over policy questions. But, as the cited authors (*Ibid*) point out, each institution has its own procedures for aggregating these individual preferences into some type of institutional preference ranking, which justifies treating them as unitary actors. In addition, as Staton (*Ibid*: 17) sustains, although courts are not actually unitary actors or always outwardly oriented, it is useful to

treat them as if they were for the purposes of the study at hand. In my case, the puzzle of judicial policymaking on which I focus does not concern with the process by which judges, as Staton (*Ibid*) characterises, *compromise, cajole, and browbeat their colleagues in search of rule or remedy*. Rather, my thesis revolves around the question of how judges calibrate the intensity of their interventions in unfriendly political contexts. Finally, Staton (*Ibid*) adds an additional solid argument for studies related to judicial legitimacy: if one of the sources of judicial legitimacy derives from public ignorance about the internal bargaining that takes place in constitutional courts, then it is in the interests of all members of the court to advance an image that deemphasises inevitable intra-court deliberation.

The unit of analysis in this work are Justices' majority decisions. Thus, I do not analyse judges' decisions individually but the aggregation of individual decisions which constitutes a majority decision. I analyse the decisions of seven Justices: Chief Justice Lorenzetti, Justice Argibay, Justice Fayt, Justice Highton de Nolasco, Justice Maqueda, Justice Petracchi, and Justice Zaffaroni. These are the judges who sat in the Court during the whole period of this study. At this point, I must clarify the terminology that I use here. I use the word "Justices" to refer to the aforementioned judges, that is, those who sat in the Court during the period in question. Meanwhile, I use the words "Court Justices" to refer to judges who sat in the Court prior to the period under study. The period under study starts in July 2004, when a substantive change in the Court membership took place. As discussed in chapter three, between December 2003 and January 2005 President Kirchner's government launched a series of reforms which resulted in the incremental consolidation of a Court's new membership. Through impeachment processes, he targeted the five most criticised Court Justices. These Court Justices were publicly called the "automatic majority" given that they blatantly supported the President Menem's government and its officers in a high number of crucial legal cases during the 1990s.¹² Three of these Court Justices

¹²These five Justices constituted a solid and homogeneous block which had an enormous power given the decision-making of the Court was governed by the majority rule – that is, it was enough that five Justices agreed on a matter to produce a Court's decision.

resigned before the end of the impeachment process and two were effectively dismissed. In addition, another Court Judge resigned due to personal reasons. Despite six vacancies, Kirchner's government only appointed four new Judges. As a consequence, a Court's new membership, combining four newly appointed Judges and three already sitting, was consolidated at the end of this process.

A milestone in this process occurred when Justice Highton joined Justices Petracci, Fayt, Maqueda, and Zaffaroni in the Court in June 2004.¹³ From that moment, for the first time in thirteen years, decisions could have been handed down without the intervention of the Court Judges belonging to the "automatic majority" bloc.¹⁴ In other words, both as a group and individually, these Court Justices would not be able to influence court decisions anymore. Simultaneously, that month marked the moment in which five out of the seven Justices sitting on the Court over the period of study became a majority. In conclusion, July 2004 is the date in which a new period of Court history started.

The dependent variable in this work is Judges' level of aggression. The assessment of the level of aggression goes beyond the outcome of each decision. As I further discuss in chapter one, I measure "level of aggression" on a four point scale built along four dimensions, namely the nature of the remedies, the effect of the remedies, the position of the government on the issue under discussion, and the cost of enforcement for the elected branches. In order to account for the different aspects constituting the level of aggression, my analysis goes beyond the outcomes of the cases. I analyse both the outcomes and the written legal arguments. Studying the content of opinion empirically is labour-intensive and requires specific legal skills (Friedman 2006). This is particularly the case in the Argentine context where judges, probably influenced by the civil law culture, write long decisions in a very complex language. For that reason, in most of the cases, the analysis of the text of the decision was complemented with specialised legal doctrine and with the

¹³ At least until January 2014, these judges along with Justices Lorenzetti and Argibay have remained in the bench.

¹⁴ According to the Court's decision-making rules of that time, five supporting Judges were necessary to issue a decision.

opinion of legal experts and Court clerks contained in interview transcripts. Finally, in order to ascertain the position of the government on the issue subject to Judges' review, I rely on newspapers and experts' opinions also contained in interviews transcripts.

Furthermore, I use a criterion of contemporary public salience to restrict the universe of decisions under study. By contemporary salience I mean that the actors thought a particular event was salient at the time it occurred, regardless of whether analysts now view it as salient (Epstein and Segal 2000).¹⁵ This allows me to accomplish one of the crucial aspects of this work: the analysis of how judges influence and anticipate the public's reactions to their decisions. This task is possible only when public attention to judicial activity is high, as occurs with salient and controversial cases. In addition, the salience of issues to the public directly affects their impact on the public's evaluation of institutional and political actors, as pointed out by Epstein and Segal (2000: 66). Finally, focusing on rulings of contemporary salience will allow me to know what the public thought at the moment a case was decided.

In the absence of systematic surveys on the views of the public on the Court, the Justices, or their decisions, I capture contemporary salience by examining the coverage media afforded to a given ruling. As a result, I propose the following measure of contemporary salience: whether a decision was directly or indirectly mentioned in at least two of the main national newspapers a total number of ten times.¹⁶ If the decision meets this criterion, I consider it as a decision of contemporary public relevance. By direct mentions I mean when a newspaper give specific details of the decision at hand, such as the name of the decision, its date or the parties involved. By indirect mentions I include media coverage which, although not providing specific details of the

¹⁵This is opposed to retrospective salience, where that analysts now view a particular issue (case) as salient, regardless of whether the actors (justices) thought it was salient at the time they were resolving it (Epstein and Segal *Ibid*).

¹⁶I use media articles from Clarín, LaNación, and Página12. These three newspapers are regarded in Argentine public discourse as holding different ideological views. LaNación is regarded as a conservative newspaper while Página12 is a progressive one. Clarín has a less clear ideological stand, which makes sensible to locate it at the center of the other two. In addition, the three newspapers have had a different editorial view on national government led by the Kirchnerist Coalition during the period under study. LaNación has maintained a consistent opposing editorial line while Página12 has supported the Government. In contrast, Clarín has had an ambivalent position towards the Government. It had a supportive editorial line until 2008 but it radically changed to an opposing one in the last two years of this study.

decision, refers to the issues addressed by the Judges' decision. For example, the *Vertbisky* decision discussed in chapter eight was covered by the media directly and indirectly. Some newspapers directly referred to it by the name of the person who brought the case to court. Likewise, others referred to it as a decision addressing the prison conditions in the province of Buenos Aires. Finally, it should be highlighted that this criterion includes media articles preceding as well as succeeding the actual date in which the decision was issued, providing they were published within the period of this study.

As for the independent variables, the first one is public support. I use public reactions as a proxy to capture whether a decision increases or decreases public support. I assume that when the public see a ruling as a positive development the Court's legitimacy increases. Although I am interested in mass public opinion, I rely on opinion leadership and media coverage for this purpose. As discussed in chapter one, the mass media is regarded as the primary means by which the public learns about political events. In turn, what is covered and the views expressed in the media are heavily-shaped by opinion leaders, that is, by a certain number of people (small in proportion to the population as a whole) who, for various reasons, can exercise more influence on what is reported, and how it is reported, than most citizens. Hence, opinion leaders, through their influence on media coverage surrounding a judicial decision, play a central role in shaping public's views on a particular decision and in a court in general. As a result, taking mass public reactions as a proxy to public support, I look at opinion leaders' reactions as an indicator of the type of mass public reactions judicial decisions provoke.

The second independent variable is the government's tolerance of decisions contradicting its own interests. I must clarify that I capitalise the word Government in this work to refer the Argentine National Government during the period under study. When this word is not capitalised I refer to either any government in general or to an Argentine government during times outside the period under study. As also discussed in chapter one, I propose the notion of government's tolerance interval as a useful analytical tool to identify when government will tolerate adverse decisions. The interval length is a function of two factors: the political power of the government

and the salience of a case to official interests. The first factor, as further explained in chapters one and five, refers to whether a government might be able to afford to incur a loss of support. In order to measure this aspect I rely on country-specific secondary sources: for example, scholarly works written by highly specialised and renowned authors. As a result, I propose a dividing line between the Kirchner's government (2003-2007) and Fernandez's government (2007-2011) where the former is regarded as "weak" and the latter as "powerful". The second aspect of the tolerance interval refers to the salience of the case to the government. As for my case selection, I am interested here in what the government thought of the decision at the moment it was issued. Thus, I am interested in contemporary issue salience. I rely on media coverage to assess the salience of an issue to the government, as further developed in chapter five. For this, I devised a mechanism which regards an issue as salient to the government when media coverage reports a high official's declaration containing the following: (i) a defence of the policy or government position under judicial review; (ii) a critique of the Court's decision for affecting official policy; and (iii) welcoming the decision as it validates official policy. In conclusion, I measure whether an issue is salient or not to the government based on the analysis of the influential character of the government or party officers in charge of defending the policy, and/or attacking or welcoming the Court's decision.

My thesis is based upon a combination of primary and secondary sources. First, I conducted 39 semi-structured elite interviews with a wide range of actors including legal scholars and political scientists, Supreme Court Justices, Supreme Court clerks, legal practitioners, and leaders of NGOs which either work on Court issues or have litigated cases before the Court. The interviews mainly aimed to investigate the organisation and function of Court, the political relevance of its decisions; Justices' motivations for their decisions; the political context in which its decisions were taken; the public's perceptions of its work; and Justices' perceptions of the context in which they operate. These interviews were transcribed for a close analysis. Respondents' names are not mentioned throughout the thesis to protect confidentiality. Rather, I

use a prefix to identify each interviewee. In Annex 1 I include a table explaining how I use different prefixes to refer to different types of interviewees and numbers to identify each of them.

Second, I created a searchable electronic newspaper archive. It contains 2698 articles related to the Supreme Court. For that, I carried out a search of online newspapers between 2003 and 2010. I used the three main national newspapers to obtain media articles referring to the Court. I entered search words such as “Court”, and “Supreme Court”. This archive is in possession of the author and saved in NVivo 9, a specialised software program for qualitative research. I included a vast range of articles in order to cover different elements of this research project. Thus, I included articles referring to any aspect of the Court and the Justices’ public behaviour. Also, the articles included not only journalists and editorialists’ views but also the views of all actors who were able to reach the media.

Interview transcripts and articles included in the newspapers’ archive data was subject to a content analysis and was coded into an initial set of categories that has been subsequently modified according to the content of data collected. I handled this high amount of material using *NVivo 9*. This software also allowed me to triangulate data running queries combining different data sources and coding categories. Through these analyses I obtained evidence to restrict the area of the Court’s decisions, measuring each of the aspects of the two independent variables and their impact on independent variables explaining the political involvement of the court.

Third, I looked in detail at 38 of the Court’s decisions. In order to assess the level of aggression of each decision I not only looked at their outcomes but also their texts. This analysis was also complemented by newspaper analysis in order to assess the position of the government on the issue at hand, a key component of my measure of judicial aggression. In addition, reading the text of the ruling was not always enough to assert the level of aggression. For this reason, it was crucial to resort to domestic legal doctrines.

Finally, both legal and political science scholarship, newspaper articles, and civil society reports have been used to investigate the key features of the political context in which Justices

operate. In this line, these sources were crucial to account for the lack of a culture of judicial independence, the lack of public support for the Court, and the increasing public scrutiny into judicial affairs.

Plan of the work

My thesis will proceed as follows. In the following chapter I present the theoretical framework I put forward in this work. It seeks to explain the behaviour of judges embedded in hostile scenarios. Particularly, I propose a model to explain how judges regulate their level of aggression in contexts marked by the lack of a culture of judicial independence and low levels of public confidence in courts as well as by high levels of public exposure. My theory builds on the core tenets of what appear to be two mutually exclusive theoretical models, namely the fragmentation of power and the public support models. This chapter also elaborates hypothesis that will be tested in following chapters.

In chapter two I demonstrate that the study of the behaviour of Justices sitting in the Supreme Court between July 2004 and September 2010 is an excellent opportunity to test the theory discussed in chapter one. Through a brief historical account, I show that the Court was subject to constant attacks by the political elite for most of its recent history. Also, I show that an increasing popular discontent toward the Court amounted to a serious crisis of legitimacy which was manifested during and after the country's political and economic crisis in 2001-2. It was in this context that the Court's new membership was consolidated. I show that these developments occurred under an increasing level of public attention to Court's affairs, which constitutes a new element in Argentine politics. Finally, I explain why standard division of power theories devoted to explaining judicial behaviour at the Supreme Court level in Argentina became inappropriate to explain the period under study in light of a reconfiguration of the context in which Supreme Court Justices traditionally operated.

In chapter three I discuss empirical evidence showing that the Justices were indeed preoccupied with protecting the Court and that they saw public support as a protective mechanism. This chapter is particularly relevant given that the proposition that judges are preoccupied with

public support in Latin America has been scarcely tested. In this chapter I support the claim that the Justices did care about public support and attempted to shape opinion leaders' views on the Court. This claim increases the soundness of the causal hypotheses I test in following chapters.

In chapter four I turn to the analysis of Justices' decisions in light of my model. Before discussing my main findings I refine the hypotheses I put forward early in chapter one. Then, I discuss the three types of remedies used by the Justices in the period under study. Finally, I present an overview of the findings suggesting two important patterns of Justices' behaviour. First, that Justices engaged in strategic behaviour in which they calculated the impact of their decisions on public opinion and on the government's interests. Second, this calculation determined the selection of the different forms of intervention the Justices used to intervene in the public realm. Together, these patterns confirm the main causal hypothesis I put forward in this work.

The following three chapters turn to the analysis of each of the type of remedies used by the Justices. In chapter five, six and seven I subsequently analyse the use of *Indirect Collective Remedies+*; *Direct Individual Remedies* and *Indirect Individual Remedies*; and *Indirect Collective Remedies-*. I show in these chapters the strategic patterns of behaviour confirming my model, explain the practices carried out by the Justices to influence public reactions, discuss the limits the Justices face in anticipating public reactions and calculating the risk of retaliation; and how Justices' potential alternative motivations explain some decisions.

In the conclusion I highlight the main findings supporting the theory put forward in this work. In addition, I discuss the contribution of my thesis to the study of judicial behaviour in Latin America in three regards: the incorporation of the public as a key factor explaining judicial behaviour; how justices build their legitimacy; and the role of the law in the positive study of judicial behaviour. In doing so, I also propose future research. I conclude by highlighting how my argument and findings fill a gap left by the judicial politics literature in the region.

Chapter 1 - Theoretical Framework

Introduction

The central argument of this work is that aggressive political intervention by judges sitting in vulnerable courts is a function of their attempt to protect the institutional security of such courts. I argue that in the absence of a culture of judicial independence, and with a high level of judicial delegitimation as well as high public visibility of judicial affairs, judges sitting in vulnerable courts will attempt to both construct public support and avoid political conflicts with the government. As a result, judicial decisions are driven by judges' calculations of both the public's reaction and the government's reaction to their rulings. I claim that the level of aggression of judges' interventions will increase when the government's tolerance is higher and the public appears to be more supportive.

More precisely, I propose that the attempts to attain institutional security lead judges to behave strategically. On the one hand, judges seek to shape and anticipate the reaction of opinion leaders who are able to both shape mass public opinion of the general image of a court (diffuse support), and to influence mass public reactions over socially sensitive rulings (specific support). On the other hand, judges calculate the government's tolerance to rulings against official interests. They anticipate that the risk of retaliation will decrease if they avoid ruling against powerful governments as well as if they avoid ruling against the government on issues of particular salience to its agenda.

In this chapter I discuss in detail the theoretical framework I put forward in this work. Such framework builds on the core tenets of what appear to be two mutually exclusive theoretical models, namely the fragmentation of power and the public support models. It seeks to overcome their limitations in explaining extant developments in Latin America. For that, rather than taking these models separately, I combine their main postulates to build an insightful theoretical account of judges' behaviour in contexts characterised by a lack of culture of judicial independence, with high levels of judicial delegitimation and a high level of public exposure. In doing this, I place my thesis in a body of literature proposing that multiple motivations shape judicial decisions. My

argument proposes that judges' ultimate goal of protecting their court leads them to balance their decisions with their desire to avoid political conflicts and build public support.

First, I theoretically discuss why public support can be used as an effective protective mechanism for courts. This discussion suggests that it is plausible to think that judges subject to constant political attacks and low level of public confidence will seek to build public support. This theoretical element has rarely been used to explain judicial behaviour in Latin America. For this purpose, the main expectation is that they will be able to influence and anticipate the reactions of opinion leaders, and to shape the public views of both the general image of a court and of particular rulings. Second, I argue that because building public support takes time, judges run unprotected until they obtain appropriate levels of support and, thus, they have incentives to engage in strategically-deferential behaviour. In doing so, I propose that judges reduce the likelihood of retaliation by calculating the government's tolerance interval. This interval is measured by the government's fears of popular backlash and the salience of the issue under judicial review. The impact of the former aspect on judicial behaviour has been traditionally overlooked by the literature on Latin American courts. Indeed, standard theories explaining judicial behaviour in the region, as I discuss in this chapter, have considered the ability of governments to sanction judges to be limited only by the distribution of power among formal political actors. This theoretical discussion is followed by the construction of empirical hypotheses which I test in subsequent chapters.

Before I address these aspects, the present chapter discusses the dependent variable of this work. I lay out the different forms of involvement from which a constitutional court might choose, which may vary in terms of their level of aggression. My discussion here is simplified for theoretical purposes. Constitutional judges have different procedural powers across the world; it is therefore difficult to capture the full range of options they have. However, it is worth building generic categories of judicial involvement for analytical purposes. I categorise these different

modes of involvement according to their level of *aggression*, which refers to the intensity of their involvement in the political arena. I measure "level of aggression" on a four-point scale built along four dimensions, namely the nature of the remedies, the effect of the remedies, the position of the government in the issue under discussion, and the cost of enforcement for the elected branches.

Different forms of judicial involvement in the political arena

My thesis seeks to understand why judges choose different forms of judicial involvement in the political arena. Most of the literature in the field has failed to differentiate, or even take into account, the fact that judges choose from a wide range of procedural forms of involvement, not to mention how such forms might have a different impact on the political system. In particular, studies focusing the role of courts in Latin America have mainly focused on whether judges rule in favour of or against the government of the day. Thus, the study of the political role of Latin American courts has been heavily-focused on the ability of judges to rule against rulers. As a result, little is known about the different ways in which judges choose to involve themselves in political conflicts. My thesis attempts to overcome this shortcoming.

The following paragraphs discuss the different forms of involvement from which a constitutional judge might choose. The discussion is simplified for theoretical purposes. Because constitutional judges have different procedural powers across the world, it is difficult to capture the full range of options they have.¹⁷ However, it is worth building generic categories of judicial involvement for analytical purposes and, then, adapting them to particular cases, as I discuss later in the case of the Argentine Court. I categorise these different modes of involvement according to their level of *aggression*, which refers to the intensity of the involvement in the political arena. I measure "level of aggression" on a four-point scale built along four dimensions, namely the nature of the remedies, the effect of the remedies, the position of the government on the issue under discussion, and the cost of enforcement for the elected branches.

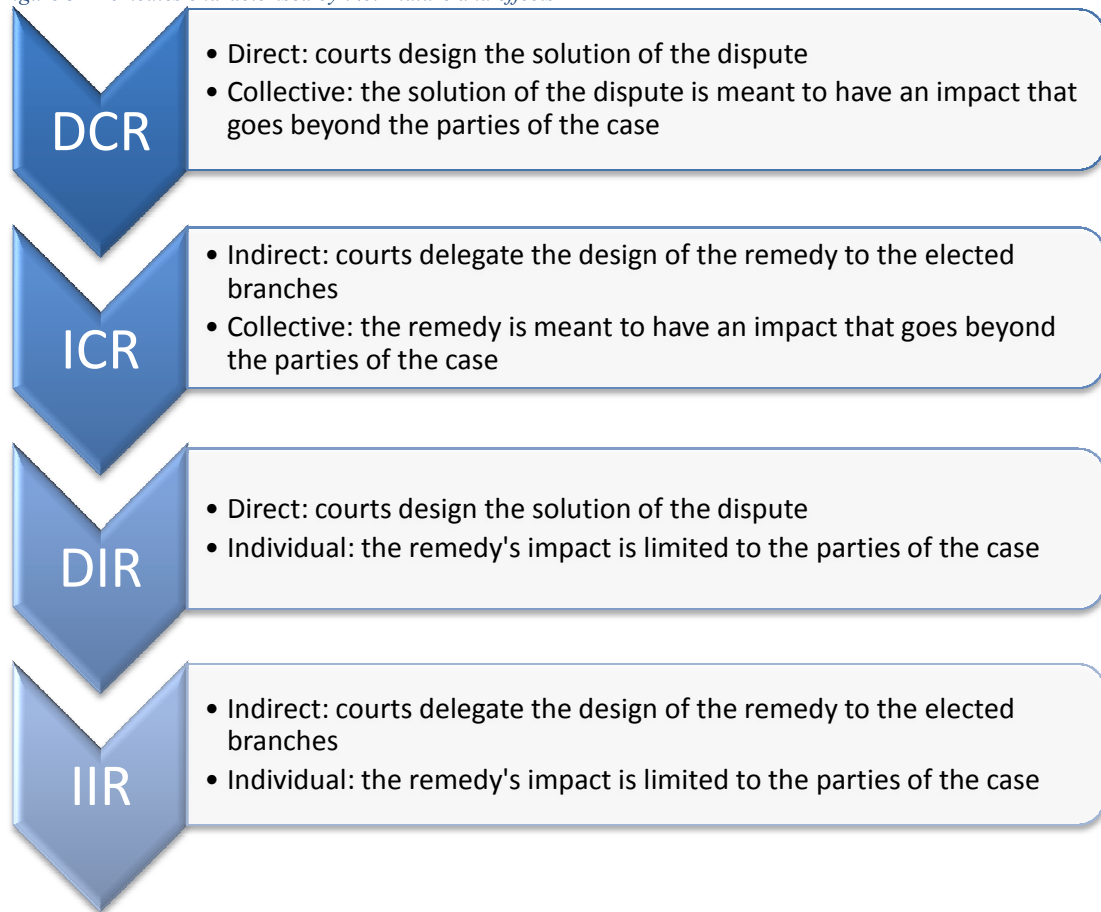
¹⁷ For a discussion of the powers of courts in different regions see: Navia and Rios Figueroa (2005) on Latin American courts; Stone Sweet (1995) on Europe; and Gardbaum (2001) on Commonwealth countries.

The first dimension, the nature of the decisions, refers to whether remedies are direct or indirect.¹⁸ Whether a decision is direct or indirect depends on which agency is in charge of designing the solution to the controversy contained in the remedy, the court or the elected branches. The involvement is *direct* if the court spells out the content of the solution to a given controversy. The involvement is *indirect* if the court delegates to the elected branches the elaboration of such a solution. The second dimension refers to the effect of the Court's decisions. Effects can be either individual or collective. By decisions with individual effects, I refer to decisions which are meant to affect the interests and rights of only a definite, concrete and identified number of individuals represented in a legal case before a court. By collective effects, I refer to decisions that are meant to affect the rights and interests of a large number of individuals regardless of whether they are explicitly identified in a legal case before the courts.

¹⁸ Although the term remedies has a legal technical definition mostly related to decisions issued by courts with concrete and a posteriori powers, I use it here to refer to any decision on the merits taken by courts. For a discussion of the use of the term remedies in legal scholarship, particularly in the U.S., see: Sabel and Simon (2004).

Taking together these two dimensions, the remedies can be categorised in four types according to an initial level of aggression: *Direct Collective Remedies (DCR)*, *Indirect Collective Remedies (ICR)*, *Direct Individual Remedies (DIR)*, and *Indirect Individual Remedies (IIR)*, as illustrated in Figure 3 below.

Figure 3 - Remedies characterised by their nature and effects



Source: *Elaborated by the author.*

The third dimension captures the position of the government regarding the policy. Here, judges can either decide to validate or invalidate a public policy currently implemented by the government. A validating decision leaves a policy untouched as it stands. Invalidation, however, occurs when the decision either nullifies or modifies the policy either partially or fully. It is necessary to highlight that when a judge upholds or strikes down a norm it does not always tell us

whether a government's policy is validated or invalidated. Take the case of the human rights policy endorsed by the Kirchner administration in Argentina.¹⁹ This policy included an unrestricted criminal accountability policy for human rights violations committed during the last dictatorship. However, this policy was severely limited by two amnesty laws and several pardons passed during the 1980s and 1990s. Kirchner sought to invalidate such amnesties. In line with the government's interests, the Court struck down these norms in a successive decision from 2005. In these cases, such decisions declared the norms unconstitutional, which meant the validation of an official policy. As a result, this dimension requires analysing the content of the cases and the context in which they are embedded, not solely looking at whether they are for or against the government, but also evaluating the ways in which the decision obstructed or accommodated the government's preferences.

Before proceeding to further discuss the remedies under this category, it is necessary to refine the set of alternatives under the two first dimensions. Taking both together, a court has eight alternative forms of intervention in the political arena. However, a closer look shows that it actually only has five. In direct remedies, both individual (*DIR*) and collective (*DCR*), endorsement of a government's policy cannot occur. Because these remedies are *direct*, it is the court that designs the remedy, and therefore the policy to be implemented. This implicitly means that the court becomes involved either in correcting a policy already in place or in requesting that the government implement a new one. Therefore, I need to rule out direct collective and direct individual remedies from the set of options.

Furthermore, when a court validates a policy, I regard this decision as one that produces collective effects and label it as *Indirect Collective Remedy* (+). The collective effect is an attribute of rulings vested with *erga omnes* effects. However, in the case of courts whose decisions are granted with only inter-party effects, the decisions produces *effective* collective effects. I say "effective" because this validation is formally valid only for the case under discussion and the decision is meant to rule the situation of the parties involved. Nonetheless, the collective effect of the decisions is produced by the fact that the government is one of the parties and is willing to

¹⁹See chapter six for a more detailed discussion on this policy.

implement such a policy. Let's take the following hypothetical example as illustration. A taxpayer petitions a judge to declare a given tax regulation as unconstitutional. However, the judge upholds the regulation and declares it constitutionally valid. Thus, the government is entitled to carry on with the collection of the taxpayer's money. In addition, it is likely that the government takes this ruling as a ratification of its public tax policy, which it may then further implement because it foresees no legal obstacles to its taxing powers. To distinguish indirect collective remedies *validating a policy* from those that *invalidate policies*, I label the former as *ICR+* and the latter as *ICR-*. As a result, I rule out indirect individual remedies (*IIR*) validating a policy from the set of alternatives and add the two types of *ICR* as shown in Table 2.

Table 2 -Nature of the Remedies and their Effects on the Government's Position.

		Government Position	
		Validating	Invalidating
Nature of the Remedy	Direct Collective Remedies	✗	✓
	Indirect Collective Remedies	✓ (+)	✓ (-)
	Direct Individual Remedies	✗	✓
	Indirect Individual Remedies	✗	✓

Source: Elaborated by the author

Finally, the different forms of political involvement might be sequenced according to the cost of implementation for the government. I assume that a direct remedy is more costly than an indirect one. This is because in the latter case the government keeps control of any crucial aspect of the policy, as it is charged to design it. Meanwhile, an indirect remedy requires implementing a court-designed policy regardless of the government's position. I expect that, for the government, it will be less costly to implement a policy designed by itself rather than from another party that may not necessarily take its interests into account. Conversely, I also assume that a collective remedy is more costly for the government than the implementation of an individual remedy. The costs might be economic, as any public policy requires economic resources; bureaucratic, as its implementation might require some degree of management; and political, as it might require the government to engage in political bargains with other stakeholders and veto players in order to pass the policy.

Alternatively, the government might be seen as failing to provide particular goods. Of course, a decision validating a policy has no cost for the government.

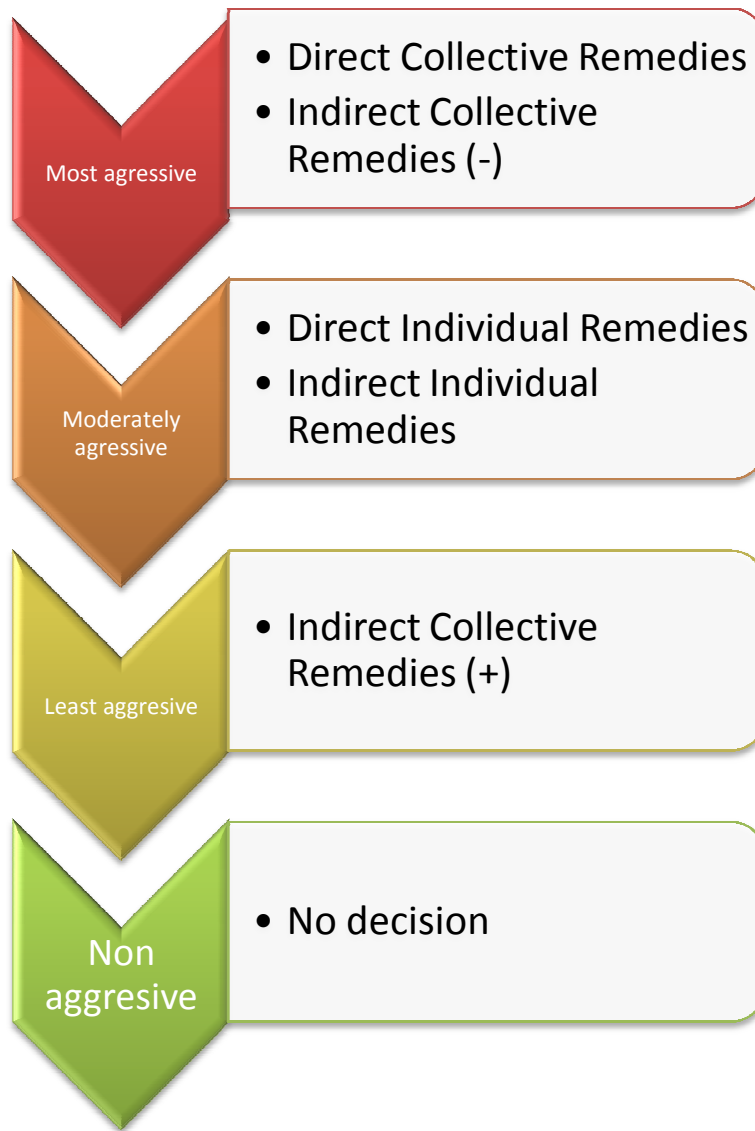
Taking these four dimensions together, the different forms of judicial involvement can be categorised by their level of aggression. The *most aggressive forms* are those remedies with a collective impact that invalidates a policy and incurs high costs of implementation. The *moderately aggressive modes* are remedies with individual impact which, despite invalidating a government policy, have fewer costs of implementation. Finally, the least aggressive forms of involvement are remedies with collective impact which do not invalidate a government policy and, thus, incur a minor cost of implementation.

Similarly, variations in aggression within each category might be observed. The categories presented here are basic in the sense that they are not uniform. This is because each of the dimensions constituting such categorisation leave room for variation in the level of aggression. This variation can be illustrated by a very simple hypothetical example. Take the case of two decisions, A and B, characterised as *ICR-*. Both decisions require the creation of a legal aid programme to be implemented by two governments respectively in different countries. Both decisions had a collective impact for the national population, implicated the reformulation of existing policies, and had the same cost of implementation for the governments. In addition, the nature of both decisions is indirect given that they defer the specifics of the policy to the other branches. However, it is in this dimension that they differ slightly and where we can observe variation within the same category of level of aggression. This is because they differ in the enforcement mechanism they establish. Decision A stipulates a strict deadline within which the policy should be created. Meanwhile, decision B puts forward a vague formula requesting the elaboration of the policy within a reasonable timeframe, leaving the interpretation of what “reasonable” means in the government’s hands. In decision A the government’s discretion to develop the policy is narrower than in B. Thus, we can say that, although both decisions fall within the *ICR-* category, decision A is more aggressive than decision B given the different enforcement mechanisms that each of them establish.

Finally, a final category should be added to this range of choices. The three dimensions pertinently capture the options when judges *do something*; that is, they issue a decision affecting the status quo. However, judges might decide to maintain the status quo. This is when the court decides not to rule on the issue at hand. ‘Not ruling’ occurs both when the court does not issue a decision, and when it decides a case on procedural grounds. As a result, ‘not ruling’ is a non-aggressive form of intervention. Note the difference between *Indirect Collective Remedies (+)* and ‘not ruling.’ In the former, although the court validates the policy, it changes the *status quo* as the policy receives a formal validation. In the latter, the court decides either to postpone its decision or to not rule on the merits; thus, the legal character of the policy is still questionable.

Figure4 illustrates the four-point scale through which remedies can be categorised according to their level of aggression.

Figure 4 - Remedies Characterised by their Level of Aggression



Source: Elaborated by the author

The paragraphs above describe my dependent variable in more detail. As discussed earlier, my aim is to understand why judges use different ways to involve themselves in politics. I sketched out the four categories of remedies from which judges might choose, and I explained that variation within each category might be observed. The classification offered here is rather simple and deliberately general for theoretical purposes. However, it is rigorously constructed along four dimensions which are of crucial significance for the present discussion. Also, it incorporates the

option of “not ruling” that judges currently have. In the following sections I describe the theoretical framework used to explain the variation in the use of these modes of involvement.

Modelling Judicial Behaviour for Judges under Constraints

The starting point of my argument is that justices strategically seek institutional protection. From this, I argue that the different forms of involvement used by justices are a function of their attempts to protect their courts from political attacks. The question is what mechanisms judges can resort to in order to protect their courts, particularly when they sit in vulnerable courts. Using judges in Latin America as my example, this question should be answered in light of the fragile circumstances in which many judges operate, marked by a lack of a culture of judicial independence and a low level of public confidence, as well as by the increasing public exposure of the judicial process I discussed earlier.

In the following paragraphs I claim that public support and the fragmentation of power hypothesis are two important protective mechanisms proposed by several authors, despite my previous suggestion that these mechanisms do not appear to work fully in present-day Latin America. However, rather than disregarding these approaches completely, my theoretical approach builds on their core propositions. In doing so, I propose a theoretical argument overcoming their limitations. In short, the central theoretical proposition of this work is that judges committed to protecting their courts will attempt to simultaneously build public support and avoid political conflicts with the government. As such, they will attempt to shape and calculate public reactions as well as anticipate the reactions of government to their rulings.

In that regard, my argument takes the core argument of the fragmentation of power hypothesis. Certainly, I claim that judges avoid political conflicts with the government by means of calculating the power of the government to launch retaliation. However, I also propose that judges takes into consideration the salience of the issue at hand to the government’s agenda. Further, my thesis transcends those works endorsing the fragmentation hypothesis, as it incorporates the construction of public support as one of the elements of the judges’ strategic calculation. In this

sense, my argument proposes that judicial decisions are not driven by only one set of consideration but by several types of consideration.

The starting point of my theory is that the public plays a crucial role in judicial affairs. First, in terms of how judges behave, I propose that public response operates in two opposite directions. On the one hand, it enables judges to achieve their goals through the building of public support. Insofar as government will incur popular backlash for launching political attacks, their ability to sanction is limited. On the other hand, the public also constrains judges. If judges care to build public support and thus increase the visibility of their workings, their margin of manoeuvre to strategically defer to governments or other actors will be narrowed. Second, I propose that the public can play a relevant role in constraining the government's ability to sanction judges. Governments are not only constrained by the distribution of power among formal actors. Under particular conditions, the government's fear of popular backlash may or may not influence their decision to retaliate. In these regards, my argument brings the public to the centre of the judicial decision making process, which is otherwise said to be dominated by legal principles, political or legal ideology, or personal interests. In the following sections I discuss in detail this argument and elaborate empirical hypotheses derived from this theoretical discussion.

Public Support and Judicial Decision

As Staton (2010: Chapter two) and Vanberg (2005: Chapter two) account, a vast body of literature has argued that popular support might lead to better implementation of court decisions, to reducing the chances that other branches would limit or reverse those decisions, and to discouraging the actions of public officers against courts.²⁰ As I discussed in this section, in a context characterised by a lack of a culture of judicial independence, popular support can be used as an effective defensive mechanism. Consequently, judges who are both publicly discredited and subject to regular political attacks should build public support in order to use it as a protective mechanism. With this proposal, I incorporate a new element into the study of judicial politics in

²⁰For a discussion on how this mechanism is expected to work and the different empirical works supporting this expectation, see Staton (2010) and Vanberg (2005)

Latin America. Considering public support as an important determinant of judicial behaviour is not unwarranted. As I discussed in the introduction of this work, current empirical developments in Latin America suggest that judicial matters are increasingly exposed to the public. There are cases of popular reactions against governments' attempt to sanction judges, and there is some preliminary evidence suggesting that attacks against courts are more likely to occur when there are low levels of popular confidence for the courts.

The proposition that public support might be a powerful protective or enforcement mechanism relies on the assumption that public preferences constitute the primary incentive for policy action in the elected branches. As Staton (2010: 22-26) and Vanberg (2005: 20) discuss, the relationship between public support and political power can provide a powerful enforcement mechanism for judicial decisions. As they explain in simple terms, if citizens value judicial independence and regard respect for judicial rulings as important, a decision by elected officials to resist a judicial ruling or to launch attacks on a court may result in a loss of public support. Consequently, where voters are willing to tolerate noncompliance or political efforts to discipline active courts, constitutional judges will lack the leverage necessary to exercise meaningful authority. In such environments, where courts are constrained, we ought to expect judicial decisions to be linked to the preferences of elected branches. In other words, courts might be incapable of exercising their own autonomous judicial power. On the contrary, where voters are unwilling to accept the defiance of judicial authority and they are able to coordinate actions defending judicial authority, courts might find the leverage necessary to exercise their powers. Vanberg (*Ibid*: 20) notes that this mechanism does not require a large number of citizens to be motivated by concerns for judicial authority. Since politicians are concerned about shifts in support at the margin, only a sufficiently numerous group of citizens is necessary to sway the calculations of politicians.

However, to serve these purposes, public support alone is insufficient. The literature has proposed some factors that can be formulated as two conditions for the operation of public support as an enforcement or protective mechanism (see for example, Staton *ibid*; Friedman *ibid*; Vanberg

Ibid). First, there must be sufficient public support for a court to make noncompliance and retaliation unattractive courses of action for politicians. This is called the legitimacy condition. Second, it must be sufficiently likely that citizens will become aware of retaliation attempts so that any support a court enjoys can be brought to bear against elected branches that choose to retaliate. In other words, courts' decisions and political responses to them must be sufficiently salient so that citizens become aware of them. This is called the transparency condition. The discussion revolving around the first condition is significant for my work because it directly addresses the crucial issue of building public support for courts. However, understanding how some factors facilitate the occurrence of the second condition is also illuminating for my purposes, because transparency is also necessary for the construction of support.

In relation to the first condition, it is appropriate to question when the public would support a court. This is particularly relevant for courts aiming to build popular support. Authors have distinguished between two interrelated types of support: specific and diffuse support.²¹ "Specific" support is understood as driven by agreement with particular measures. Specific support is a measure of whether people think an institution is doing a good job in terms of particular outcomes (Friedman, 2002:2615). In the case of a court, it would generally refer to the agreement with particular rulings. Thus, here, popular support is circumscribed to whether the public favours particular decisions or not. Meanwhile, Friedman (*Ibid*) explains that "diffuse" support refers to a reservoir of favourable attitudes of goodwill that help individuals to support institutions regardless of particular outcomes. In the case of courts, it refers to their level of public support regardless of particular rulings. In this light, diffuse support is equated to legitimacy. The core idea here is the extent to which the public support a court even when it rules cases that sometimes do not converge with the interests of the majority. In this realm, it has been argued that diffuse support, or legitimacy, is likely to be a function of courts' ability to show themselves to be impartial bodies, which includes but goes beyond the matter of being perceived as unengaged in

²¹ This distinction follows a broader political science discussion which separates institutional support into two components: specific and diffuse support. See for example Easton (1972).

partisan politics.²² The main implication then is that judges might think that they can build public support and, thus, they seek to convey a public image of impartiality in order to build and maintain diffuse support. One might add that in contexts where minimal confidence in the courts originates from a wide range of causes beyond a lack of impartiality, such as the Argentine case I will explain in the subsequent chapter, judges attempting to build diffuse support might also present a public image that is able to redress the origins of popular distrust in them. For example, if a court is highly discredited by accusations of management corruption, transparency initiatives might have a positive impact on the public's view.

Some authors argue that what counts towards making public support an enforcing mechanism is diffuse support (see for example Staton, *Ibid*). However, these two types of support, although different, are close and dynamically interconnected; in fact, this link has significant implications for judicial behaviour. Drawing on the work of authors such as Gibson *et al* (1998), Grosskopf and Mondak (1998), and Mondak (1991 and 1992), Vanberg (*Ibid*: 50) maintains that considerable research by political psychologists found that specific support impacts upon diffuse support for a court.²³ This is because, over time, the support that an individual exhibits for a court is, at least in part, a function of how that person evaluates the substantive outcomes of the court's decisions. This interconnection has the following implication for judicial deliberation. As Vanberg (*Ibid*: 51) has put it, since support constitutes an important judicial resource, a concern about retaining or building support for the court may influence judicial deliberations. Specifically, judges may realise that their current decisions have implications for future support. This is particularly relevant for decisions related to sensitive issues in particular scenarios. In other words, judges are likely to be aware that the support they enjoy is a valuable resource that can be "spent" quickly if they decide on too many unpopular decisions on sensitive matters. This recognition, together with

²² For a more detailed discussion of how public perceptions of judges' impartiality is theoretically linked to diffuse support see Staton (*Ibid*: 127-153) and Vanberg (*Ibid*: 49-53).

²³ For a short discussion of these works see Vanberg (*Ibid*: 50).

a desire to maintain or gain the court's support, may prompt judges to be sensitive to public opinion.²⁴

This discussion has significant implications for judges in need of public support for their courts. In such scenarios, specific support becomes crucial in order to contribute to the construction of diffuse support. As a result, judges will be concerned with maintaining an appearance widely supported by the public, such as the image of impartiality and transparency, while at the same time being sensitive to the majoritarian public opinion on specific issues. In other words, judges might bring their attention to both specific and diffuse support in their attempt to construct public support.

In relation to the second condition, the question is when public support is likely to operate as a defensive or enforcing mechanism. In other words, let's consider a scenario in which citizens become aware of and convinced that politicians are attacking the court or not complying with judicial decisions. In this regard, authors such as Staton (*Ibid*: 14) propose that if public support is expected to work as a protective mechanism of judicial authority, the public needs to be sufficiently informed about the court's work. Individuals need to know the activities of courts in order to identify and deter politically-negative reactions against judicial authority. Thus, as Friedman (*Ibid*: 2615) concurs, public support for courts is likely to occur when courts become salient to the public. In discussing this condition, Vanberg (*Ibid* 45-49) further clarifies not only that the work of courts must be salient to the public, but that the politician's reactions to such work must be as well. As discussed in the introduction to my thesis, judges in Latin America operate in a context characterised by increasing public exposure to judicial affairs. In this scenario judges can make their decisions public more easily in order to use public support as a protective mechanism.

Among the factors contributing to the occurrence of this condition, the impact of opinion leadership and media coverage is of particular relevance for this study.²⁵ This factor is also useful

²⁴ Of course, this does not mean that a court will decide cases on the basis of opinion polls. Nor does it imply that judges cannot rule against majoritarian popular sentiments occasionally.

²⁵ For a discussion of other factors such as the presence of interests groups and the complexity of the issue at hand see Vanberg (*Ibid*).

in understanding how judges can build popular support. The mass media is regarded as the primary means by which the public learns about political events. In turn, what is covered and the views expressed in the media are heavily shaped by opinion leaders, that is, by a certain number of people (small in proportion to the population as a whole) who, for various reasons, can exercise more influence on what is reported, and how it is reported, than most citizens (Vanberg, *Ibid*: 45). Opinion leaders include, obviously, news editors, editorial writers, and reporters. Moreover, they include sources that these individuals rely on, such as political insiders, experts, and interest groups. Relying on previous works including McCloskey and Zaller (1984), Page *et al*, (1987), and Zaller (1992), Vanberg (*Ibid*: 45-46) maintains that there are strong empirical grounds showing that opinion leaders have predictable and considerable effects on the development of public awareness and mass opinion on particular issues. These effects have important implications for discussions of when public support might result in a protective mechanism. First, it implies that opinion leaders, through their influence on media coverage surrounding a judicial decision, play a central role in raising awareness of a decision and of a potential retaliation. More intense media coverage of a decision and the resulting response by politicians makes it more difficult to attack a court or to evade the decision without detection. Second, this suggests that judges and politicians will be particularly attentive to opinion leaders in gauging potential public opinion on a particular issue. In this light, although different, mass public opinion and opinion leaders' views are closely related. In fact, the latter might be used as an effective indicator of the former in contexts in which there is no other effective means to measure mass opinion. Finally, the importance of opinion leadership suggests that politicians and judges will not react to current public interest and opinion on a case, but rather to what public attention and opinion, once mobilised, may be.

Most importantly, for the purposes of this thesis, the role of opinion leadership is relevant for judges attempting to build public support. What people think of a court is filtered by what the mass media reports. Thus, in building support, judges might attempt to influence the views opinion leaders have on their courts. This implies that judges will do something to shape public reactions. This *something* varies from the implementation of a strategic communication policy aimed to filter

the information released to the public, to the development of public relations activities aimed at making opinion leaders more familiar with some aspect of the work of the court. Furthermore, the attempt to build support will lead judges to calculate the reactions opinion leaders have to their decisions. This is crucial for both diffuse and public support. For example, think of a case in which a court evaluates whether or not to decriminalise abortion. In contexts dominated by particular religious belief, judges will be attentive to the opinion of the head of the dominant religious institution in order to anticipate public reactions to the ruling. This logic also applies to diffuse support. Take the case of a court seeking to build support on impartiality grounds, in a context in which judicial *watchdog* think tanks have strong influence on the political debate. The judges will be attentive to the opinion of these institutions in order to evaluate popular sentiment towards them. Another important consequence is that judges will be interested in exposing their work to the public. By making public their decisions judges will be able to show a positive public image to the public and, expectedly, build public support. It seems that judges in most countries in Latin America face no major constraints in bringing opinion leaders' attention to judicial affairs, given the high level public exposure of judicial matters.

Although these theoretical considerations are persuasively powerful, they seem to face some limitation when applied to the Latin American context. If the core tenet of the public support approach is correct, the central implication for judges who are both publicly discredited and subject to regular political attacks is to build public support in order to use it as a protective mechanism. However, the use of this mechanism currently in Latin America puts judges in a difficult position, as already pointed out at the outset of this chapter. Building public support may expose judges and their courts to political attacks. Discredited judges aiming to build public support will have to show the public that they behave impartially, which includes, but is not exclusively restricted to, ruling against governments. However, ruling against governments is a delicate matter in Latin America where political attacks on courts abound and judges are still not able to use judicial legitimacy as a protective mechanism. Thus, judges in the early or mid-term stages of their attempt to get public

support might put their court at risk. As a result, judges aiming to protect their courts should do something else apart from building public support.

The discussion above suggests that public support can be used as an effective protective mechanism for court. Further, it suggests that it is plausible to think that judges subject to constant political attacks and low levels of public confidence will seek to build public support. The main expectation is, for this purpose, that they will influence and anticipate opinion leaders' reactions able to shape mass public views on both the general image of a court and on particular rulings. The problem with this course of action is that it increases the risk of retaliation. Building public support takes time, and judges run unprotected until they get an appropriate level of popular confidence. A government will find it easy to sanction judges without protection. Furthermore, in their attempt to build public support judges might have to confront the government in order to raise support. This, in turn, also increases the likelihood of retaliation. As a result, if judges take seriously the advice to build public support in order to use it as a defensive mechanism, they will have to do something else until they create the condition under which public support is meant to work. I turn to this issue in the following section.

Avoiding Political Clashes with the Government

In a context lacking a culture of judicial independence, it is plausible that independent justices might attempt to build public support in order to use it as a protective mechanism. However, building such support is not a simple endeavour; it takes time and requires the investment of material resources. This is particularly the case for judges embedded in contexts marked by a lack of confidence in courts. Thus, in such scenarios, courts seem to run unprotected until the public vests them with legitimacy and the political environment becomes transparent enough to put the mechanism to work. The question now is how does a court protect its institutional security if public support is not currently available? I build on the core theoretical propositions put forward by fragmentation of power theories and propose that judges indeed calculate the likelihood of retaliation in choosing among different modes of intervention. However, I propose that, by doing this, they calculate the government's tolerance interval to adverse

decisions. Any political actor prefers a policy which is as close as possible to their ideal position. However, as discussed above, they may be willing to tolerate a policy that does not meet their ideal position. Specifically, a tolerance interval exists around each of their ideal positions such that they would be unwilling to challenge a court's decision placed within that level of tolerance. As a result, decisions falling within this interval are likely to be tolerated by a government, which means that the government will not retaliate in response to the ruling. Those falling outside will encourage retaliation. This tolerance interval is constituted by the strength of the government as well as by the salience of the case at hand for the official agenda. Particularly, the former brings another theoretical element to the study of courts in Latin America, as the public was traditionally not regarded as placing constraints on the government's ability to launch attacks against judges.

As discussed in the introduction of this work, standard theories grounded in the fragmentation of power seem to be as ineffective as predicted in today's Latin America. In that section I showed that these theories have failed to explain important developments in the region suggesting that resorting to the fragmentation of power mechanism might not be the most reliable course of action for judges. Latin American judges are constantly exposed to political attacks, even in context of divided government. The ability of politicians to sanction judges does not seem necessarily constrained by the distribution of power among different political actors. Also, sometimes in the context of a unified government judges may feel protected, which suggests that the fragmentation of power might not be the only factor shielding them from political attacks. Finally, even when the power is distributed among different political actors, some judges prefer to engage in deferent decision-making rather than exert their authority against governments.

Notwithstanding these shortfalls, the basic premise of the fragmentation hypothesis should not be totally discarded but subject to a rigorous re-elaboration. Judges can protect their courts strategically through the strategic avoidance of political conflicts with the government. In doing so, judges should calculate the constraints faced by governments who wish to launch retaliations. However, such constraints do not necessarily arise from the formal distribution of powers. In context of high level of public exposure to judicial matters, it is possible that negative reactions to

political retaliation limit the sanctioning powers of governments. Hence, the government's fears of popular backlash operate as a constraining element. However, it is plausible to think that, in contexts determined by a lack of a culture of judicial independence, governments may be willing to sanction judges even in light of a potential loss of popular support. This is particularly the case if a matter subject to judicial decision is particularly salient for the official agenda. I propose that judges engage in this type of strategic thinking to calculate when the government will tolerate an adverse ruling, as I further discuss below. Additionally, fragmentation of power does not work for retaliation, which does not necessitate coordination among different branches of government. Indeed, it can resort to a wide range of forms of retaliation. This is particularly relevant to cases in which the agency with real sanctioning powers is the executive, as opposed to the executives and the congress, as many authors have proposed. These attacks can take the forms of such things as public statements calculated to undermine its reputation, budget reductions, and pressure through public demonstrations carried out by government supporters, among others. In these instances, institutional coordination is not required. In other words, political fragmentation has no use for protecting courts.

It sounds counterintuitive for judges seeking to build public support to engage in strategic avoidance of political conflicts. As discussed above, judges need to expose their work to the public in order to get support. Acting strategically might negatively impact its quest for support if their strategic behaviour is exposed to the public. However, let's consider for a moment how judges not concerned with public support might use this course of action. Avoiding conflicts with the government does not necessarily mean that a court must please the government in all its decisions. Even in contexts where retaliation against independent tribunals is a common practice, governments might choose to restrain their desire to retaliate and to tolerate inconvenient rulings. The key for judges here is to anticipate when this is likely to occur. Epstein, Knight and Shvetsova (2001:128-129) proposed the notion of the government's tolerance interval as a useful analytical tool to identify when governments will tolerate adverse decisions.

The interval length is a function of two factors: the political power of the government and the salience of a case to official interests. Authors have proposed other elements relevant for this calculation. Epstein et al (*Ibid*) propose (1) case salience, (2) case authoritativeness, (3) public policy preference, and (4) public diffuse support for the court. In contexts where there is a lack of a culture of judicial independence and highly discredited courts, (2) and (4) seems to be irrelevant. It is highly unlikely the legal authoritativeness of a ruling would be a crucial aspect inducing government's compliance in a context marked by a lack of a culture of judicial independence. Understood as the ability of judges to produce a clear, consensual ruling in the general legal area at issue in the dispute (Epstein et al, *Ibid*: 125), case authoritativeness have a persuasive power when rulers adhere to the rule of law. However, when governments systematically sanction judges for issuing adverse decisions, such adherence to the principles of the rule appears to be non-existent. Meanwhile, diffuse support for a court is likely to be regarded as non-existent in these types of scenarios. In the case of public preference for the policy, this factor matters only when reactions to the government's actions, be it tolerance or retaliation, might have an impact on the popularity of the government. Thus, I incorporate this element into the first factor I proposed, as discussed below.

The first factor refers to whether the government is strong enough to punish judges. I propose that such strength is a function of whether a government might be able to afford a negative popular backlash, that is, whether the government will see its goals frustrated as a result of the negative public reactions provoked by its retaliation against courts. Thus, I do not refer here to whether the government is divided or fragmented. In this regard, my theory departs from theories grounded on the fragmentation of power hypothesis in one important aspect. By looking at Latin American courts, such theories see a government's ability to sanction judges as only limited by the distribution of powers among formal actors. Ríos-Figueroa (2007: 34-35) explains that it is the fragmentation of power in the executive and the legislature that has important consequences for the courts. As he further explains, this fragmentation means that no single political party controls the three branches necessary to enact a policy. Under this view, the government's capacity to retaliate

is determined by the distribution of power among formal actors, i.e. political parties or internal factions within the same party. Unlike these views, I contend that the ability of government might also be limited by actors operating outside the formal political arena.

More precisely, I propose that public reactions to political sanctions might set such constraints. This proposition is not empirically groundless in the Latin American context, although more systematic evidence still needs to be compiled. As discussed in the introduction of this thesis, there are instances in which the public reacted against political attacks to courts. In addition, the likelihood of this type of reaction increases in contexts characterised by increasing public exposure of judicial matters. As a result, I propose that the government's strength is a function of whether a government is able to incur a loss of support. Consider the case of a weak government who took power with a low level of the voteshare in the presidential election. In this scenario, retaliation against a court might bring about popular backlash against a government which cannot afford a loss of support, not even marginal. Also, consider the scenario in which a court might rule against a government in the matter of a very unpopular policy. Here, attacking the court for striking down an unpopular policy will increase the risk of negative popular backlash. Under these scenarios, where a government cannot afford a loss of public support, the government's tolerance interval will be longer.

The second factor refers to the salience to the government of the issue subject to judicial revision. Not all decisions against a government will provoke the same type of reactions. Some rulings might not either relate to the official core agenda or limit some crucial powers, though some of them might. In the former case, it is unlikely that the government will be motivated to retaliate. On the contrary, the likelihood is that retaliation will increase when a judicial decision is contrary to the government when the issue at hand is salient to its agenda. As a result, whether a decision is of relevance to the government increases or decreases the length of the tolerance interval.

In this light, a strategic judge will calculate how the length of the government's interval will affect the chances of retaliation. We can observe three scenarios in which risk of retaliation varies from highest to lowest. The longer the interval, the lower the risk of retaliation will be. Thus, judges will feel protected as the risk of retaliation is low when the government is weak and the issue is of no particular salience to the official agenda. Conversely, the shorter the interval, the higher the risk of retaliation will be. A judge will feel unprotected when the government is powerful and the issue under discussion is particularly salient to its interests. In between these two extremes, moderate risk of retaliation will arise either when: (a) the government is powerful and the issue is not salient to its agenda; or (b) when the government is weak and the issue is of relevance to its agenda.

Strategic judges seeking protection for their courts will usually go for the lowest level of retaliation risk and, thus, will decide against weak governments in non-salient issues.²⁶ Equally, a strategic judge will prefer to endorse government policies when the risk of retaliation is high or moderate. Similarly, it is also possible that in a given period of time only two of the three scenarios are materially possible. For example, take the case of a government that is strong for a long period of time. During such periods only scenarios of medium and short intervals are possible given the strength of the government. In these situations, the safest course of action for strategic judges will be to render their most aggressive rulings when the scenario is medium.

Although this seems to be an effective course of action for judges in contexts lacking a culture of judicial independence, it seems a less reasonable option for judges embedded in such a context and seeking to build public support. Assuming that such judges would expose their work to the public in order to gain popular support, exposing their strategic decisions might undermine any attempt to build such support. However, this does not mean the option of calculating a government's tolerance interval should be completely abandoned. Rather, the calculus might also

²⁶ An alternative theoretical proposition may suggest that judges will rule against weak governments in any type of case. However, as discussed in the introduction to this thesis, there are instances in which even weak governments retaliate against judges. Thus, this alternative view appears not to be fully applicable to the Latin American context.

incorporate the public's response to the rulings. The main implication of this, then, is that the attempt to build public support will restrict the range of strategic options for the court. As a result, judges will engage in strategic deferential behaviour only when it is strictly necessary, that is, when the likelihood of retaliation reaches its highest level.

Testable Hypotheses

The previous discussion underscored how public support and the interests and power of government shape, at least theoretically, the decisions that judges make. This allows me to further elaborate my argument. I argue that judges' level of aggression is a function of their attempt to protect their courts in contexts characterised by the lack of a culture of judicial independence, low levels of public support and by high levels of public exposure. I propose that, by pursuing protection for their courts, judges behave strategically. On the one hand, judges influence and anticipate the reactions of opinion leaders who are thought likely to be able to both shape the public views on the general image of a court (diffuse support) and influence public reaction to decisions over socially-sensitive rulings (specific support). On the other hand, judges calculate the government's tolerance to decisions contrary to its own interests. They anticipate that the risk of retaliation will decrease if they avoid ruling against powerful governments in issues of particular salience to the official agenda.

From this theoretical proposition the main empirically testable hypothesis can be elaborated:

The 'level of aggression' of a court will increase when:

(a) Other things being equal, the government's tolerance is higher;

(b) Other things being equal, the public appears to be more supportive;

This main hypothesis can be unfolded into four hypotheses. The first three are determined by the range of options judges have at their disposal to regulate their level of aggressiveness. As discussed in the first section of this chapter, judges can regulate their aggressiveness using different types of remedies. Such regulation is present, for example, when judges decide to use the

most aggressive modes of intervention instead of the moderate ones. Alternatively, they can also do so by modifying some aspects of a same type of remedy. This is because the categories of remedies presented here are basic in the sense that they are not uniform, as the dimensions constituting each category leaves room for variation in the level of aggressiveness. Hence, they can increase or decrease such levels of aggression by altering the feature of a same remedy. Such reduction can take place, for example, when judges issue the most aggressive modes of intervention ordering the government to implement a particular policy in an open timeframe rather than establishing a strict deadline for the enforcement of a ruling. One can say that the former is a less aggressive intervention than the latter, in which the government has greater room to manoeuvre given the flexible time frame.

As a result, the first three hypotheses can be read as follows:

H1: The 'level of aggression', measured by judges' use of a different type of remedy, will increase when:

(a) Other things being equal, the government's tolerance is higher;

(b) Other things being equal, the public appears to be more supportive;

H2: The 'level of aggression', measured by judges' alteration of some features of the same type of remedy, will increase when:

(a) Other things being equal, the government's tolerance is higher;

(b) Other things being equal, the public appears to be more supportive;

H3: The 'level of aggression', measured by judges' alteration of some features of the same type of remedy, will decrease when:

(a) Other things being equal, the government's tolerance is lower;

(b) Other things being equal, the public appears to be less supportive;

An additional hypothesis should be added here if one takes law seriously. Following Friedman (2006: 269), just as studies of strategic judicial behaviour take full account of factors that might influence strategic decisions, they also must pay attention to the bounds law places on strategic conduct. Judges are not always completely unconstrained to engage in strategic behaviour. In this regard, legal procedural regulations can restrict or enhance the ability of a judge to increase her level of aggression. For example, judges can easily resort to indirect or direct collective remedies in countries where collective legal actions are incorporated into their legal system, such as the *class actions* in the U.S. In these cases judges are legally empowered to issue decisions requesting the implementation of policies as a solution to the legal disputes at hand, with key aspects of the most aggressive mode of judicial intervention discussed in the first section of this chapter. However, the absence of legal disposition regulating this kind of mechanism is not necessarily the main constraint that judges face when issuing the most aggressive modes of intervention. In some countries, particularly but not exclusively in common law countries, judges are entitled to make law and, consequently, to regulate their own powers. A standard example of this kind is the celebrated *Marbury vs Madison* decision which allegedly vested the US Supreme Court with constitutional review powers. In these types of cases, a judge can resort to a particular remedy only if such a remedy is supported by a legal doctrine which is sufficiently matured and shared by the members of a tribunal. For example, the creation of a type of remedy with collective effects, having an *erga omnes* effect in legal jargon, in a country where judicial decisions are traditionally vested only with individual effects requires a high level of legal innovation and sophistication. The proponent of this new legal doctrine should be skilled enough to both produce such doctrine, if the doctrine is brand new in their legal circles, and convince their peers in collegiate benches.

Taking these elements into account. I put forward the following additional hypothesis in order to capture the limits posed by law:

H4: Judges get as aggressive as permitted by conditions of the legal environment in which they operate.

Before I proceed to conclude this chapter, a clarification is necessary. In proposing my theory I recognise an important problem. In most models regarding judicial behaviour as strategic behaviour, particularly standard separation-of-power approaches (Helmke 2005: 34), I simplify reality by assuming that judges operate in a context of complete and perfect information. Hence, I assume that judges are able to collect necessary information to anticipate public reactions to their decisions as well as measure the two elements constituting the government's tolerance interval. However, things are more complicated in real life. Judges live in an uncertain world and, hence, they face an unavoidable problem when it comes to collecting sufficient information. Such information is not always readily available. For example, sometimes the lack of legal knowledge among journalists leads them to wrongly interpret the text of a ruling and, thus, to misreport it. In turn, such misleading media coverage might raise negative reactions against the ruling. In anticipating public reactions, judges might miscalculate such reactions, having incorrectly trusted that the decision would be adequately covered by the media. Calculating a government's tolerance interval is equally complicated. For example, whether an issue is salient to the government is not quite obvious. It is possible that an issue becomes relevant to the official agenda only after the decision takes place and due to supervening situations. Sometimes opposition leaders might use an anti-government ruling as a platform to attack the government. This, in turn, might make the government strongly defend its position on the issue in order to protect it from such attacks. In that regard, the issue becomes salient to the official agenda only after the ruling takes place and due to unexpected supervening situations. As a result of this discussion, the unavoidable character of the information-collection problem might lead judges to miscalculate both public and government reactions to their decisions and, thus, not to behave as predicted.

Conclusion

In this chapter I discussed the theoretical framework underpinning the argument I put forward in this work. The central argument of this work is that the level of aggression among judges is a function of their attempt to protect the institutional security of their courts. I argue that

in contexts characterised by a lack of a culture of judicial independence, a high level of judicial delegitimisation, and by a high level of public visibility of judicial affairs, judges sitting on new or recently reformed courts will attempt to both construct public support and avoid political conflicts with the government. As a result, judicial decisions are driven by the judge's calculations of both the public's reaction and the government's reaction to their rulings. I claim the level of aggression of their interventions will increase when the government's tolerance is higher and the public appears to be more supportive.

The discussion of the theoretical underpinning of this work was preceded by an exploration of the dependent variable of my work. In this respect, I claim that most of the literature in the field has failed to differentiate, or even take into account, the fact that judges choose from a wide range of procedural forms of involvement and such forms have a different impact on the political system. In this light, I elaborated four generic categories of judicial involvement according to their level of *aggression*, which refers to the intensity of the involvement in the political arena. I measured 'level of aggression' on a four-point scale built along four dimensions, namely the nature of the remedies, the effect of the remedies, the position of the government on the issue under discussion, and the cost of enforcement for the elected branches.

Then, I proceeded to discuss the theoretical grounds of my argument. I propose a theoretical account for judges operating in contexts characterised by a lack of a culture of judicial independence, a low level of public confidence, and by high levels of exposure to judicial affairs. More precisely, I argue that judge's selections of different modes of involvement in the political arena are a function of their desire to protect their courts. Such desire leads judges to simultaneously attempt to build public support and avoid political conflicts with the government. As a result, judges engage in strategic behaviour aimed to:

- Anticipate the reaction of opinion leaders who are thought likely to be able to both shape mass public views on the general image of a court (diffuse support), and

influence mass public opinion on decisions over socially-sensitive rulings (specific support).

- Calculate government's tolerance to decisions contrary to its own interests, anticipating that the risk of retaliation decreases if they avoid ruling against powerful governments on issues of particular salience to the official agenda.

My argument proposes that the public plays a crucial role in judicial affairs. First, in terms of the behaviour of judges, I suggest that the public operates in two opposite directions. On the one hand, it enables judges to achieve their goals through the construction of public support. Though governments will incur popular backlash for launching political attacks, their ability to sanction them is limited. On the other hand, the public also constrains judges. If judges care to build public support and, thus, increase the visibility of their workings, their room to manoeuvre to strategically defer to governments or other actors will be narrowed. Second, I propose that the public can play a relevant role in constraining the government's ability to sanction judges. Governments are not only constrained by the distribution of power among formal actors. Under particular conditions, government's fear of popular backlash influences its decisions to retaliate or not. In these regards, my argument brings the public to the centre of the judicial decision-making process which is said to be dominated by legal principles, political or legal ideology, or personal interests. From this theoretical discussion empirically testable hypotheses were drawn. They read as follows:

H1: The 'level of aggression', measured by judges' use of a different type of remedy, will increase when:

(a) Other things being equal, the government's tolerance is higher;

(b) Other things being equal, the public appears to be more supportive;

H2: The 'level of aggression', measured by judges' alteration of some features of the same type of remedy, will increase when:

(a) Other things being equal, the government's tolerance is higher;

(b) Other things being equal, the public appears to be more supportive;

H3: The 'level of aggression', measured by judges' alteration of some features of the same type of remedy, will decrease when:

(a) Other things being equal, the government's tolerance is lower;

(b) Other things being equal, the public appears to be less supportive;

H4: Judges get as aggressive as permitted by conditions of the legal environment in which they operate.

Chapter 2 – Political Constraints to the Court: Lack of a Culture of Judicial Independence and Crisis of Legitimacy

Introduction

The theory I put forward in this work seeks to explain the behaviour of judges embedded in hostile scenarios. Particularly, I propose a model to explain how judges regulate their level of aggression in contexts marked by a lack of a culture of judicial independence and low levels of public confidence in courts as well as by high levels of public exposure. Crucially, I demonstrate in this chapter that the study of the behaviour of Justices sitting in the Supreme Court of Argentina between July 2004 and September 2010 is an excellent opportunity to test this theory. Through a brief historical account, I show here that the Court was subject to constant attacks by the political elite for most of its recent history. Also, I show that an increasing popular discontent toward the Court amounted to a serious crisis of legitimacy, which was manifest during and after the country's political and economic crisis in 2001-2. It was in this context that the Court's new membership was consolidated. I show that these developments occurred under an increasing level of public attention to the Court's affairs, which constitutes a new element in Argentine politics. Finally, I argue that standard division of power theories devoted to explaining judicial behaviour at the Supreme Court-level in Argentina became inappropriate for explaining the period under study, in light of a reconfiguration of the context in which Supreme Court Justices traditionally operated.

In this chapter I show that the lack of a culture of judicial independence is observed through a pattern of political attacks against the Court. Such attacks suggest, as Helmke (*Ibid*) states, that there is a gap between formal institutions and real political practices. This gap permitted the incumbent and incoming governments to regularly appoint loyal justices and sanction disobedient Justices since 1946. I also show that the level of public confidence in the Court reached its lowest point during the 1990s, when President Menem ruled the country for two consecutive terms. The Court was largely criticised for its partisanship, lack of transparency, and failure to protect human rights. This provoked a profound crisis of legitimacy, which was manifest during the country's crisis (2001-2002) and its post-scenario, when the public regarded the Court

as one of those responsible for the country's downfall. I also offer evidence suggesting that public scrutiny of the Court has incrementally increased since the mid-1990s. Initially, the Court's affairs seem to have been of no public relevance for most of its recent history. However, the situation changed during Menem's administration, when the origins of the crisis of legitimacy started to be more public. It was during the country crisis and its immediate post-crisis scenario, when the Court's affairs become a definitely salient issue in the political arena. All these aspects marked the context in which the Court's new membership was consolidated.

I also discuss in this chapter why previous theories explaining judicial behaviour at the Court's level cannot work for the period under study. I show here that an additional element characterised the new context. The government used the Court as a source of legitimacy for itself since 2003 which, I argue, increased the cost of retaliation since 2003. This element together with the increasing level of public scrutiny of the Court reconfigured the political scenario in which the Justices operated. I show that the public became a central player in relations between the Court and the government. This presents new opportunities and constraints for Justices. Finally, I show that such new elements were not considered by previous theories. These theories were grounded in the fragmentation of power hypothesis and did not consider how the public plays a central role in these political dynamics.

The chapter proceeds as follows: In the first section I account for the lack of culture of judicial independence. I show how the recent history of the Court was marked by Executives' attempt to subordinate it by means of interruption of Court Justices' tenure and alteration of the bench seats. In the second section, I discuss the low level of public confidence in the Court. I show that public critiques towards the Court progressively increased since the mid-1990s, leading to a profound crisis of legitimacy during and after the country's crisis of 2001 and 2002. Also, I discuss how public attention to Court's affairs increased over this period. Then, I explain the developments leading to the reconfiguration of the Court's membership. Finally, I explicitly account for the changes in the political arena in which the Justices operate. I discuss how theories explaining

judicial behaviour at the Court's level became obsolete in light of such changes. In the conclusion I highlight the key aspects discussed in this chapter and briefly introduce the following chapter.

The Lack of a Culture of Judicial Independence

The first element characterising the context in which the Justices operated is a lack of a culture of judicial independence. In this section I underscore this lack through an historical account of the Court-Executive relationships in Argentina. Political elites behaved as if the formal rules granting the Court independence and life tenure were non-existent. In this regard, I show in this section that in Argentina there is a gap between formal institutions and real political practices which permitted incumbent and incoming governments to appoint loyal justices and sanction disobedient Justices when necessary since 1946. This gap is attributed, among other factors, to the chronic political instability that affected Argentina between 1930 and 1983 and the strong presidential character of democracy (Helmke 2005:62; Herrero 2008: 72). In 1930 a *coup d'état* against the democratically elected government initiated a period of active military intervention and political instability. Six democratic breakdowns took place from 1930 until 1976, at an average of one every five years. In that period, nineteen presidents were sworn in and were then removed (Herrero, *ibid*: 73). Since 1983 Argentina has re-embraced democracy as an uninterrupted political system.

The patterns of Executive attacks against the autonomy of the Court started in 1946.²⁷ Two distinct periods can be observed before the reforms process initiated in 2003 leading to the consolidation of the Court's membership subject to this current study. During these phases most democratic and military governments sought to control the Court. To that end, Executives have not only nominated and appointed friendly Justices for open vacancies through secretive and discretionary procedures but also influenced when a vacancy would occur. As a result most administrations, both democratic and dictatorial, were able to shape a new Court majority with their own appointees.

²⁷Between 1863, when the Supreme Court was constituted, and 1946 the Court did not suffer attacks from the executive branch.

It should be highlighted that the attacks on the Court were not a relevant issue in the public arena for most of the period discussed below. The secondary sources I use in this work do not provide any evidence to support that idea these attacks had been covered in the media or that they were of any concern for a majority of the population. In the same vein, I found no evidence that mobilised civil society groups or social movements took this issue seriously. In this vein, Oteiza (1994: 93-96) concludes that matters related to the Court, including its membership and decisions, had no public relevance for most of the recent Court's history. It was not until the mid-nineties, as remarked by legal scholars and journalists interviewed in my field work, that the Court's affairs started to be of public relevance. In all these instances, attacks on the Justices' tenure and reforms of the Court's number of seats were scarcely subject to public attention.

First Phase: 1946-1983

This period starts when Perón was elected president for the first time in 1946 and ends when the last military dictatorship in Argentine history collapsed in 1983, as shown in Table 3. In this phase, marked constantly by democratic crises, most Executives succeeded in manipulating Court composition and appointing loyal Justices. They resorted to irregular interruption of Court Justices' life tenure, court-packing plans, and discretionary appointment of friendly Court Justices.

Table 3– First Phase 1946-1983

First Phase: 1946-1983		
Perón	1946 – 1955	Democratic Elected Government
Lonardi - Aramburu	1955 – 58	<i>De facto</i> Military Government
Frondizi	1958 - 1962	Democratic Elected Government
Guido	1962 1963	<i>De facto</i> Military Government
Illia	1963 - 1966	Democratic Elected Government
Onganía – Levingston - Lanusse	1966 - 1971	<i>De facto</i> Military Government
Cámpora – Lastiri – Perón – Isabel Perón	1973	Democratic Elected Government and Provisional

		Democratic Government
Successive Military Juntas	1976-1983	<i>De facto</i> Military Government

Source: Elaborated by the authour

In terms of irregular interruption of Court Judges' life tenure, the Court was purged six times during this phase. Although judges cannot be removed for political reasons and the impeachment process involves a formal removal procedure established by the National Constitution, 33 percent of Court Justices who left the Court were removed through irregular procedures and only 6 percent were impeached (Mollinelli, 1999). In this phase, the average tenure fell from ten to four years. President Perón's administration impeached four and removed three of five judges sitting in the Court in 1947.²⁸ The impeachment process was a politically motivated reaction from the *Perónist* government to unfavourable previous decisions (Chavez, *ibid*: 38; Helmke, *ibid*: 64; Herrero, *ibid*: 92; Oteiza, *ibid*: 61). Previous to Perón's democratic government, a military government ruled the country. One of the most relevant officials of this *de facto* government was Perón himself, who was eventually elected president in 1946. Many clashes occurred between the Court and the Executive. As some authors highlight (Herrero, *ibid*; Oteiza, *ibid*) the Court Justices set boundaries to the *de facto* powers; showed opposition to the creation of new Courts by the military government; and opposed reforms within the Secretary of Labour. All these cases led the elected *Perónist* government to sanction the sitting judges (Herrero, *ibid*; Oteiza, *Ibid*). The fact that charges were not solidly presented and that most of them were related to the Court Justices' use of their judicial review powers against the incumbent government reveals the intentions of the *Perónist* government to both punish the Court and remove those justices that would potentially oppose Perón's administration (Herrero, *Ibid*). Almost without debate, the *Perónist*-controlled Senate voted to dismiss three impeached Justices.²⁹

²⁸ One of the evicted Justices, Judge Repetto, resigned before the end of the impeachment process. The fifth Justice sitting in the Court, Judge Casares, was appointed by the 1943-46 military government and was not impeached, presumably because he did not join the Supreme Court majority in those cases that upset government (Oteiza, *Ibid*: 61).

²⁹ As Herrero (*Ibid*: 95) recounts, multiple irregularities characterised the impeachment process. The defendants' attorneys were not allowed to assist their clients in the Senate chamber, being forced to follow the process from the tribune. Furthermore, the Justices were requested to submit written statements to be read

Later purges occurred by decree during successive *de facto* military governments. This happened in 1955, 1966, and 1976 (Helmke, *ibid*: 63-75; Herrero, *ibid*: 104-120; Oteiza, *ibid*: 63-84). These governments were based on revolutionary ideas that called for the replacement of the institutions that supported the previous democratic regimes. In this sense, it can be inferred that Court Justices' removals were grounded in political motivations. The most salient example of this is found in the *de facto* government that overthrew Perón in 1955. The military government not only imprisoned Perón and other prominent politicians, but also banned all references to *Perónism* and *Perónist* symbols. The dismissal of the Court, comprised of loyal *Perónists*, was a consequence of this hostility to *Perónism* (Herrero *ibid*: 104).

In addition, when democratic governments followed *de facto* governments, judges appointed by the non-democratic regimes resigned once the regime transitions occurred (Helmke, *ibid*; Herrero, *ibid*: 104-120; Oteiza, *ibid*). For example, in 1973 Court Justices tendered their resignations because they feared the new government would not reconfirm them, preferring to resign instead of being removed (Herrero, *ibid*: 114). Such resignations also occurred after the democratic election in 1983. President Alfonsín's team of legal advisers made clear that the tenure of the incumbent Court Justices would not be respected (Helmke, *ibid*: 76-78). As a consequence, the incumbent judges resigned upon learning this plan just prior to the new democratic government taking power (*Ibid*).

Court-packing plans were also used to attack the Court. Frustrated by the lack of support for his policies from the same very justices he appointed, Frondizi enlarged the bench from five to seven seats. In doing so, he aimed to consolidate a majority of Court Justices loyal to his government (Herrero, *ibid*: 110). As a result, Justice Orgaz tendered his resignation in protest to the Court-packing plan. Consequently, Frondizi appointed three loyal Court Justices securing a loyal majority. In 1964, Illia, one of the two presidents who did not appoint his own Court, attempted to implement a Court-packing plan, increasing the seats to ten. However, his proposal

out loud by the Senate's secretaries rather being allowed to present their arguments orally. Finally, once the accusation and defence were presented, there was no debate as all the senators were *Peronists*.

was not accepted by the House of Deputies (Herrero, *ibid*: 112). Later, the Court size was again reduced to five seats by Onganía's dictatorship in 1966 (Chavez, *ibid*: 41).

The impeachment of loyal Court Justices was another feature of this period. There was no Court composition where the majority of members were appointed by a precedent president with an opposing political orientation. In fact, several governments had the chance to appoint their 'own' Court. Military governments replaced the whole Court in 1955, 1966, and 1976. Democratic governments also had the chance to consolidate loyal majorities such as Perón in 1947, Frondizi in 1958-60, and Cámpora in 1973. In this phase only two governments did not replace the Court: the *de facto* Guido's 1963 administration and Illia's 1963-66 democratic government. (Helmke, *Ibid*: 63-75; Herrero, *ibid*: 104-120; Oteiza, *ibid*: 63-84). The ability of governments to appoint loyal judges was facilitated by a secretive and discretionary appointment processes (Helmke, *ibid*: 63-75; Herrero, *ibid*: 104-120; Oteiza, *ibid*: 63-84). In addition, presidents' proposals were not challenged and were barely analysed by the congress in all the cases. In this sense, democratic presidents Perón³⁰, Frondizi³¹ and Cámpora³² appointed loyal Court Justices (Herrero *ibid*: 98, 107,115). Meanwhile, *defacto* governments appointed loyal Court Justices in 1955, 1966 and 1976. These Executives replaced the whole Court, unilaterally appointing Court Justices by decree (Helmke, *ibid*: 63-75; Herrero, *ibid*: 104-120; Oteiza, *ibid*: 63-84).³³ But unlike the democratic administrations of this phase, the military governments appointed prominent judges and legal practitioners with well-respected reputations in legal circles (Herrero, *ibid*: 104-120). Although in none of the cases were the appointees from within the military ranks, the nature of this type of

³⁰ After being a relevant figure of the 1943-46 *de facto* government, Perón, from the Justicialista Party also known as *Perónist* Party, was elected president in 1946. He designated four of the five justices seating in the Court. As Herrero (*Ibid*: 98) discusses, the background of these Court Justices is indicative of their closeness to Perón's inner circle

³¹ After a three year dictatorship that overthrew Perón's government, Frondizi, from the Union Civica Radical Intransigente Party, was elected president in 1958. Frondizi appointed six Court Justices, three of them when he took power in 1958 and the other three in 1960 as a consequence of his Court-packing plan. Like Perón, he sought to fill the Court with loyal Justices. Although among Frondizi's appointees there were a recognised legal scholar and two law professors, all of his candidates belonged to either his personal circle or were member of his party.

³² Campora, a *Perónist* candidate, was elected president in 1973. Eventually, he would resign to allow Peron to assume his second mandate. He appointed five Court Justices.

³³ In some cases, Supreme Court's vacancies occurred during *de facto* governments. In these occasions the same appointment procedure was implemented. For example, when Justice Bidau resigned in 1970, Onganía appointed the first women to the Supreme Court, Judge Argua.

government suggests that political loyalties were also determining factors in these appointments. As Helmke (*Ibid*: 69) remarks, it was seen as a rule to appoint judges who shared their basic military outlook and ideology.

Second phase: 1983 -2003

This phase corresponds to administrations of Alfonsín, Menem, De La Rúa, and Duhalde (See Table 4). Notwithstanding the democratic nature of these governments, the Court was also the target of Executives. I focus mainly on Alfonsín and Menem's terms as they appointed their 'own' Courts.³⁴ Also, I briefly refer to Duhalde's failed attempt to impeach all Supreme Court Justices. De La Rúa did not launch any attack on the Court during his short term. Similarly, during another short tenure, President Duhalde appointed only one Justice due to a vacancy provoked by a resignation.

Table 4 - Second Phase: 1983 -2003

Second phase: 1983 -2003			
Alfonsín	1983 - 1989	Democratic Government	Elected
Menem	1989 - 1999	Consecutive Elected Governments	Democratic
De La Rúa	1999 - 2001	Democratic Government	Elected
Puerta – Rodríguez Saa – Camaño - Duhalde	2001 - 2003	Provisional Consecutive Democratic Government	
Kirchner	2003 – 2007	Democratic Government	Elected
Fernández	2007 – 2011	Democratic Government	Elected

Source: Elaborated by the author

³⁴Between the years 2000 and 2003 five presidents took power. One was democratically elected and the other four were appointed by Congress as a result of the economic crisis. None of these implemented measures to intervene the Court. As such, this period has been left out.

As his predecessor had, Alfonsín had the chance to appoint a completely new Court. He thought that the Court Justices appointed by the military government should be replaced (Helmke, *ibid*: 77). Carlos Nino, one of Alfonsín's main legal advisers, argued the incoming democratic government must not respect the tenures of judges that are sworn in by *de facto* governments (Nino, 1996: 67). As they knew Alfonsín's position well before he took power, all sitting Justices resigned after he was elected.

Although the majority of the newly appointed Court was relatively close to the *Union Civica Radical*, the President's party, Alfonsín sought to appoint well respected Justices (Herrero, *ibid*: 120). The appointment of Belluscio, Carrió and Caballero reflected the balance of power within the three main sectors of the ruling party. Justices Fayt and Petracchi had ties to the Socialist Party and the *Perónist* Party respectively. However, none of the appointees had a relevant position in their parties. Rather, they possessed very well-known reputations either as lower judges or scholars. As expected, none of the new Justices were ideologically close to the military.³⁵

As in the previous phases of Argentine history, Alfonsín faced no opposition in appointing his candidates. Although Alfonsín lacked control over the Senate, his proposals were not challenged by members of the opposition. In a process that lasted no more than twenty days, in a closed session, the Senate approved Alfonsín's proposal almost without debate (Oteiza, *ibid*: 95 and 110). In fact, even before Alfonsín took power, newspapers revealed candidates' names, emphasising the fact that the Court was already consolidated (Oteiza, *ibid*: 93). The appointment process had no public repercussions either. There was no relevant discussion among academics or legal practitioners about the candidates, and media coverage was limited to informing the public about candidates' names, whether they accepted the candidacy, and their later appointments (Oteiza, *Ibid*: 93 and 110-11).

Notwithstanding his original commitment to appoint a well-respected Court rather than a loyal Court, Alfonsín eventually attempted to alter the size of the Court to pack it with loyal

³⁵ For a detailed account of the newly appointed Supreme Court Justices see Oteiza (*Ibid*: 103-111) from which this paragraph is drawn.

Justices. A military rebellion made Alfonsín redress his retroactive justice policies regarding human rights crimes committed during the last dictatorship. He expected the Court would rule a decision establishing a limitation of statutes grounded in due obedience arguments. Several Court Justices expressed their refusals in privately-held meetings with top government officers (Herrero, *ibid*: 121). As a consequence, Alfonsín attempted to increase the number of seats in the Court but the *Perónist* Party blocked the initiative in Congress (Helmke, *ibid*: 82).

Conversely, President Menem, elected in 1989, had a more aggressive approach to the Court. He was determined to subordinate it to the Executive through a packing plan. Initially, he hoped to provoke open vacancies and fill them in with friendly Justices. Before taking power, Menem developed a ‘carrot and stick’ strategy with several of the incumbent Justices to get them to resign (Helmke, *ibid*: 83). Just three months after taking office and because of the failure of his first initiative, Menem sent a bill to the Congress increasing the number of seats to nine with a clear Court-packing plan. The political motivations of the reform were made apparent by government officials. Particularly, Menem’s intentions to subordinate the Court were expressed on a TV show interview. Replying to his interviewer, the former president inquired ‘Why should I be the only president in fifty years who has not had his own Court?’ (Larkins, 1998: 428). In the same line, Cabinet members emphasised the importance for the government to have a Court supporting government’s policies (Helmke, *ibid*: 85; Miller, *ibid*). In the Congress, *Perónist* deputies were encouraged to vote in favour of the law because ‘the President needs the enlargement of the Court’ (Larkins, *ibid*: 428).

The appointment process rules coupled with Menem’s control of the Senate allowed the appointment of loyal Justices with weak qualifications in most of the cases. In 1990, due to the passage of the Court enlargement, the government appointed six friendly Justices. In addition to the four seats newly created by the law, two seats became open as two Justices tendered their resignations due to their opposition to the packing plan. As Chavez (*ibid*: 34) accounts, the speed of the process prevented a thorough evaluation of the candidates’ expertise and background. The Senate Appointment Committee unanimously approved Menem’s list of candidates. In this

hearing, the committee opposition members were absent. Subsequently, on the floor the Senate body approved the list in a secret session lasting only seven minutes long. Again, members of the main opposition party did not attend the session.

The background of the newly appointed Justices revealed that their links to both Menem's inner circle and the *Perónist* Party were determinant for their appointments. Authors such as Chavez (*Ibid*)Helmke (*Ibid*), Miller (*Ibid*) and Vertbisky (*Ibid*) give a precise account of this. For example, Justice Julio Nazareno was Menem's former law firm partner. Then, as governor of La Rioja, Menem appointed Nazareno to the Attorney General's Office and then to the Court. Justice Cavagna Martinez was Undersecretary of Justice in the province of Buenos Aires under a *Perónist* administration in 1975. It is also well-known that he was a close friend of Menem's brother, Senator Eduardo Menem.³⁶ Justice Moline O' Connor was Menem's regular tennis partner and brother-in-law of the incumbent Secretary of Intelligence. His most recent professional position before his appointment was as a President of the National Tennis Association. Justice Barra had a close friendship with cabinet members and was Menem's Under Secretary of the Interior.³⁷ Justice Levene served as Court Justice in the 1975 *Perónist* administration. He was also a legal advisor of Menem's Undersecretary of Justice. Only Justice Oyhanarte enjoyed a more respectable career, at least in legal circles.³⁸

Meanwhile, De La Rúa, elected president in 1999, had no chance to appoint his 'own' Court majority. He did not launch any attack on the Court. Probably, this was not because of his commitment to judicial independence but because his administration lasted less than two years. In fact, his party's platform for the electoral campaign included the removal of the Court Justices (Helmke, *ibid*: 91-92). Later, Duhalde launched a massive attack on the Court aimed to impeach all

³⁶ Justice Cavagna Martinez resigned from the Court in 1993. Later, he was appointed Ambassador to Italy in 1994. In 2001 he served as Menem's private lawyer in a corruption case against the former president.

³⁷ After resigning from the Court in 1993, he was appointed Ministry of Justice in 1994.

³⁸ Subsequently, Menem appointed three new Justices. In all the cases, loyal Justices were appointed. First, Justice Oyhanarte resigned in 1991. The filling of the other two vacancies was the outcome of a deal between *Peronist* and Radical Parties. The latter party lent support to Menem's initiative to reform the National Constitution in order to be re-elected. In exchange, the *Perónist* party guaranteed resignation of two of the most loyal SCJN Justices, Barra and Cavagna Martinez. However, after the constitutional reform and after being re-elected, Menem appointed two loyal Justices.

Court Justices. But, as I discuss further in another section of this chapter, he failed to do so. He only appointed Court Justice Maqueda due to a vacancy caused by resignation.

The brief discussion of the history of the Court reveals the lack of a culture of judicial independence. This is characterised by a gap between the formal protection of Court Judges' tenure and actual practices. Since 1946 most governments have successfully attempted to subordinate the Court. These developments also illustrate the extent to which the lack of a culture of judicial independence was represented by a common practice in which political elites saw the Court as a servant of their own interests rather than an autonomous agency. In such a context, one can certainly expect that the Justices had an urgent need to seek protection for their Court.

Low Levels of Public Confidence in the Court

Another aspect of the political context inherited by the new Court composition was the low level of popular confidence in the Court. In light of the absence of polls measuring levels of support for most of the recent history of the Court, the low level of confidence in the Court can be inferred from the fact it was traditionally criticised for its partisanship, lack of transparency and failure to protect individual rights. This led to a profound crisis of legitimacy which manifested during the country's crisis and its aftermath, when the public regarded the Court as one of those responsible for the country's downfall. Consequently, such popular discontent incrementally gained a relevant space in the public debate and became one of the salient issues of Argentine politics in the years before and after the consolidation of a new membership in 2004.

The Court's low level of public confidence can be attributed to three factors. The first one is referred to its alleged lack of independence. More precisely, the Court was perceived as partisan for most of the twentieth century. By partisan I mean that the Court was perceived as identified with the government in power and that such government unilaterally influenced the outcome of the cases in which it was involved.³⁹ Thus, the Court was perceived as a proxy for the government. In fact, Iarysow *et al* (2002: 703) observes that qualified local analysts were emphatic in this

³⁹I follow Brinks here (2005:598).

respect: throughout the twentieth century, the Court did not constitute a reliable check to the political powers. These negative views were aggravated during the 1990s, when President Menem increased the Court's size and successively appointed loyal judges. These Court Justices constituted the publicly known *automatic majority*, given that these Justices were perceived to vote in favour of the government in all relevant matters (Vertbisky, *ibid*).⁴⁰ Scholarly works accounts for these views. For example, Brinks (2004: 606-607) affirmed not only that Court Justices were closely associated with president Menem's preferences, but that there were also ongoing political interferences in the decision-making process during Menem's governments. Ruibal (2009: 66) asserted that during Menem's government, the Court backed the overreaching of the Executive's power, delegating to it powers formerly attributed to other branches and, in many cases, suspending constitutional rights under arguments of economic emergency.⁴¹ These views were also extended to the public domain.⁴² Chavez (2004: 51-52) reports different public opinion polls in this regard. In a 1992 poll only 11 percent of the Argentinians believed that the judiciary performed 'well' or 'very well.' Respondents, according to the author, attributed their negative assessment to the assaults on judicial autonomy from administration officials seeking impunity. In 1994, only 8 percent of Argentinians believed that the Supreme Court was independent of Menem; 78 percent of responders characterised it as subordinate to the President. Concordantly, Larkins (1998: 429) cites a 1994 Gallup Poll, in which 72 percent of respondents said that judges were too 'influenced by the government,' and 69 percent believed that the decisions of the Supreme Court were either 'extremely politicised' or 'very politicised.'

The second factor relates to the lack of transparency of its internal workings and the alleged corrupt practices that result from it. The lack of transparency of the Court's internal procedures was perceived as restricting public debate and the circulation information on public affairs by scholar such as Carrió (*Ibid*) and social organisations (ADC et al 2003). However, during

⁴⁰In addition, the *automatic majority* was highly criticised by political oppositions, academia and media due to appointees' lack of academic and professional credentials and their public links to the ruling government (Carrió, 1996 ; Helmke, 2005 ; Herrero, 2008; and Oteiza, 1994).

⁴¹For a legal analysis of rulings in line with this statement see for example Carrió (1996) and Oteiza (1994).

⁴²For a thorough analysis of rulings perceived as unduly favouring the Government see Vertbisky (2006).

the nineties the lack of transparency provoked allegations of management corruption and collusion with political actors (Alba Ruibal 2012: 24-26; Helmke 2005: 84-92; and Herrero, 2008: 120-124). In this regard, the public in general regarded the Court as a corrupt institution. A poll cited by Larkins (*Ibid*: 429) reports that 64 percent of respondents considered it either ‘very corrupt’ or ‘corrupt.’ The third factor related to the poor record of the Supreme Court in the protection of fundamental rights. The so-called Menemist Court set a wide range of legal doctrines undermining the protection of ‘individual rights’ and favouring the state (Ruibal 2009: 72-73). In this line, a legal scholar and prominent practitioner affirmed that the jurisprudence of the Court should be characterised as being mainly against the individual and in favour of the state (Carrió 1996: 160). Moreover, Gargarella (1998) argues that the Court in the 1990s not only systematically defended the particular interests of the Executive, but it developed a solid, conservative jurisprudence, supporting policies that were opposite to egalitarian political and economic trends.

It was during the 1990s that an incipient public scrutiny of the Court began. For most of its history, the court was not a truly visible actor in Argentine political life (Ruibal 2009: 70). Argentine society had historically paid scant attention to the composition, decisions, and function of the Court (Oteiza *Ibid*: 109-112). But the negative reputation of the Justices constituting the *automatic majority*, and the Court in general, eventually became a politically-relevant issue in the public arena. Media attention of the Court’s behaviour increased dramatically over these years (Helmke: 87). In fact, the need to reconstitute the Court became one of the main issues in the 1999 presidential electoral campaign. Especially after the public allegations of corruption scandals that involved Court Justices, the main opposition leaders proposed changes to the Court (Helmke *ibid*: 90-91). The centre-left coalition that won the election (the *Alliance for Justice, Work, and Education*, or *Alianza*) included the restructuring of the Court in its platform as part of a broader institutional reform plan (Ruibal 2010: 60). However, no significant changes occurred under the new administration.

The level of popular confidence reached its lowest point during the country’s economic and political crisis in 2001 and 2002. For sure, although Justices belonging to the automatic

majority were the main subject of public discontent, the Court itself was negatively regarded in the public arena. Actually, the critique against the Court operated as a mobilising factor for protesters. In December 2001, Argentina was the scene of intense social protest critiquing the economic and social measures of its government. Unlike protests in previous decades, in which trade unions took centre-stage, in 2001 civil organisations and citizens groups were the protagonists (Benente, 2011: 33). Street protest and public demonstrations occurred daily after the government decided to freeze private savings in early December. On December 19th and 20th the use of force by the police to clear up protests ended with five people dead and several others hurt, including policemen. The crisis quickly led to the resignation of President De La Rúa, a series of interim presidents in less than a week, as well as serious street disturbances, the closing of all the banks, and an unprecedented economic collapse.

Although the political elite was the initial main target of the public protests, the Court quickly became a target of public demonstrations. The main scenes of public protest and demonstration in the capital city were *Plaza de los dos Congresos*, in front of the Congress, and *Plaza de Mayo*, in front of *Casa Rosada*, where the Executive sits (Benente, 2011: 52). However, on December 28th a massive demonstration was concentrated in front of the Court House (*Ibid*: 52). The Court was considered to be the one responsible for the country's collapse, and, for the first time in Argentinean history, it was at the centre of the social protesters' demands. (*Ibid*: 55).

The protest in front of the Court House started after the Court rejected a petition to declare unconstitutional the Presidential decree freezing bank savings on December 28th, the very last working day of the calendar year (Ruibal, 2009: 71). In *Kipper* the Court Justices rejected exceptional cautionary measures dictated by lower judges against the economic plan on procedural grounds. This ruling was seen as another sign of the Justices' corrupt practices and partiality as well as a failure to protect citizens' rights (LP4 2010; LS3 2010). Public demonstrations were initially promoted by 'The Labour Lawyers Association', and by self-organised citizens groups, members of the 'Junta para la Promocion del Juicio Politico.' Later a vast and diverse range of groups joined the protests. As Ruibal (*Ibid*: 71-73) highlights, popular discontent against the Court

was mobilised by two types of social groups which differentiated from each other by the extension of their agendas and the means used to advance them. Firstly, a massive and heterogeneous group of professional organisations, social organisations, neighbourhood assemblies, and individual citizens, among others, successfully advocated for the impeachment and dismissal of Court Justices. Changes in Court membership were thought to be a solution for its institutional crisis. This group mobilised thousands of citizens who attended regular demonstrations in front of the Court House. Secondly, two coalitions mainly comprised of civil society organisations, ‘A Court for Democracy’ (Una Corte para la Democracia) and the ‘Coalition for Argentine Dialogue’ (Mesa para el Dialogo Argentino), successfully advocated for a broader reform agenda. For them, practices resulting in the Court’s crisis of legitimacy were facilitated by both Justices’ behaviour and the Court’s institutional settings. In this line, their reform agenda included not only Court membership renewal but also other reforms aimed to democratise both the selection and appointment of Justices and the internal procedures of the Court, as well as to increase its efficiency.

In the immediate post-crisis scenario, the Court Justices remained sitting while their negative reputation increased. This was due to a public political conflict with the provisional President. After the resignation of President De La Rúa in December 2001, Argentina had three temporary presidents. In January 2002 Duhalde, appointed by the Congress, finally took charge of the transition until new elections were held. Soon after taking office, the President initiated the impeachment of the nine Justices. In a reaction to this, on February 1st 2002, only one working day after *Kipper*, the Court Justices dramatically reversed their early decision and issued a very controversial ruling declaring unconstitutional the Decree-Law that had frozen savings and triggered the crisis. The ruling was signed by the Justices belonging to *automatic majority*. In addition, the Court Justices issued an administrative resolution called *acordada*, expressing that the *Smith* would ‘set precedent’ for all further rulings by Argentine courts. This was an unusual move, as *acordadas* were regularly used to communicate and resolve administrative matters rather than establish jurisprudence. The Court Justices grounded their ruling in very unconvincing legal

arguments. Legal scholars sharply pointed out the inconsistencies between this ruling and both the recently decided *Kipper* and a long list of the Court's precedents (Spector, 2008-2009: 784-785). The economic impact of *Smith* put in danger the stability of the transition government. In this context, it was regarded as a preemptive strike to deter Duhalde's impeachment plans (Kapiszewski, 2006: 17; Rosenkrantz, 2010-2011: 1565; Spector, *ibid*: 786). The media perceived this decision as an attempt to weaken President Duhalde's power (Benente 2011: 95-96). President Duhalde himself said it was 'extortion by the Court to avoid impeachment' (*Ibid*). In the same line, Justice Belluscio, who did not sign *Smith* and did not belong to the *automatic majority*, admitted that his colleagues attempted to create economic chaos in response to the President's attempt to impeach them (Benente *ibid*: 92). Although *Smith* was sensitive to social claims against the economic policies, the discrediting of the Court was such that people continued to demand the Justice's resignation. In March 2002, a poll revealed that 9 out of 10 individuals thought that the Court's membership needed to change (Benente *ibid*: 110).

After the *Smith* decision, President Duhalde ordered the hastening of the impeachment process. However, Justices of the *automatic majority* managed to survive this attack. On May 16th 2002, the Congress commission in charge of the impeachment presented accusations for the nine Justices (Benente 2011: 125). However, when the accusations reached the plenary of the Deputy Chamber, Duhalde instructed his legislators to dismiss the charges. Herrero (*Ibid*: 126) asserts that in spite of the gravity of the accusations and having enough votes for a guilty verdict, Duhalde realised that removing the court might have endangered the already unstable Argentine democracy. This author (*Ibid*) argues that Duhalde's key mistake was to impeach not only the six Menemist Justices but also the other three Justices as well, which provoked an in-block resistance from all the Court Justices. In this line, this was the first time that the Court Justices were able to resist a political attack from the government. Possibly, the main factor contributing to this was the extremely delicate political situation of the country.

This brief account of the recent history of the Court suggests that it was subject to low levels of confidence, particularly during the last years of the twentieth century. Indeed, it was

negatively regarded by large and diverse segments of the public. Three main aspects motivated the increasing public discontent, the Court's alleged partisanship, corrupt practices, and a poor record in the protection of fundamental rights. All these extremes led to a profound crisis of legitimacy in 2001 and 2002. This was accompanied by an increasing level of public scrutiny. In fact, during the nineties the Court was subject to intense public scrutiny for the first time in its history. The Justices' behaviour was extensively criticised in scholarly circles as well as in the public realm which put reform of the Court at the centre of the presidential campaign in 1999. The level of public scrutiny reached its peak throughout and after the country's crisis of 2001-2002. The Court as an institution was at the centre of the protest and it was regarded to be one of the institutions responsible for the country's downfall. The public scrutiny did not decline during the transition to Duhalde's government.

[The Consolidation of a New Membership](#)

Between December 2003 and August 2005 the Court's new membership was consolidated, as part of a reform process led by President Kirchner. As it is discussed, this reform process was strategically motivated. The government oversaw wide-ranging reforms: firstly, changes to the Court Justices' appointment procedure restricted the President's powers and enhanced transparency and public participation; secondly, the so-called automatic majority was dismantled, filling the vacancies by appointing four new Justices publicly regarded as independent from the government; and, finally, they implemented a progressive reduction of bench seats from nine to five, restricting the President's ability to fill two more seats given to unexpected vacancies. This process was unique in Argentine history. For the first time the President restricted his own powers to appoint new Justices, the Justices' appointment processes were public, transparent, and open to public participation, and the seat reductions arose from the President's desire to restrict his abilities to fill the remaining open vacancies, rather than from a Court-packing plan, as had occurred in the past. All these developments occurred under intense public attention.

President Kirchner was elected in 2003 in an extremely fragile institutional context. He took office after probably the most serious institutional, financial, and economic crisis to have

befallen Argentina in recent history. In addition, he gained only 22 percent of votes, becoming the least supported president in Argentina's democratic era (Ruibal, 2009: 73). In fact, he came second after former President Menem, who had 24 percent of the vote. According to the Constitution, both candidates had to go to a second election round. However, polls pointing to a second-round victory for Kirchner prompted Menem to withdraw his candidacy. As a result, Kirchner took office without the opportunity to increase his legitimacy through elections.

In relation to the Court, upon his election, he promised to address the perceived lack of independence of the Court (Brinks 2004). He was motivated by two main reasons. First, Justices belonging to the *automatic majority*, still constituting the driving force within the Court, represented a threat to his administration. For sure, they were loyal to Menem, Kirchner's main opponent, but more importantly, they had under review several legal cases related to post-crisis economic policies that the President was planning to maintain. Second, there was also a clear majority which favoured the removal of the Court Justices (Brinks, *ibid.*: 610). As discussed above, widespread disapproval of the Court converted it into an iconic symbol of the political crisis in which all institutions were involved. These perceptions were captured by polls cited by Ruibal (2010: 196) which revealed that, just before Kirchner took power, 97 percent of respondents thought that changes in the Court's membership were needed and that the judiciary was the most questioned of state institutions. In this regard, the reform of the Court appeared to be a very popular policy and a potential source of legitimacy.

In this context, Kirchner faced a complex scenario. On the one hand, Court Justices demonstrated their political power to deter impeachment attempts in relation to Duhalde's initiative. On the other hand, the public might have reacted negatively to the launch of a plan to reform the Court's membership. He ran the risk of being perceived to be perpetuating the long-standing tradition of governments who appoint subservient Court Justices. As a result, reforming the Court's membership required a well-calculated strategy to avoid both the Court Justices' political boycott and a popular backlash. In response to these challenges, Kirchner planned a fourfold strategy to modify the Court's membership.

First, he crafted a new rule regarding judicial appointments which restricted his wide-ranging discretionary powers on the matter and increased the transparency of the process (ADC, 2008: 30-33). Through Decree 212, the new rule established that when a vacancy comes up in the Court, the President proposes one or more candidates whose names will be published for thirty days in the outlet for official government announcements (Official Bulletin), and for three days in at least two newspapers with national circulation. The nominees' names will also appear on the official website of the Ministry of Justice. During this time, the candidates must file a sworn statement detailing their assets, and they must list, *inter alia*, all the civil and commercial associations with which they have been affiliated over the previous eight years, the law firms in which they have practiced, and a client list covering the same eight years. Individuals, nongovernmental organisations, and professional associations have fifteen days from the last publication in the Official Bulletin to file comments and objections. The Argentine Internal Revenue Service must also conduct an investigation of the candidates' tax history. The President then has fifteen days from the expiration of the comment period to decide whether or not to submit the nomination of the (or one of the) candidates to the Senate. The Senate, as prescribed in the Constitution, must then approve nominees by a two-thirds vote in an open and public hearing.⁴³ The decree came on the heels of the proposal presented to the government by the civil society coalition *Una Corte para la Democracia*, which actively mobilised for the Court's reform (Ruibal 2012: 24-27). Shortly after the Executive initiative, the Senate reformed its own internal regulations on the matter. It included public hearings and allowed citizens to present their views on each of the nominees (ADC, *ibid*; Ruibal *ibid*). The new regulation was clearly aimed at dissipating any suspicion of Kirchner's intentions in reforming the Court. The new appointment procedure constituted a dramatic change. Previously, candidates were selected with no public notice or comment and approved by the Senate in closed, sometimes middle-of-the-night sessions, as discussed earlier in this chapter. In interviews with the author, civil society members of the *Una Corte para la Democracia* coalition claimed that this reform largely fulfilled its purpose (CSL2 2010; CSL6 2010; LS3 2010). As a result, it cleared the path for the second leg of the strategy.

⁴³ The translation and summary of the decree were taken from Brinks (*Ibid*: 609).

Kirchner's second move was to bring about the removal and resignation of a substantive portion of the so-called *automatic majority*. He instructed his congressmen to initiate impeachment against Julio Nazareno, Eduardo Molind O'Connor, Guillermo Lopez, and Adolfo Vazquez.⁴⁴ This strategy seems to have been very well calculated. Ruibal (2010; 146) suggests that with the impeachment of only four Justices Kirchner aimed to avoid a corporate reaction from the Court Justices. In this point, Kirchner probably learnt from Duhalde's mistakes. Also, as Brinks (*Ibid*: 609) suggests, in promoting the impeachment of less than an absolute majority of the Court, it seems he aimed to dispel accusations that he was planning to create a new *automatic majority*. As a result of the government's strategy, Nazareno, Lopez and Vásquez resigned before the legislative impeachment took place and charges were presented. Moline O'Connor was removed after a guilty verdict.⁴⁵ By September 2004, when Vazquez resigned, Kirchner successfully achieved his goal of dismantling the *automatic majority*. Nonetheless, in 2005, Congress launched the impeachment of Justice Belluscio, the fifth and last member of the *automatic* bloc. His removal, in September 2005, occurred in the midst of tension between the President and the Congress. Congressmen who had prosecuted the other Court Justices believed Boggiano should also be impeached as the charges were the same as those made against his colleagues (Brinks, *ibid*; Herrero, *ibid*: 127). But President Kirchner allegedly wanted to avoid criticism for appointing his own majority so he preferred that Boggiano remain in the Court (Brinks, *ibid*; Herrero, *ibid*).

Kirchner's third strategy was to propose the nomination of four prestigious candidates. Each of the appointment of these candidates generated intense interest and a great deal of public comment (Brinks: 610; Ruibal, 2009:67). The new Justices were not identified with any political faction or interest group close to the government. They had ample professional credentials, and they proceeded to demonstrate autonomy with respect to political power during the public hearings (Herrero, *ibid*: 250; Ruibal, *ibid*). In the end, Justice Zaffaroni (December 2003), Justice Highton (June 2004), Justice Lorenzetti (December 2004) and Justice Argibay (January 2005) joined the

⁴⁴ Justices Nazareno, López, and Vázquez resigned before the Senate Commission presented charges against them.

⁴⁵ Moline O'Connor and Boggiano were charged with malfeasance in office.

Court. Their appointment was followed by an intense public debate over their background and profile, which implied a greater control of the designation process by new actors. For example, Brinks (*Ibid*: 611) shows interesting polls in his analysis of these processes. A poll taken days after the nomination of Eugenio Zaffaroni shows that 88.6 percent of respondents were aware of his nomination while, as might be expected, only 23.6 percent of the respondents claimed some knowledge of the candidate before his nomination. However, at the time of the poll 64.6 percent believed he was a ‘good’ or ‘very good’ choice for the Court. The next three candidates were subject to similar levels of public scrutiny and debate (Brinks, *ibidem*; Ruibal, *ibid*).⁴⁶

Finally, the last step of Kirchner’s plan was to reduce the number of seats on the bench. This came out of two unexpected vacancies. As discussed above, he did not expect Boggiano’s removal. Also, another Court Justice, Belluscio, resigned in August 2005 as he reached retirement age. The president was severely criticised because he made no decision about these vacancies for several months (Ruibal, 2009: 67). On the one hand, this lack of decision allowed him to keep control of possible nominations and changes in the court at any time. On the other hand, if the president had decided to resolve this situation by nominating two more justices, six justices would have been appointed during his term in office. This circumstance mobilised the *Una Corte para la Democracia Coalition* who requested the reduction of bench seats, a claim supported by opposition parties and the justices themselves (Ruibal, *ibid*). As a consequence, in December 2006, the Congress passed a bill proposed by Senator Fernandez, the future President, reducing the number of bench seats from nine to five. So the two vacant seats would not be filled and the court would gradually move to a five-judge composition as the sitting Justices retired or resigned.

Kirchner’s political leadership in consolidating the new Court’s membership should be understood, at least partially, in the context of the precarious political circumstances in which he

⁴⁶It should be stressed that June 14th, 2004 marked an important date for the purpose of this study. Justice Highton joined the Court that day. When this happened, Justices Petracci, Fayt, Maqueda, and Zaffaroni were already sitting in the Court⁴⁶. These four Justices, together with Highton, remained in the Court until the end of the period of this study. This means that from this day the Justices which I regard as holding a new mission for the Court and institutional maintenance perception became a ruling majority. As discussed in the introductory chapter, I take June 15th 2004 as the start of the period of my study.

came to power. With a weak political mandate entering office, Kirchner moved quickly to legitimise his government through a wide range of policies.¹ The measures leading to the consolidation of the new Court's membership were part of this attempt to gain legitimacy (Ruibal 2009: 73, 74). In this context, Kirchner saw the reform of the Court as an opportunity to build legitimacy and support. He presented it as a symbol of the new administration and as a way to break with a historical tradition in which presidents subordinated the Court (Ruibal, *ibid*). In fact, this policy was remarked as one of the positive successes of Kirchner's government by the public (Natanson 2004). Also, academic and journalistic analyses of the electoral success of Kirchner's successor, President Fernandez, in the presidential election in 2007, include the consolidation of the Court's membership as one of the key policies that brought support to the Kirchnerist administrations (Levitsky and Murillo 2008).

The New Political Scenario and the Call for an Alternative Theoretical Explanations of Judicial Behaviour in Argentina

In the last section of this chapter I discuss two important aspects. The first one seeks to explicitly account for the reconfiguration of the political context in which the Justices operated vis-à-vis previous Court Justices. I argue here that the circumstances surrounding the crisis of legitimacy and how the reconstitution of the Court's membership had occurred placed the public as a central actor in terms of the relationship between the Court and the government. Second, I discuss how these changes have a significant impact on our theoretical understanding of judicial behaviour at the Supreme Court level in Argentina.

Changes in the Political Landscape in which Judges Operate: The Public as a Central Player in Court-Government relations

The reconfiguration of the political context in which Justices operated vis-à-vis their predecessor is determined by the role the public played in the period under study. The circumstances surrounding the crisis of legitimacy and the Court's membership reform converted the public into a central actor in terms of the relationship between the Court and the government. The Court's affairs were increasingly subject to public exposure and the government relied on the

Court's independence as a source of its own legitimacy. All these developments brought both opportunities and a new set of constraints for the Justices in their attempts to get protection for the Court.

Public attention to the Court's affairs progressively increased from the mid-1990s to the period under study, as discussed in preceding sections of this work. In fact, the significance of the public's attention to the Court is illustrated by the fact that the reform of the Court was included in the presidential electoral campaign by the political alliance that took power in 1999. It was during the crisis in 2001 and 2002 and its immediate post-crisis scenario, that the Court's affairs definitely became a salient issue in the political arena. The Court as an institution was at the centre of the protest. The crisis contributed to the visibility of the court and made it, for the first time, a concern for society at large (Ruibal, 2009: 71). Given the significance of the reforms led by Kirchner, the public then turned to the Court's affairs. Here, it was not the discrediting of the Court which provoked public attention. Rather, it was the institutional response to tackle, at least partially, such discrediting. Later, because the newly appointed Justices were on the bench, public scrutiny of the Court was constant and intense. A wide range of matters related to the Court became salient issues in the public agenda. A specialist on judicial communication (Baumgratz, 2011, 2011a) remarks that media coverage included not only news related to Court rulings, but also the cases that reach its docket, the Court's institutional acts, Justices' public appearances, and any other aspects of both Court and Justices' behaviour that go beyond judicial decisions.⁴⁷ Also, journalists who covered the Court's affairs for *Clarín* and *La Nación* from the end of the 1990s (R1 2010; R2 2010; R3 2010; R4 2010) claim that, compared with previous years, media attention of the Court was even more intense after the appointment of the new Justices. As a result, in their views, the Court's affairs became a regular issue in the news. In addition, they speculated that it was unlikely that this would change in the near future.

⁴⁷ It should be noted that this intense media coverage was probably due to the Court's intense communication policy, as discussed in chapter 3.

Such intense public scrutiny constituted an opportunity for the Justices in two regards. First, as discussed in the previous chapter, using public support as a defensive mechanism requires increasing the visibility of the Court or, in other words, increasing the conditions of transparency. From this perspective, the increasing level of public attention to the Court's affairs constituted an excellent opportunity to build and use such support. One can take such level of public exposure as an auspicious starting point in getting an appropriate level of visibility for the Court. In fact, as I explore in the following chapter, the Justices took advantage of this opportunity by developing a strategic communication policy to build public support. Second, a scenario of intense public attention of public support can reduce the ability of the government to retaliate. Matters relating to the Court became relevant in the public agenda, which made it likely that any attempt to modify the Court's membership would have extensive public repercussions, and might also generate popular backlash against the government. The high level of public repercussion of judicial affairs represents an opportunity for the Justices to engage in judicial decision-making that is compatible with their goal to build public support, particularly if one takes into consideration the following change in the political context.

The Government's use of the Court as a source of legitimacy should be understood also as an opportunity for the Court. This element operates as a constraining factor for the Government's ability to retaliate. As discussed earlier in this chapter, during the first Kirchnerist administration, the President showed himself to be one who respects the Court's independence. In fact, he implemented a series of measures to further this image. When President Fernandez took power in 2007, the reform of the Court was still praised as one of the main achievements of the previous government and the party in power. Under these conditions, assuming that part of the popular support for the Government arises from this policy, it seems implausible that it would reverse in altering the composition of the Court. Several interviewees during the author's fieldwork including ONG's leaders (CSL1 2010; CSL5 2010; CSL6 2010; CSL7 2010), legal practitioners (LP2 2010; LP3 2010), legal scholars (LS1 2010; LS2 2010; LS3 2010) and journalists (R3 2010; R4 2010; R5

2010) agreed on the fact that this situation shielded the Court from attacks aimed at modifying its membership. A leader of an NGO devoted to monitoring the Court's work (CSL7 2010) argued:

'The Justices were clever enough to take advantage of the political context, particularly during Kirchner's term. They knew that it was unlikely that the government would interrupt their tenure.'

Conversely, these developments brought constraints to the Justices' attempts to get protection. The first one is constituted by the fact that they faced a new range of retaliations. One might argue that the developments leading to the consolidation of the Court's membership can be taken as a response to a lack of a culture of judicial independence. However, my counterargument is that they only amounted to reducing the Government's ability to affect the Court. As a consequence, these developments did not eliminate the risk of retaliation completely. The still existent lack of a culture of judicial independence can be inferred from empirical developments. First, no reform in the direction of reducing partisan control over Court Justices' tenure was passed. On the contrary, the Government's powers to impeach Court Justices remained intact over the period under study. Indeed, Kirchner used them to provoke the vacancies necessary to reconfigure the Court's membership. This suggests, at least speculatively, that the Government wanted to retain this power. Second, although there were several grounds to impeach Court Justices belonging to the *automatic majority*, their impeachments were at least in part based on the content of judicial decisions rather than some other kind of misconduct or malfeasance. Presenting these kind of charges is highly controversial. As Brinks (*Ibid*: 610) notes, these impeachments are yet another assertion of political control over the justices and the content of their decisions. In this vein, several legal scholars interviewed during the author's fieldwork (LP1 2010; LP2 2010; LP3 2010; LP4 2010) stressed that the grounds on which these impeachments were based might have breached constitutional principles. Notwithstanding, the controversial nature of the impeachment charges passed almost unnoticed in the public realm. Additionally, the lack of a culture of judicial independence was still a feature of the political setting. In such a context other, subtler, forms of

retaliation are at hand. In fact, rulings on non-compliance⁴⁸ and public street demonstrations⁴⁹ occurred during the period under study.

A second constraint arises from the new political scenario. As showed above, the Justice still face incentives to engage in strategic deferential decision-making given the existent lack of a culture of judicial independence. However, their ability is restricted by the increasing level of public scrutiny and their attempt to build public support. One can argue that for most of Court's history the Justices were free to engage in strategic deferential behaviour. This was facilitated by the fact that such behaviour had no other consequence than granting them some level of protection. This was the pattern until the public mobilised against the Court and triggered the membership reform process undertaken by Kirchner. But now strategic deferential behaviour is costly for the Justices, particularly as it can potentially undermine their attempt to build support. As a consequence, the decision to engage in deferential strategic behaviour is constrained by the fact that it could be negatively received by the public.

A Call for a New Theoretical Accounts Explaining Judicial Behaviour in Argentina

The reconfiguration of the political context in which Justices are embedded calls for a new theoretical account of judicial behaviour. Authors such Helmke (*Ibid*), Herrero (*Ibid*) and Iaryczowe *et al* (2002) adapted standard rational choice accounts to cases characterised by the lack of a culture of judicial independence. However insightful these work are, they were designed to explain judicial behaviour in contexts different to the one in which the present study focuses. As a result, these theories face serious limitations in terms of explaining the Justices' behaviour in the period under study.

Before accounting for the context in which these works were effectively applied, a quick summary of their findings is at hand. These works represented a significant contribution to the understanding of judicial behaviour in Argentina as they revealed the strategic pattern of judicial behaviour at the Supreme Court level. In fact, they arrived at similar and complementary

⁴⁸For examples of this type of retaliation, see the discussion of the *Badaro I* decision in chapter 7; and, of the *Badaro II* and *SosaIV* decisions on in chapter six.

⁴⁹See discussion of the Thomas decision in chapter five accounting for this type of demonstrations.

conclusions. In general terms, they found that the Court Justices did not rule against the government's core interests to avoid political conflicts when the government had control of the Congress. Consequently, they found that political fragmentation is the most effective protective mechanism for Justices.

Iaryczower *et al* (*Ibid*: 700) sought to determine the behavioural factors that contributed to the probability of a Supreme Court justice voting for or against the constitutionality of national norms⁵⁰. Analysing important Court cases from 1935 to 1998, they found that the probability of voting against the government falls as the control of the president over the Congress grows stronger, and in particular, as he or she acquires the ability to increase Court size or successfully start impeachment procedures against Justices. Using the Court's vote as a unit of analysis, a 13 percent increase in the probability of a decision in favour of the constitutional norm is observable when executives have a sufficient majority to change the Court's size. A 23 percent increase in this probability occurs when governments have a majority sufficient to impeach sitting justices (Iaryczower *et al*, *ibid*: 711). Findings using individual justices as the unit of analysis show developments in the same direction (*Ibid*: 711). Additionally, the authors observed that the longer the time remaining for a change in the political orientation of the President, the higher the probability of a pro-constitutionality decision (*Ibid*).

Helmke (*Ibid*) shed light on another question. She was interested to know why the Court Justices ruled against the incumbent government on several occasions. She tests the thesis of *strategic defection*. This theory proposes that when the main threat emerges from a future government, justices might face incentives to rule against the current government although they share the current government's preferences. It should be noted that under this light, the capacity of current and future governments to threaten justices is inversely related. When threat from opposition is credible, the incumbent government is unable to keep their Justices loyal. Therefore,

⁵⁰ They looked at 1,646 legal cases. To distinguish between important and unimportant cases, the data-set includes only those cases: a) that involve the constitutionality of government norms, including laws, presidential decrees, and administrative resolutions; b) in which the Court decided for or against the constitutionality of the challenged norm; and c) that were published *in extenso* in *La Ley*, the most important Argentine legal journal.

a reverse political cycle occurs in which Justices strategically defect when the current government start losing power. Helmke applied her *strategic defection* model of judicial behaviour to four Argentine governments, the last military dictatorship (1976-83), Alfonsín's presidency (1983-89) and Menem's two successive administrations (1989-1995 and 1995-99).⁵¹ In agreement with Iaryczower *et al*'s findings, Helmke's statistical results revealed relevant patterns of changes in Court decisions at the end of each government. She (*Ibid*: 156) found that in three of the four governments under study, Court Justices increasingly ruled against the current government as soon as opposition power grew; and that when the incumbent government remained strong, Court Justices increasingly backed up the government. She also found that patterns of change are more apparent in the most politically-relevant cases.

Finally, Herrero (*Ibid*) investigated the factors accounting for Court Justices' cooperation with executives in highly sensitive cases during the administration of several presidents between 1983 and 2005. Unlike Iaryczower *et al* and Helmke, Herrero developed qualitative research focusing on a few salient cases. By salient cases the author means 'cases dealing with the executive's high-priority policy preferences, those ones in which an antigovernment ruling can severely hinder the president's political priorities' (Herrero: 38, *Ibid*). His main findings suggest that the Court consistently avoided obstructing the government's policy preferences due to strategic considerations. The author claims that the permanent attacks that the Court suffered since Perón provoked risk-averse behaviour from the Court Justices. He found that this behaviour was observed between 1983 and 2005 in highly sensitive cases on three key policies issues: human rights, pensions, and economic emergency. Systematically, all politically-sensitive cases related to these issues that reached the Court received pro-government treatment (Herrero, *Ibid*: 324). In some exceptional circumstances, the Court postponed the treatment of cases for many years, thus avoiding conflicts with the incumbent government while at the same time waiting for a regime change (Herrero, *Ibid*: 325).

⁵¹ She analysed over 11,000 justices' individual decisions in cases involving either the government in power as a party or presidential decree involving the government in power when the decision was made.

Rooted in the fragmentation of power hypothesis, all these theories were designed to explain judicial behaviour in particular contexts. First, they are meant to be applied to cases in which the government's ability to retaliate was expected to be constrained only by the power of other institutional actors. For example, when discussing the dynamics of Court-Executive relations her model aims to capture, Helmke (*Ibid*: 37) accounts for the number of political actors who must agree to sanction judges. In this account, she concentrates on the distribution of power among political actors and parties. In reference to this point, she (*Ibid*: 169) in fact acknowledges that her model 'was agnostic about whether politicians' costs are due to public backlash, congressional disapproval or difficulties in selecting new judges.' Further, she (*Ibid*: 46) proposes that constraints to the government's capacity to retaliate can arise from outside the formal distribution of powers, particularly in reference to public reactions to political sanctions. However, she points out that such capacity to retaliate is possible in situations where judges have greater legitimacy, which is not the case under study. In the same vein, Herrero (*Ibid*: 53-56) and Iaryczower *et al* (*Ibid*: 701) build their models including only three basic players: Justices, the President, and Congress. These theories exclusively focusing on constraints arising from the formal distribution of power were not groundless. This chapter briefly showed that *de facto* and democratic presidents faced no constraints external to the formal political arena.

Second, these theories were thought to explain judicial behaviour when judges face the most extreme forms of retaliations, interruption of life tenure and court-packing plans. For instance, Helmke (*Ibid*: 27-40) modifies the standard strategic account of judicial behaviour applied in the U.S., incorporating, among other aspects, interruption of life tenure as the main threats judges face. This was followed by Herrero (*Ibid*: 47-57) and Iaryczower *et al* (700-701). In the latter case, they (*Ibid*: 705) explained that the two 'dangers' faced by justices in Argentina were court enlargement and impeachment, which require a supermajority in both chambers. Again, the application of these models to the Argentine case is empirically warranted. As I explained in this chapter, Court Justices were subject to these types of retaliation along the recent history of the Court.

Notwithstanding the value of these works, the context in which the Justices operated has changed. As already mentioned, the public became a central actor in Court-Executive relations. Particularly, it seems to play an important role in constraining the ability of the government to sanction judges, as discussed above. In this regard, the government's capacity to launch political attacks against courts is not only limited by the distribution of power among institutional actors. Connected with this, the new constraints that governments face to sanction Justices do not mean that one should discard retaliation at all from the political scenario. On the contrary, it means that new forms of retaliation might arise in new contexts, as I also discussed above. Additionally, in relation to Helmke's theory, the current study covered two successive administrations of the same political sign and Fernández's electoral victory was largely predicted (Levitsky and Murillo, 2008: 1). However, the Justices did rule against Kirchner's administration several times in cases of contemporary salience even before the presidential election and ruled in favour of the government in only one relevant case that year, as discussed in chapter four. As a result, new theoretical approaches, such as the one I propose in this thesis, are necessary to explain judicial behaviour. Such theoretical accounts should take into consideration the new role the public plays in Court-Executive relations, the government's limited ability to retaliate, and the Justices' apparent willingness not to defect.

Conclusion

In this chapter I mapped the main aspects of the political context in which the Justices operated in the period under study. I showed that the lack of a culture of judicial independence and the low level of public confidence in the Court, together with a high level of public scrutiny marked the political scenario inherited by the Justices in 2004. In doing so, I demonstrated that the Argentine case represents an excellent opportunity to test the hypotheses put forward in this work.

The lack of a culture of judicial independence, I showed, can be inferred from the Executives' regular attempts to subordinate the Court. In fact the Argentine political system is marked by a gap between formal institutions and real political practices. Incumbent and incoming governments regularly appointed loyal Justices and sanctioned disobedient Justices when necessary

since 1946. Meanwhile, suffering from low levels of public confidence, the Court was criticised for its partisanship, lack of transparency, and failure to protect individual rights. These negative views were aggravated during the 1990s which provoked a profound crisis of legitimacy during the country's crisis and its aftermath. Then the Court was publicly regarded as one of those responsible for the country's downfall. Parallel to these developments, public scrutiny of the Justices' behaviour has increased over the years. In fact, the Court's matters became one of the salient issues of Argentine politics in the years before the consolidation of a new membership between 2003 and 2005. Although such matters seem to have been irrelevant in the public debate in prior decades, the situation changed during the 1990s, when the popular discredit of the Supreme Court increasingly gained the public agenda. From then, the Court was at the heart of the public scene, subject as it was to extended criticism during the country's crisis in 2001 and 2002, and its aftermath. As a result, the Court's affairs were no longer going unnoticed by the public, but were subject to an intense and constant public scrutiny during periods of crisis.

In light of these developments, I discussed two matters in the last section of this chapter. First I explicitly accounted for the reconfiguration of the political context in which the Justices operated vis-à-vis previous Court Justices. I argued that the circumstances surrounding the crisis of legitimacy and the reconstitution of the Court's membership contributed to making the public a central actor in terms of mediating the relationship between the Court and the Government. This new role for the public is a consequence of both the increasing level of public scrutiny of the Court, and the Government's use of the Court in securing claims of its own legitimacy. These developments represented new opportunities and constraints for the Justices. Second, I explained why previous theories accounting for judicial behaviour at the Court's level turned out to be inapplicable in light of the reconfiguration of the political context. Grounded in the fragmentation of power hypothesis, these theories were designed to explain judicial behaviour in contexts in which the government's ability to retaliate was likely to be constrained by institutional actors, such as political parties. Also, these theories sought to explain judges' strategic calculations as reactions to the threats of life tenure interruptions and court-packing plans, the most severe types of

retaliations. However, the reconfiguration of the political context in which Justices are embedded reveals the Government's capacity to sanction as being constrained by the public, including other modes of retaliation that are at hand in the current period under study.

Chapter 3 –A Strategy to Build Diffuse Support

Introduction

The theory I put forward in this work relies on the assumption that judges seek to protect their court and that the achievement of such a goal determines the level of aggression in their decisions. Particularly, I propose that judges will attempt to both construct public support and avoid political conflicts with the government. In terms of public support, I propose that the judges will both shape and calculate opinion leaders' reactions to their rulings. Notwithstanding the theoretical power of these propositions it is worth questioning whether there is any empirical evidence that the Justices were indeed preoccupied with protecting the Court, whether they saw public support as a protective mechanism, and, if so, whether they had some idea of how public support can be put to work as such a mechanism. This is particularly relevant given that the proposition that judges are preoccupied with public support in Latin America has been scarcely tested. In this chapter I support the claim that the Justices did care about public support and attempted to shape opinion leader's view on the Court. This claim increases the soundness of the causal hypotheses I test in following chapters.

Preliminary evidence suggests that the Justices were indeed preoccupied with the institutional security of the Court. One of the Justices, in an interview I conducted, (J2 2010) remarked that when courts play a politically relevant role in solving social and political conflicts, they are exposed to pressures from different sectors, including government and other powerful political actors. In such contexts, public support for courts, he claimed, is crucial for protecting such courts. Another Justice interviewed by the author (J1 2010) claimed that '*Popular support is vital to protecting the Court from potential attacks from other political actors and agencies.*' In the same vein, Chief Justice Lorenzetti (LaNacion 2007) affirmed in a public interview that a strong Court depends on popular support and that it is the people who must defend it from political attacks.

Initial evidence also suggests that the Justices perceived public support as a defensive mechanism. The Justices, however, did not take popular support for granted. They were aware of the high level of mistrust surrounding the Court. As already explained, the Court went through its deepest crisis of legitimacy between 2001 and 2002, when it was regarded as one of the agencies co-responsible for the political and economic collapse of the country. The Justices were conscious of these developments. In interviews with the author, they recognised that the Court was highly distrusted by the public. One of the Justices (J3 2010) sustained that the discredit was so deep that it spread to the whole Judiciary. Similarly, another Justice (J2 2010) argued that a sign of the magnitude of discredit was indicated by the fact that negative views on the performance of the Court came from a wide range of spheres, including the political sphere, the academic sphere, the business, the Church, the Bar, and social movements. Also, three Justices (J1, J2, and J3 2010) remarked that these negative views were exacerbated during the 1990s, although they were cautious about asserting that all the allegations against the Justices at the time were true.

Justices' own declarations are a valuable resource when it comes to ascertaining their views on this matter. However, this initial evidence is not necessarily conclusive on whether the Justices actually attempted to build public support. In that line, I discuss here empirical findings from which such an attempt can be inferred. Particularly, I show that the Justices sought to create the necessary conditions to put popular support to work. First, in relation to the condition of legitimacy or diffuse support, I present information suggesting that the Justices attempted to build public support by presenting the Court as a transparent, independent and activist agency in order to attract diffuse support. Second, the Justices developed a twofold strategy aimed at increasing the visibility of the Court and to influence opinion leaders' views of the Court. For these purposes, they used the media strategically, attempted to control the quality and quantity of media coverage, and approached relevant opinion leaders through public relations activities. These extremes suggest the Justices were aware that the logics and dynamics of public support could be used as a defensive mechanism for the courts.

Furthermore, the evidence I present here suggests that the political circumstances in which Justices operate is crucial for understanding their motivations. As explained in chapter one, I treat judges' attitudes and behaviours as constituted and embedded in broader institutional and political settings. Here I show that the Justices were aware of the Court's lack of legitimacy and that the images they put forward to gain diffuse support represented an attempt to reverse this situation. In addition, I discuss how the Justices' strategic use of the media sought to capitalise on a high level of public scrutiny. In this regard, the Justices' preoccupations with building public support and the way they attempt to do so should be understood as a response to the context in which they operate.

The discussion proceeds as follows. First, I discuss Justices' attempts to build diffuse support. I show that they presented the Court as a transparent, independent, and proactive institution. I also present evidence that these images successfully resulted in an increase in public support. Second, I discuss how the Justices attempted to strategically increase the transparency of the Court's work and shape opinion leaders' view on the Court. I show that they used the media strategically, attempted to control media coverage, and approached opinion leaders to effectively communicate the new image to the public. I conclude the chapter by highlighting the key findings discussed here and summarising my argument and discussing some elements with important theoretical implications for our understanding of how judges build public support.

Building Diffuse Support: Changing the Court's Image

The first condition for putting public support to work is that courts must enjoy sufficient legitimacy, as discussed in chapter one. Legitimacy, I discussed previously, is conceptualised as diffuse public support or a deep commitment to the institutional integrity of the Judiciary. The core idea here is that the public supports a court even when it hands down unpopular rulings. In that regard, diffuse support differs from specific support, as the former is a function of the public's view on particular rulings. Distinguishing between the two types of support is crucial for Justices in need of public support. This is especially the case because general positive sentiment towards a court depends on how a court is presented to the public and how the public perceives that image.

The Justices seems to have at least an elemental understanding of this distinction. Particularly, the evidence suggests that they are aware of the nature of legitimacy and their effort should be channelled to create a positive sentiment for the Court's work in general. For example, a Justice (J2 2010) claimed that public support would occur only when people love the Court, but this does not mean, she warned, that the Court must please the majority of society in its decisions. This could only happen if people realise how valuable the work of the Court is. As such, the Justices sought to build public support by presenting the Court to the public as a transparent, independent and proactive agency. This presentation was aimed at reversing public perceptions leading to the crisis of legitimacy, and indeed it brought positive results for the Justices' strategy to rebuild public support, as I discuss below.

Before discussing these extremes in detail, it is worth remarking on the potential theoretical implications of my findings in relation to diffuse support. The literature has traditionally regarded diffuse support as a function of the image of courts' impartiality, as discussed in chapter one. However, I show in this section that there is still inconclusive evidence suggesting that such support might not necessarily arise from public perceptions in this regard. Sometimes, as the present case tentatively suggests, diffuse support is also a function of the image of courts reflecting other features. In this sense, the evidence I discuss below enhances our understanding of how judges build diffuse support in situations marked by low levels of public confidence, as I discuss later in the conclusion of this chapter.

Transparency

The Justices presented the Court to society as a transparent institution. In order to do this, they strongly publicised a new policy of reform enhancing internal transparency. Under this policy, implemented subsequently and incrementally by Chief Justices Fayt, Petracchi and Lorenzetti, transparency is understood in the sense that the Court's internal work and the judicial process is open to public scrutiny. This image responded to some of the main criticisms leveled at the Court by society in general, as described in chapter two . It was largely claimed that the Court's institutional procedures permitted secrecy and opacity of the internal work of the Court.

Particularly during the 1990s, this facilitated both the Court's engagement in corrupt practices and collusion, while also freeing the Justices to unlawfully rule in favour of incumbent governments, corporations, Justices' relatives and former law firms' partners (Asociación por los Derechos Civiles *et al*, *ibid*).⁵²

In an attempt to reverse this negative view, the Justices implemented a transparency policy. First, Chief Justice Petracchi implemented a series of reforms with the aim to make transparent different aspects of the Court's workings. These reforms included, first, the publicity of different aspects of the Court's decision-making processes, such as the internal case-file circulation (Corte-Suprema 2003);⁵³ the inclusion of the legal representatives' names of each party in all the judgments (Corte-Suprema 2004); the prohibition of Justices' interviews with one of the parties (Corte-Suprema 2004a); and the regulation of public hearings which involved formalising a practice already developed by the Court since 2004 (Suprema 2007).⁵⁴ Second, the Justices made public the way they manage their own economic, administrative, and human resources; they allowed public audits of its finances;⁵⁵ and they made public a wide range of aspects related to their budget expenditures. Also, they regulated their duty to elaborate and publicise their financial asset declarations when requested by any citizen (Corte-Suprema 2005).⁵⁶ Thirdly, they made the content of their rulings both public and accessible (Corte-Suprema 2004b).⁵⁷ In addition, periodical quantitative reports and annual qualitative reports summarising the most relevant cases decided

⁵² For example, it was suggested that the non-public character of the internal cases-file circulation permitted Justices to either delay or speed up their decisions arbitrarily (Asociación por los Derechos Civiles, *et al* 2002). Moreover, it was also claimed that both the fact that legal representatives' names were printed in rulings and that Justices held private meetings with just one party's legal representatives permitted the Court to unlawfully benefit some practitioners (ADC *et al*, *Ibid*).

⁵³ The Court's decision-making process involves the circulation of case-files through 'Jurisdictional' Secretaries and Justices' offices until a majority is reached. Specifically, the Court decision-making process starts when the Court Main Desk sends a file-case to one of the 'Jurisdictional' Secretaries (these secretaries are organised according to six thematic areas) that secretary attaches a report to the file and sends it to one of the Justices' offices. The first Justice reviewing the case writes a resolution draft that is attached to the file to be circulated among his colleagues who can adhere to that resolution, support that resolution but write his own vote, or disagree with it and write his own arguments. In the case that a majority is not reached, the circulation process is repeated among Justices until majority occurs.

⁵⁴ For media reports on these reforms, see for example Boschi (2004); La Nación (La Nación 2004a; 2006; Pagina 12 2008).

⁵⁵ The Court signed an agreement with the Auditoria General de la Nación (AGN), the national state agency in charge of public audits, according to which the latter would audit Court budget's management yearly. These reports are accessible to any individual through the agency's web page.

⁵⁶ The media was also attentive to this issue (Hauser 2004a; Ventura 2004; Rodríguez 2004).

⁵⁷ For media reports reporting on this topic, see for example (La Nación 2004d).

were published.⁵⁸ Finally, the transparency policy included the publication of different types of reports presented at public events.⁵⁹

The Justices successfully presented this transparency policy in the public realm. Several reporters and NGO leaders agreed (CSL1 2010; CSL7 2010; R1 2010; R2 2010; R3 2010; R4 2010; R5 2010), in field work interviews with the author, that the Justices explicitly wanted to present the Court as transparent and make this image one of its distinctive features. In the public realm, media reports anticipated the Justices' intention to make transparency a distinguishing feature of the new Court. For example, Silvina Boschi (2004a), in reference to the Chief Justice of that time, wrote in *Clarín*:

'Petracchi is working hard to leave his a mark on his term [as Chief Justice]; and proposed several measures to streamline the functioning of the Court and increase the transparency of its procedures [.]'

As expected, the presentation of this image had a positive impact on building diffuse support. The different reforms and practices mentioned above were subject to intense media coverage. They were mentioned altogether 277 times in all three newspapers between 2003 and 2010. This suggests that the Justices were able to extensively communicate to society that they had changed the internal procedures and workings of the Court, communication which is essential to shaping public perceptions.

⁵⁸ Statistical reports are published every six months on the Court's web page and are accessible to anyone. They include the number of cases that reached the Court, distinguishing them by type of subject and the number of cases decided. They also report patterns of judicial decisions showing frequencies of majority formation, individual votes, individual Justices' disagreements and abstentions. The statistics published until 2008 by the Court also include a report of number of cases the Court rejected to review. These reports distinguish rejected cases according to the type arguments supported by Court.

⁵⁹ Although it can be said this practice was initiated by Chief Justice Petracchi when he gave an end-of-the-term report to a civil society organization in 2006. It was expanded and consolidated under Chief Justice Lorezenti's leadership. In 2008 he reinstalled the "Judicial Year Opening" which was suspended for fifty-three years. At the very beginning of the calendar year the Chief Justice presents publicly the work plan of the Court, mentioning the issues covered by the cases that will be decided over the course of the year. As part of the same policy, since 2009 the Justices also reported what Chief Justice Lorenzetti calls "state policies of the Court", which are not strictly related to either of the cases decided by the Court or financial issues (Corte-Suprema 2010). For example, the *2010 Presidency Report* includes issues such as the Court's communication policy, management policies, and the performance of offices within the structure of the Court, among others.

Most importantly, the Justices succeeded in making the Court seem a transparent agency. This can be inferred from a number of newspaper articles reporting opinion leaders' views on the Court's transparency reforms. Individually, each reform was publicly welcomed. For example, *La Nación* (LaNacion 2004b) reported in relation to the external audits that:

'It is a very positive step and should be valued as a good step on the path of maximum transparency that should characterise the judicial branch.'

The same newspaper (LaNacion 2007) praised as a very positive development the disclosure of Justices' assets:

'This decision is an important and significant step for the transparency of the Republic and an example for a lower-court judge.'

In the same line, but related to the publication of management issues, a journalist from *Página 12* (Hauser 2004a) argued:

'The Court began to change its old habit of failing to account its work when it decided to make public several aspects of the ways it manages its own budget on its website.'

Commenting on the implementation of public hearings, she also (Hauser 2007) asserted that:

'Until not long ago, the secret was one of the rules of coexistence and survival in the Supreme Court. It is one of the vices, in fact, that the court in its new form has been trying to banish, or so it seems. In this direction, the Justices have agreed on a permanent system of public hearings for cases of high importance.'

Similarly, the transparent policy in general was also largely praised as a positive development. It was perceived as breaking with the culture of judicial secrecy, which had dominated the Court's workings in previous years.⁶⁰ For example, in early analyses, the three newspapers recognised that the new reforms were a step forward towards reversing the old practices of furthering secrecy and facilitating corruption. Later, in evaluating the performance of Justice Petracchi as Chief Justice by the end of his term in 2006, media reports highlighted that this policy, among other aspects, permitted the Court to change its profile towards society and to differentiate itself from the corruption and obscure years of the Court in the 1990s (Verbitsky

⁶⁰ In fact, only, the procedure for the disclosure of Justices' assets received partial negative reports given its complexity (LaNacion 2005).

2006; Clarin 2006). In the same line, Petracchi's leadership in advancing this policy was publicly recognised, and his term was perceived as strongly linked to the construction of a transparent Court (Clarin 2006; Verbitsky 2006). Furthermore, media reports remarked that a new era seemed to have been initiated in which the Court had become a transparent institution. By 2010 the journalist Hauser (Hauser 2010) suggested that this image had already been consolidated and became one of its distinctive features.

This perception of the Court's image of transparency was confirmed by some leaders of NGOs and by legal scholars.⁶¹ For example, Hauser (Hauser 2004) collected opinions of many of them in articles published by *Página12*. For example, Andrea Pochak, co-director of CELS, and Gil Lavedra, a member of Argenjús, analysed the measures implemented at the outset of the reform process and linked them to a potential recovery of the Court's legitimacy. Pochak sustained that:

'In 2004 a renewal of the Court began to be noticed, not only because it changed some of its members, but also by changes in its functioning and its jurisprudence, which helped it to regain legitimacy.'

Similarly, she later remarked that:

'Clearly, there is a process of internal transformation in the Court [...] there have been given numerous measures to make it more transparent and more effective. This makes it more reliable and credible to society.'

Four years later, Carlos Oteiza, quoted by a journalist of *La Nación* (Zommer 2008), president of Fores and later president of ADC, affirmed that:

'It could be affirmed that [the SCJN Justices] opened their offices, breaking a culture of secrecy rather frequent in the judiciary.'

Activism

The Justices also showed the Court to be an activist agency. The activist profile of the Court, the evidence suggest, was constituted by two extremes: the development of a working

⁶¹Despite these positive insights, social activists have also raised some concerns regarding how the Court has implemented some of these reforms. For example, officials of some of these organizations (CSL1 2010; CSL2 2010; CSL3 2010) regretted that the Court has hardly both called for amicus curiae briefs and implemented public hearings between 2008 and 2010. Among the many reasons that might account for this, they suggested the potential strategic use of these mechanisms. They claimed that it might be possible that the Court, having already gained a high level of legitimacy, has less interest in implementing them. It should be noted that although these criticisms were raised by interviewees in private, they have not been exposed in the public domain by social leaders and academics.

agenda mindful of social concerns as well as the enhancement of human rights protection. Here, the activist image is understood as judges' ability to use the law to transform society. This image, Helmke (2005: 31) sustains, is increasingly accepted in Latin American legal scholarship. In that regard, the term activism is empirically-defined and not connected with the normative discussion referring to whether judges depart or not from legal interpretation. In this regard, the activist image can be understood as the Justices' response to one of the main criticisms leading to the Court's crisis of legitimacy. As discussed in chapter two, the Court was largely criticised for its conservative jurisprudence and narrow view of human rights protection.⁶²

In relation to the first aspect, the Justices sought to present the Court's working agenda as a built-in response to social concerns. Relevant actors highlighted this presentation in my interviews with them during fieldwork. Some ONGs leaders (CSL1 2010; CLS 2 2010; CLS4 2010) agreed on the fact that the Justices' were particularly concerned in presenting the Court as driven by social demands in the public domain. For example, two journalists (R1 2010; R5 2010) revealed some details of the way they attempted to do so. They described the following regular practice aimed to limit the public diffusion of decisions that might contradict this image. When the Justices issue a decision that might not enhance its proactive profile, the Justices issue another simultaneous ruling that does. Then, the Justices widely publicise the second decision through different channels while they limit the visibility of the first one. In addition, the Justices selectively choose decisions with social impact to discuss in regular encounters with journalists. In the view of the mentioned journalists view, the Justices struggle to demonstrate that they rendered decisions aimed at producing positive social changes.

In fact, the Justices overtly acknowledged the importance of this image for their attempts to reconstitute legitimacy. In interviews with the author, assessing how the Court was perceived by society, a Justice (J2 2010) maintained:

⁶²In chapter two, see section entitled *Low Levels of Public Confidence in the Court and Increasing Public Exposure*.

'I believe that this Court will be part of the history of the Argentine judiciary, if not the history of the country [...] because it is an active Court and preoccupied with social issues.'

The activist image also included a strong component related to the firm protection of human rights. Different actors also confirmed this aspect in interviews with the author during fieldwork. For example, a top leader of one of the main human right organisations in Argentina (CSL5 2010) speculates that the Court decided to reconstruct its own legitimacy defending the rights of disadvantaged people against the wrongdoing of state agencies and big corporations.

Indeed, in an early analysis of the new profile of the Court, Wainfield (2005) cites an off-the-record declaration of one of new Justices:

'[The human rights matter] is fertile ground to draw a new portrait of the Court. We are forming something "like" an ideology of the Court. An emerging common thought, linked to a dynamic view of human rights. Rights of excluded and discriminated sectors of society are being recognised and protected discriminated sectors neglected. For example, this is the case of a retiree who was punished by neoliberal policies and the previous jurisprudence of the Court.'

Another indicator of the relevance of this image for the new Court profile is the fact that showing the Court as an activist was a regular matter in Justices' public appearances. For example, Chief Justice Lorenzetti in an interview to a journalist of LaNación (Ventura 2005) argued that the way the Court would fix its own wrongdoings was by furthering the protection of people's individual rights. Concordantly, in response to a journalist asking how the Justice would achieve the goal of bringing the Court closer to the people, Justice Zaffaroni stated that the Court would keep its explicit focus on individual and collective rights (Hauser 2006). Similarly, in announcing the agenda of the Court for each year, Chief Justice Lorenzetti regularly anticipated that a dominant issue would be the protection of human rights provoked by state institutional deficits (Pagina12 2010).

The evidence also suggests that Justices succeeded in shaping public views in this area. Indeed, reports and analyses in the three main newspapers regularly highlighted the Court's commitment to producing positive changes on socially-relevant issues. In particular, in the first years of the period under study, the Court was referred to as an agency devoted to restoring the

damages and inequalities provoked by neoliberal policies that were implemented during the 1990s in Argentina. For example, the journalist Alfredo Zaiat (2004) highlighted:

'That a series of Court rulings with an impact on the economy advanced in the inescapable task of repairing the blunders of the 90s [...] These rulings propose to society an urgent cultural debate on the substantive meaning of the Constitution, its values and commitment to universal social human rights.'

In the same vein, the influential journalist Wainfield (2006) argued that:

'Several decisions built a coherent beam of restorative work which is related to severe violations of rights among broad sectors of the population during the 90s.'

More recently, the Court has been portrayed as having consolidated an apparent commitment to social matters. In evaluating the transition between Justices Petracchi and Lorenzetti as Court Chief Justices, Verbistky (2006) affirmed that the Court was able to implement judicial policies aimed at both reconstructing democratic institutions and bringing them closer to society in general. For the new stage, the author foresaw that the Court would intensify its attempts to bring itself closer to the people. In the same way but from a different newspaper, Boschi (2007) of *Clarín* evaluated that the election of Justice Lorenzetti as Court Chief Justice would mean the consolidation of the Court's willingness to be more attentive to social demands, a novel development from an historical perspective. Concordantly, a journalist from *Página12* (Pasquini Durán 2007) claimed that one of the main merits of the court is:

'Addressing the rights of citizens as priority issues regardless of their status. Taking the woes of different sectors of society seriously, especially those who come to the Court as the only and last resort to it, instead of looking the other way or waiting for the agenda that is overseen by the political or economic powers, it is an attitude that deserves to be exalted in a country so in need of good examples.'

Following the same line of argument, in an analysis of the Court's performance in 2008, the journalist of the conservative *La Nación*, Zommer (2008), highlighted that the Court consolidated a new profile. The reporter indicated that the Justices showed a clear stand in the direction of the resolution of relevant social matters, which can be observed through both actual rulings and their public statements. In fact, in her article, the author cited several social leaders and academics that agree on the crucial role played by the Court in enhancing human rights protection.

In a similar analysis, Alberto Amato (2009) highlighted that the Court had issued decisions of undeniable social relevance since Justice Lorenzetti was appointed Court Chief Justice.

In particular reference to the second aspect of the activist image, the Court was perceived as an effective guarantor of human rights. In an interview with the author, a journalist covering the Court's matters for the conservative *La Nación* (R3 2010) suggested that the Court's emphatic public endorsement of the protection of human rights had increased its prestige. In addition, Vertbisky (2006) remarked that by 2006 the Court was able to reverse several aspects of the conservative rights jurisprudence developed by the Court itself during the 1990s. In fact, the reporter sustained that the Court had re-established the most protective rights jurisprudence, first established by the Court between 1983 and 1989.

Independence

Finally, the Justices sought to present the Court as independent from the Government. As discussed in the previous chapter, the Court was perceived as partisan by society at large. Thus, the Justices attempted to show that they were not identified with the Government and it did not influence their decisions. As a consequence, in their attempts to build public support, the image of independence was reduced to its relations with the Government. In fact, the leaders of one of the main NGOs in Argentina critically (CC2 2010; CC4 2010; CC5 2010) pointed out that, although the Justices were independent from any sector of society, they were mainly preoccupied with this particular image.

In their engagement with the public, attempts were made to present the Court as independent from government. Journalists from the three newspapers interviewed during the author's fieldwork agreed that this image was a priority for the Justices (R1 2010; R3 2010; R5 2010). One of the journalists (R3 2010) claimed that the Justices wisely read the political landscape and regularly took advantage of each public intervention to show different aspects of their independent work. The journalist claimed that the Justices were aware that the first thing that the public wanted to know is whether the Justices are independent or not. Moreover, two journalists (R1 2010; R5 2010) revealed that the Justices, particularly Chief Justice Lorenzetti,

invested great effort in presenting their decisions as non-influenced by political actors. This is consistent with what one of the Justices remarked when explaining her relationship with the media in an interview with the author. The Justice (J2 2010) explained that they were aware that engaging with the media put their image of independence at risk. This is because, she claimed, journalists tend to assess Justices' performance in terms of whether they are independent from the government or not.

In fact, the Justices were successful at promoting this image. The systematic analysis of newspaper articles carried out for this study, as discussed in the introduction, indicates that the Justices consolidated the image of independence from the Government in the sense proposed above. Three aspects were widely publicised over the years in the public realm. The first aspect is the Justices' ability to set the Government's agenda. As such, many rulings were perceived as indicating that the Justices were willing to bring some issues to the Government's attention and request their immediate solution, as will be discussed in chapter seven. Second, many decisions were reported as showing that Justices' decisions were not bound by the government's position. For example, a journalist from *Página12* (Moreno 2005) published:

'In reforming the Court in 2003, the President has built an exemplary court with Justices whose wisdom nobody dares question. And a salient feature of the new Court is for what society was mobilised in Argentina: independence from the wishes of the executive.'

Similarly, Zommer (2008), from *La Nación*, emphatically remarked:

'The conclusion does not need nuance: this year, the Supreme Court of Justice of the Nation intervened in the political arena as never before since the return of democracy in 1983. It did so through rulings and with appropriate public statements of some of his ministers. And, on several occasions, with decisions out of step with the priorities and desires of the other branches of government.'

Third, several newspaper articles reported the disappointment, and sometimes anger, of the government's top officers with some Justices' decisions. For example, Hauser (2004) wrote for *Página12*:

"Look at the mess that we put together" said a Cabinet member when the Supreme Court declared unconstitutional the work insurance law. The amazement returned to Government House the day the Court suspended the

elections in the Province of Santiago del Estero [proposed by the national government], which triggered a political crisis in the province. These two recent decisions, coupled with a series of decisions on human rights and judicial reform, opened great expectations: Can the Court ultimately be a strong social actor? Will it be stopped working as an appendage of political power? Will it establish itself as an autonomous power?’

In the same vein, an article published by *La Nación* (La Nación 2009) argued that the tension between the Court and the Government was manifestly evident that year. One of the lines of the text reads:

‘The current Supreme Court, which Kirchner displayed as one of his successes after disarming the court linked to Menem, is more critical of the executive branch of what the Presidential couple desired.’

Notwithstanding the extended view of the Court as independent from the Government, some concerns were raised on two particular occasions. In 2004, the Justices handed down rulings in several cases which brought negative views from conservative circles. The decisions, some in favour and other against the government, revolved around human rights, pension rights, and labor rights. The conservative newspaper *La Nación* published a series of articles commenting on these rulings, as will be discussed in chapter five. Although the content of these articles did not affirm that the Justices were not independent, they suggested that an alleged dangerous ideological convergence between the new Justices and the Government might be occurring. Thus, at the very beginning of the new Court’s era, a latent negative view of the independence of the Court was present. The second occasion on which concerns about a lack of independence were present was at the very end of the period under study, although they did not reach the media this time. None of the forty-four individuals interviewed in my fieldwork suggested that the Court was not independent from the ruling government. However, some interviewees, including legal practitioners (LP1 2010; LP2 2010; LP3 2010) and a prominent legal scholar (LS1 2010) expressing strong criticisms against the past and incumbent national governments claimed that the Court would pass the test of ‘true’ independence only when it ruled against crucial interests of the ruling government. Concordantly, some NGO leaders (CSL1 2010; CSL3 2010) declared that the Court would be truly independent only when it ‘hits’ the government and predicted that if that does not happen, public support obtained by the Court would vanish.

The evidence presented here shows that the Justices successfully presented images widely welcomed by the public. As discussed previously, building diffuse support requires the judges to appear capable of making the public provide the courts with legitimacy. From the evidence discussed here it can be inferred that the Justices attempted to build public support by showing the Court as transparent, activist, and independent. This image was clearly welcomed by the public as several newspaper articles describe. As a result, I can conclude that the Justices were able to generate legitimacy, essential to putting public support to work. This, in turn, reinforces the preliminary evidence suggesting that Justices saw popular support as a defensive mechanism and were willing to build it.

Increasing the Court's visibility

A second condition for the effective use of public support as an enforcement mechanism is transparency (Staton, *ibid*; Vanberg, *ibid*). People must be sufficiently informed about the work of courts in order to identify and deter potential noncompliance. From this it follows that transparency is also crucial for judges building support from scratch, as in Argentina. Judges need to make widely public the images they are advancing in order to build legitimacy. In fact, the Justices were aware of this. In interviews with the author, three Justices (J1 2010; J2 2010; J3 2010) explicitly pointed out that the Court's reputation would increase when their work was publicly known; and they were working in that direction. In the same vein, the Chief Justice (LaNacion 2007) reaffirmed this in a public declaration:

'Throughout our history, the judiciary has been attacked many times and none of us stood up against this. This is because we did not find it interesting or important. The first task is to make the population see that the judiciary is important and must be defended. We [the Justices] are willing to do so.'

How can judges make their work effectively known by the people? Media attention and opinion leadership can be a solution for this. As discussed in chapter one, the mass media is regarded as the primary means by which the public learns about political events, and the views expressed in the media are heavily shaped by opinion leaders. However, Staton (*ibid*: 26) warns that media attention presents a distinct problem of its own. Most reporters are not trained in legal

and judicial matters and, thus, might misreport judicial happenings. Similarly, relying on opinion leaders might also be problematic for Justices in a context where judges wish to present to society a radical change in the Court's public profile. Opinion leaders might not be fully aware of these changes and the motivations behind them. In the same line, when rendering unpopular decisions, Justices might want to cushion their negative impacts in public reactions by either diminishing their visibility or, on the contrary, by increasing it by insistently explaining to society the arguments behind such decisions. Additionally, in a context characterised by a lack of a culture of judicial independence, Justices might face incentives to be deferent to the Government, which can certainly be perceived negatively by the public. In all these cases judges might want not only to increase the visibility of their work but also to shape the views of opinion leaders on judicial issues and, thus, to exert some control over the type and content of information covered by the media. As a result, building public support is a rather delicate endeavour for judges, particularly if they rely on media attention to gain it, because in those instances they might have to gain some control over the media coverage in order to successfully communicate with the public.

As such, I discuss evidence suggesting two important developments in this section of the thesis. First, I demonstrate that the Justices were aware of the need to generate conditions of transparency through the use of the media. And second, I show that the Justices attempted to control the type and content of information to be covered by the media as a means of influencing opinion leaders' reactions to their decisions. For these purposes, the Justices attempted to strategically use the media, exert some control over media coverage, and build public relations with opinion leaders. All of these developments constituted what I call a "*strategic communication policy*", which explains, at least partially, the Justices' success in promoting the images of transparency, independence, and activism.

In doing so, the Justices deliberately sought to take advantage of the political context. As discussed in chapter two, the work of the Court was highly exposed to the public in its recent history. Court-related issues were on the media radar long before its current membership was partially changed. As discussed before, the perceived dependent character of the Court during the

1990s, public mobilisation against the Court during and after the 2001 crisis, and the impeachment processes, resignations, and appointment of former Justices in 2003 and 2004 made the court subject to extensive media coverage. Subsequently, the new composition of the Court generated high expectations in society in general, and, thus, media attention of its behaviour was an unavoidable fact for the new Justices.⁶³ Rather than fighting against this development, the evidence suggests that the Justices saw this context as an opportunity to favour their own institutional interests by channelling media attention to particular developments and messages.

The Justices' efforts to increase transparency incrementally occurred in two stages. In the first one, in which Justice Petracchi was appointed Chief Justice between November 2003 and November 2006, there was no communication policy as such. Actually, as Chief Justice, Petracchi endorsed the principle that judges must speak only through their rulings.⁶⁴ Notwithstanding his position, the other Justices engaged regularly with the media, referring to diverse aspects of the Court's workings, including rulings, reforms of internal procedures, and controversies with the national Executive (LaNacion 2004; Clarin 2005; Pagina12 2005; Veiras 2005). Nonetheless, there were some agreements on what the different aspects of the communication policy would be. For example, the Justices attempted to control the flow of information available to the media, achieve some degree of institutionalisation of their relations with journalists, and initiated public relations with professional associations of journalists.⁶⁵ In the second stage since November 2006, in which Justice Lorenzetti was appointed and re-appointed Chief Justice, the communication policy was incrementally shaped. Justices managed to control the flow of information reaching media, maintain and consolidate public relations with media, and developed effective institutional

⁶³ This attention had not diminished over the time. As Baumgratz (2011), a specialist in judicial communication remarks, media coverage had included Court's judicial behaviour, cases that reach its docket and actual judicial decisions, and the Court's and Justices' non-judicial behaviour, including institutional acts, Justices' public appearances, and issues related to private life, among others.

⁶⁴ After several Justices responded to criticisms against the Court addressed by government officers, Chief Justice Petracchi requested that their colleagues avoid making comments on the issues and reminded them that judges must speak through their decisions (Clarin 2005a). Also, the same year in an article reflecting on the role of media in democracy, the Chief Justice made public his endorsement of this principle (Petracchi 2004).

⁶⁵ The Court limited access to the Court House to reporters who were already granted official permission in 2004 (LaNacion 2005a) and attempted to prohibit *off the record* interviews with staff members and Justices in 2005, although this was not implemented (LaNacion 2005b).

communication channels with journalists. Although he expressly denies it, in fieldwork interviews journalists from the three newspapers (R1 2010; R3 2010; R5 2010), two Justices (J2 2010; J3 2010) and some Court Clerks (CC1 2010; CC2 2010; CC3 2010) recognised that the design and implementation of this policy was largely shaped by Chief Justice Lorenzetti.

The strategic use of media to build public support.

The strategic communication policy had as one of its primary goals the presentation of the new image of the Court through the media. The Justices' intention to do so can be inferred from their own words. For example, two Justices (J1 2010; J2 2010) pointed out that this policy allows the Court to make other actors aware of its institutional standing, how valuable its work is, the changes it has incorporated, and the role it plays in the political system. The Justices' predisposition to engage with the media and the value of this engagement was remarked upon by Chief Justice Lorenzetti. In a speech given to the Association of Journalistic Entities of Argentina (ADEPA for the Spanish acronym), he stated that the Court, and judges in general, must communicate their rulings to the public through the media (Clarín 2006). This was later reaffirmed in an interview with the author when a Justice (J1 2010) acknowledged that media is a critical vehicle for Court's communication with the public.

Concordantly, journalists covering judicial affairs agreed on what they regard as the main goal of the Court's communication policy. They explained (R1 2010; R3 2010; R4 2010; R5 2010) that Justices not only wanted to promote the Court's workings but more importantly to communicate how the Court changed its own institutional standing. In this regard, the Justices attempted to use the media strategically in order to effectively communicate the new image of the Court. Different actors have referred to this new image but perceived the communication policy that developed the image as part of a larger strategy. Three journalists (R1 2010; R3 2010; R5 2010) maintain that the Court had a special interest in news that referred to the Court. One journalist (R5 2010) affirmed that when promoting its work the Court:

'[...] is preoccupied with what would be written in the title and the first lines of newspaper articles which are the parts of an article that all readers look at.'

Highlighting this strategic view, a prominent scholar and a leader of a rights organisation (CSL7 2010) asserted:

‘The communication policy has been designed to strategically disseminate information and to make the public know what exactly the Court wants to be promoted in the public domain.’

As expected, these strategic considerations have impacted the way select topics and cases are to be promoted publicly. One of the journalists interviewed (R1 2010) remarked that the policy:

‘[...] has also been aimed to both promote the discussion of some issues in the public agenda when this benefits the court, and avoid public discussion of other issues that might be inconvenient for the Court’s interests.’

Similarly, another reporter described what she regards a common practice. She (R5 2010) explains that the Justices sought to limit the publicity of decisions that they perceived as inconvenient for building a favourable image:

‘It is common that the Court issues two decisions simultaneously. Sometimes, one is likely to be welcomed by large sector of the public, and the other is likely to trigger negative reactions. In these situations, the Court attempts to attract media attention to the first former and explicitly avoid promoting the latter [...] Actually, Justices prefer not to respond questions about cases of negative media impact.’

The attempt to control the quality and quantity of media coverage

Engaging with the media might be problematic for judges with a particular communication agenda. Media coverage is selective and might focus on aspects considered as irrelevant, inappropriate, or detrimental by judges. In addition, in polarised political arenas in which the media takes a stand in favour of or against political factions, coverage of judicial matters might be manipulated and used to advance the media’s political agenda. Thus, judges have incentives to go public but to somehow control media exposure. In the Argentine case, the Justices’ willingness to go public in search of public support combined with intense media coverage exacerbates these risks.

The evidence suggests that the Justices were conscious of these obstacles and, thus, sought to influence the quality and quantity of the information circulated in the public domain. Journalists covering judicial issues (R1 2010; R3 2010; R4 2010; R5 2010) revealed that the Justices were particularly concerned about how their decisions were interpreted politically. One journalist

illustrates how important this issue is for the Justices. She (R1 2010) explained that, in public interventions, most Justices explicitly explain why none of its decisions have been motivated by partisan or personal interests. She further remarked that:

‘Justices are particularly concerned about how its decisions are interpreted in political term. [...] They do not want to be accused of advancing any political agenda, neither the government’s nor the opposition’s.’

Led by this type of concern, the Justices attempted to control the quantity and quality of media coverage. They implemented several mechanisms. First, they applied strict control of the flow and content of information in order to reverse old practices.⁶⁶ For this, the justices institutionalised the relations between them and reporters’ practices channelling this interaction,⁶⁷ limited the contents of the information the Court intended to communicate,⁶⁸ determined the content and ways to deliver the information professionally,⁶⁹ and foreclosed any potential non-authorised source from within the Court staff.⁷⁰

Journalists’ criticisms of the control exerted over the flow and content of information suggests the issue’s magnitude. Some reporters (R1 2010; R5 2010) agreed that the Court’s communication policy makes their job more difficult. One of them further (R5 2010) affirmed that

⁶⁶ According to reporters interviewed by the author, before the new Justices were appointed the interaction between the Court and the media can be described as an informal and highly discretionary relation. In this sense, Justices and Court staff “leaked” information rather than communicating it. Thus, journalists’ ability to access to information depended on the kind of personal relationship they developed with both Justices and Court staff and the content of the information provided was unilaterally decided by the source, either Justices or staff members. The Justices made public their anger with these “leaks” and their intentions to change this practice (See for example (LaNacion 2005b)).

⁶⁷ Journalists interviewed by the author mentioned that Justices are reluctant to provide information and communicate Court regarding developments through practices other than the ones described below (R1 2010; R3 2010; R5 2010).

⁶⁸ Experienced journalists dedicated to covering Court-related issues pointed out that the content of information is “homogeneous” even when it is provided by different sources within the Court (R1 2010; R3 2010; R4 2010). By homogeneous they refer to the fact that Court sources refer to the same decisions, the same issues and transmit the same institutional message. They also highlighted that this fact indicates a previous discussion among Justices over the type of information they want to circulate.

⁶⁹ Four of the interviewed journalists (R1 2010; R3 2010; R4 2010; R5 2010) highlighted that the type of information and the ways it is delivered suggest that the Court has been regularly advised on this matter.

⁷⁰ Early in 2005, the discomfort of some Justices with regular information leaks was known by journalists, as it is indicated by some newspaper articles (LaNacion 2005b). In the same way, in interviews with the author several journalists (R1 2010; R3 2010; R5 2010) remarked that unlike in the past when “gossip” was a way to circulate information from within the Court, it is currently very difficult to obtain information from “unofficial” sources. One journalist explained that “unexpected” decisions are frequent nowadays. By “unexpected” the journalist meant that no one outside the Court knew about the coming decision.

it is difficult for them to obtain exclusives and that the content of information provided by the Court is already thoroughly filtered and analysed by the sources.⁷¹

Finally, the Court's aggressive public communication policy gradually incorporated different means to promote and to attract media attention to strategically selected information. In a first stage the Court relied on media interviews and public interventions such as lectures and public events, among others. Later, the policy incorporated weekly meetings with journalists aimed at communicating the content, salience and impact of some of the Court's decisions.⁷² According to some journalists (R1 2010; R5 2010) the discussions in these meetings revolve around a small number of decisions and the meeting agenda is set by the Chief Justice. Although journalists raise issues outside the Chief Justice's agenda, he is usually reluctant to refer to them. Additionally, the Chief Justice's declarations are regarded as *off the record* declarations, and, thus, cannot be cited in the media. In these terms, meeting with journalists is an effective tool for the Court to selectively disseminate information and to advance its own interpretation of itself.

In addition, the Justices created a news agency, which fulfilled a relevant role in channelling media attention to particular developments. Although the 'Judicial Information Centre' (hereafter JIC) is a news agency for the whole judiciary, it played a key role in the Court's own communication policy.⁷³ The agency was exposed to the Justices' influence, particularly that of

⁷¹ Particularly referring to the content of the information delivered, some journalists (R1 2010; R3 2010; R5 2010) pointed that although the content is clearly limited, the information delivered is "complete" in the sense that it covers all the necessary aspects to turn that information into media news.

⁷² These meetings are held just after the "Acuerdo" meeting in which Justices agree and sign rulings weekly. The meeting are led by Chief Justice Lorenzetti who, in very plain language, concentrates on the legally substantive content of the decisions avoiding referring to their factual particularities, as described by three reporters in interviews with the author (R1 2010; R3 2010; R5 2010). A Justice (J1 2010) remarked that Chief Justice Lorenzetti, in line with the aim to present the information as complete as possible and avoid misreporting, performs this task as a "teacher" in order to fully communicate the content and relevance of the decision.

⁷³ The JIC is an innovative agency intended to communicate judicial developments to general population. Its aim is to make judicial information, "*read by all citizens in the most rapid, clear and accessible way through the Internet*" (Corte-Suprema 2011). Its main task is to upload on its web page information generated by the Judiciary describing and explaining judicial decisions in plain language (Corte-Suprema: 27). The JIC is thought to foster debate over the work of judges and, thus, its web page aims to be a space for dialogue and opinion where all publications can be commented on, evaluated and shared through e-mail or social networking by those who navigate (Corte-Suprema, *Ibid*: 31).

Chief Justice Lorenzetti.⁷⁴ In fact, some journalists (R1 2010; R5 2010) mentioned that the Chief Justice played an essential role in the design of the JIC's internal policies. Furthermore, the JIC worked as an instrument to transmit particular messages and contents. In her analysis of the JIC's workings, Baumgratz (2011a) maintains that this agency creates news rather than circulates information. This means, she asserts, that it elaborates a message, selects the content of a ruling that supports that message, and dismisses elements or information that are regarded as irrelevant for the intended message. In this way, an influential journalist (R3 2010) claims that, '*the information circulated by the JIC is not neutral. Rather, it represents a particular point of view put forward by the Justices.*'

Approaching Opinion leaders

Opinion leaders heavily shape what gets covered and the views expressed in the media. As a result, judges aiming to build public support might have incentives to develop links with opinion leaders, and, more importantly, to shape their views on courts' workings. Usually, opinion leaders are a certain number of people who, for various reasons, can exercise more influence on what is reported, and how it is reported, than most citizens (Vanberg, *Ibid*). Opinion leaders include, obviously, news editors, editorial writers, and reporters, as well as the sources that these individuals rely on, such as political insiders, experts, and interest groups. Relying on leaders from the world of journalism brings some problems for the Justices' effective communication. Most journalists are not trained in legal interpretation and might misinterpret jurisprudential rationale, often written in rather complex language. Similarly, opinion leaders outside the media sphere might not be fully conscious of the changes the Justices incorporated to the Court's workings. This, which also applies to media opinion leaders, is aggravated in the case under study, as the Justices were proposing radical changes to the Court's standing which break with old and well-established practices. Journalists may not be able to perceive the nature and implications of these changes. As a result, Justices needed to build bridges with opinion leaders and articulate spaces where they can

⁷⁴ Some institutional factors facilitated this influence over its work. According to top JIC staff interview by the author (CC1 2010), the JIC was included as part of the Court's own structure. In addition, JIC staff members were appointed discretionally by the Court and were incorporated as member of the Chief Justice's office.

effectively present the new images. For this purpose, they carried out public relations activities with both media and civil society opinion leaders.

In relation to media opinion leaders, the Justices were aware of the gap between the media and the judicial worlds. For example, the Justices were concerned with legal and political misunderstanding of their rulings. One Justice (J1 2010) remarked that the gap between the language used by journalists and the one used by judges might prove to be an obstacle for the effectiveness of the Court's communication policy. He further acknowledged the obstacle: '*Not only do journalists know little about law but also, in general, judges know nothing about journalism*'. In the same line, another Justice (J2 2010) complained that '*in general journalists lack the appropriate legal knowledge and, sometimes, misunderstand the meaning of rulings.*'

In order to fill this gap, the Justices developed a series of public relation tactics towards journalists. For this purpose, the Court's Chief Justice and other Justices regularly gave speeches and participated in high-profile public events organised by professional journalism organisations. On most of these occasions, Justices explicitly highlighted the Court's openness to the media and its intention to build bridges between the judiciary and the media.⁷⁵ Also, the Court hosted and co-hosted formal meetings aimed at discussing how the media and the judiciary might interact,⁷⁶ and organised public seminars and workshops in the same line.⁷⁷ Additionally, the Justices signed cooperation agreements with the two main professional organisations of journalists in order to study and discuss different approaches to the relations between press and courts. Particularly, a

⁷⁵ Although he was sceptical about the use of the media as a communication means for courts, Justice Petracchi attended ADEPA dinners as Chief Justice. This practice has been continued by Chief Justice Lorenzetti since his first appointment in 2006 to the present. Chief Justice used these occasions to promote the Court policy towards media and to encourage the construction of links. For example, in the 2010 ADEPA's award ceremony, Chief Justice Lorenzetti promoted and praised as positive the measures taken in this regard by the Court and journalists' professional associations (Alfie 2010).

⁷⁶ For example, in 2006 the Court hosted a meeting with journalists of the main national newspapers and press officers of the whole judiciary in order to discuss the creation of a judicial information centre which was eventually created in 2006. For this meeting, Horacio Vertbisky, one of the main Argentine journalists, explained that journalists were invited to give their opinions of what they need from a centre such this in order to make judicial rulings more accessible to general public (Verbitsky 2006).

⁷⁷ For example, in 2007 the Court co-organised with ADEPA a Seminar addressed to journalists, media entrepreneurs, and judicial operators aimed at promoting mutual understanding about the relation of the judiciary with the media (LaNacion 2007c). In 2008, the Judicial Information Center, an agency of the Court, organized another seminar together with FOPEA entitled "Press and justice: towards a better quality of information" (Clarín 2008).

Justice (J1 2010) highlighted that all these tactics have permitted the Court to develop strong links with journalists and to fill the gap between the media and the judiciary.

In relation to other types of opinion leaders, the Justice developed close relationships with civil society officers. As discussed in chapter two, several NGOs played a crucial role in the protests against the Court, and performed a relevant role during the impeachment and appointment processes which lead to the Court's new membership. Many of these organisations were key actors monitoring and assessing the work before and after the crisis as well as proposing judicial reforms and bringing salient cases to court. As a result, leaders of these organisations became authoritative voices in Court affairs and, more broadly, in judicial affairs, as remarked by journalists of the three newspapers in interviews with the author. Many of these organisations, according to legal scholars (LP1 2010; LP2 2010; LP3 2010), journalists (R3 2010; R5 2010) and legal practitioners (LP2 2010; LP3 2010; LP4 2010) enjoyed a high level of public approval before, during, and after the crisis.⁷⁸ Justices seem to be aware of the relevance of these actors and, thus, focused on the development of public relations with leaders from these organisations.

In this context, the Justices developed, as referred to by rights activists (CSL1 2010; CSL2 2010; CSL5 2010; CSL6 2010; CSL7 2010), journalists (R3 2010; R5 2010), and legal scholars (LS1 2010; LS2 2010; LS3 2010) an unprecedented and permanent institutional dialogue with NGO leaders. This sustained an ongoing interaction that was initiated in the aftermath of the crisis. The relationship with NGO leaders was manifest in three key realms. First, the Justices engaged in dialogue in order to discuss reforms to the Court's internal workings. As Ruibal (2012) shows, just after its membership renewal some Justices held several meetings with social leaders in order to discuss their reform proposals. Eventually, the Justices were responsive to social demands and implemented most of their proposals. This relationship was gradually expanded to other organisations, such as professional associations with which the Justices discussed reforms to the Court's jurisdiction. Second, the close relationship was also manifest in the realm of

⁷⁸ Along the text of this thesis I reference several newspapers articles quoting or citing both individual declarations of NGO leaders and reports published by these organizations. This indicates that there were indeed opinion leaders shaping public views on the Court.

accountability. One of the leaders of one of the most important human rights organisations (CSL5 2010) pointed out that the Court was particularly interested in taking into account NGOs. His declarations are consistent with the fact that NGOs were regularly invited to public events organised by the Court such as the ‘Opening of the Judicial Year’ annual conferences. Finally, the Justices participated individually and on behalf of the Court in different initiatives in which they were able to promote the work of the Court. For example, the Court and the *Asociacion por los Derechos Civiles* engaged in an initiative aimed to massively publicise the Court’s most salient rulings in 2007 (CLS1 2010; LS3 2010). They produced a special leaflet, written in plain language and highlighted the positive aspects of the decisions, which was published by *Clarín*.

These public relations activities permitted the Justices to maintain a close relationship with individuals able to influence public views on the Court. The intensity of the dialogue between them was highlighted in fieldwork interviews with some journalists (R3 2010; R5 2010), social leaders (CLS1 2010; CLS2 2010; CLS5 2010; CLS6 2010; CLS7 2010) and scholars (LS1 2010; LS2 2010; LS3 2010). In fact, some of them view this relationship as not entirely appropriate for an institution and civil society organisation. For example, one legal scholar (LS2 2010) claimed that the Court and NGOs ‘became partners in crime’ in the process of the Justice’s attempt to build public support. In the same critical stand, a journalist (R5 2010) and another legal scholar (LS1 2010) share a view that NGO leaders reduced the critical tone towards the Court’s performance because its new standing was, at least partially, a by-product of their own initiatives. Although it is beyond the scope of this work to assess the veracity of such claims, it illustrates the magnitude of the closeness between the Justices and these organisations.

The previous paragraphs showed evidence that the Justices were concerned with generating conditions of transparency. They saw the media and opinion leadership as an effective tool to publicise the new Court’s image. But Justices also were aware of the complications this solution might involve. In order to avoid them, they developed a strategic communication policy which included the strategic use of the media, the control of the quantity and quality of media coverage, and the establishment of public relations with some opinion leaders.

Conclusion

In this chapter I discussed the extent to which the Justices were preoccupied with building public support. I offered evidence supporting the claim that the Justices not only cared about public support but also they saw it as a defensive mechanism. In addition, the evidence suggests that the Justices sought to shape opinion leaders' views on the Court. All these aspects are not only inferred from Justices' own declarations but also by their strategic use of media which reveals their attempts to build public support as well as to develop links with relevant opinion leaders.

Particularly, I showed that the Justices attempted to create the conditions under which public support is more likely to work as a defensive mechanism. Firstly, in terms of the legitimacy condition, I demonstrated that the Justices sought to make the Court more popular by presenting it as a transparent, independent and activist agency. This attempt clearly responded to the main popular criticisms that originated in the Court's crisis of legitimacy. Secondly, in terms of the transparency condition, I showed that the Justices deliberately sought to use the media to publicise and promote the new image of the Court in order to build public support. Also, the Justices deliberately approached opinion leaders to secure transparency. Both the strategic use of media and the deployment of bridges with opinion leaders can be also seen as motivated by the Justices' desires to influence opinion leaders' view on the Court.

This discussion also suggested that the Justices' attempt to build public support was largely influenced by the political context in which operated. I showed that the Justices were aware of the Court's lack of credibility and the origins of such negative popular perceptions. In response to this, the Justices portrayed the Court as transparent, independent, and activist. Moreover, the Justices were fully aware of the context characterised by a high level of public exposure. Rather than struggling against this, they capitalised on it and implemented an aggressive communication policy in order to increase the visibility of their work.

Finally, the preceding discussion provides important elements to empirically test the hypotheses put forward here. First, the evidence presented here enhances the analytical power of

my theory. As discussed in chapter one, I hypothesise that Justices will be attentive to public reactions in their rulings. The evidence discussed in this chapter empirically reinforces this theoretical expectation. It suggests that the Justices were concerned with protecting the Court from political attacks. Also, it shows that the Justices view public support as a defensive mechanism and were motivated to build it. Finally, the discussion of the images put forward by the Justices to build public support is a valuable resource to capture the impact of public reactions on public support, as I discuss in the following chapter.

I close this chapter by raising an issue with important theoretical implications. This relates to how Justices attempted to build public support. Although there are no polls confirming that the Justices' strategy was successful, throughout this chapter there are an important number of opinion leaders' declarations which permit us, at least tentatively, to affirm that the Justices were able to reconstruct their legitimacy and build public support among opinion leaders, if not among the public in general. If the Justices were indeed able to do so, the evidence suggests that courts' legitimacy is not only determined by their image of impartiality. This, in part, departs from the common wisdom in the judicial legitimacy literature which proposes that legitimacy ultimately derives from perceptions of impartiality and principled and lawful decision making⁷⁹ However, the evidence from the Argentine example leads to a different, although not necessarily contradictory, conclusion. Based on the evidence presented here, one can argue that public support is not only a function of the image of impartiality but the ability of judges to redress the origins of public dissatisfaction to courts. As a result, one can contend that judges seeking to build public support should not only be preoccupied with building a public image of impartiality but also concentrate on other aspects. In doing so, they might be especially attentive to the context in which they operate to identify the roots of public disaffection towards them. Although these are all tentative conclusions and need a more systematic analysis which is beyond the remit of this work, they deserve to be highlighted as a contribution to an ongoing discussion on how the public serves as a defensive mechanism to courts in Latin America.

⁷⁹ For a discussion on this proposition and its empirical implications see Staton (2010: 127-165) and Ruibal (2011).

Chapter 4 – Explaining Justices’ Level of Aggression

Introduction

In this work I propose that in contexts characterised by a lack of a culture of judicial independence, a high level of judicial delegitimisation as well as a high level of public scrutiny, judges’ levels of aggression will increase when the public appears to be more supportive and the government’s tolerance is higher. This is a result, I argue, of judges’ concerns with protecting the institutional security of their courts. In the preceding chapter I demonstrated that the Argentine Justices were embedded in such a context between July 2004 and October 2010. As a result, given the inapplicability of previous theories explaining judicial behaviour at the Court’s level in the past, as also discussed in chapter two, the current case is an excellent opportunity to test my theory. In this frame, I showed in chapter three that the Justices were indeed preoccupied with protecting their Court, and that they perceived public support as a defensive mechanism, which further enhances the soundness of my theory.

In this chapter I explore the main findings of my work. Before that, I refine the hypotheses I put forward earlier in chapter one. I discuss the use of opinion leaders’ public reactions as a proxy to capture increases and decreases in public support. Second, I discuss the measurement of the two key elements constituting the government’s tolerance interval, those being the salience of the issue at hand and the strength of the government. Based on this discussion, I refine the hypotheses predicting Justices’ use of the different modes of involvement and their corresponding levels of aggression.

According to my case selection criteria, I found that the Justices rendered 38 decisions of public relevance. These decisions are distributed across three types of remedies: *ICR+*; *DIR/IIR*; and *ICR-*. The analysis suggests three important points. First, it suggests that the Justices decided these cases strategically, as most of them permitted Justices to build public support and avoid engaging in political conflicts with the Government. Second, the analysis suggests that a significant number of decisions support my hypotheses. Particularly, the data shows that the

Justices increased their level of aggression by using different modes of involvement when the public appeared to be more supportive and the Government's tolerance interval was greater during both periods. Also, it shows that the Justices decreased their level of aggression by altering the features of a same remedy. Finally, it shows that existing legal constraints prevented Justices from becoming more aggressive. Third, when analysing the relation between public reactions and levels of aggression, as well as the relation between the Government's tolerance interval and levels of aggression separately, I found consistent results. They confirm the expectation that Justices' levels of aggression will increase when the public is more supportive and the Government's tolerance interval is shorter.

The chapter proceeds as follows. First, I discuss the refinement of the original hypotheses according to the political scenario in which the Justices are embedded. I then classify 38 decisions into the different modes of involvement discussed in chapter one. Finally, I present an overview of the findings confirming most of the refined hypotheses. I conclude by highlighting the main key findings discussed in the chapter, and briefly introduce the next chapters.

Predicting Judicial Level of Aggression in the Argentine Context

In chapter one I put forward four testable hypotheses which I test both in the present and subsequent chapters. However, before testing them, I must proceed in their refinement. Such refinement involves the following aspects. They must be refined in a way that captures the particular circumstances of the case under study. Also, the key concepts used in these hypotheses must be operationalised in order to capture the key elements of my model. Finally, I need to devise the methodological proxies to capture an increase and decrease in public support for the Court, as well as the extremes constituting the government's tolerance interval. I undertake this task in the following section.

Opinion Leaders' Reactions and Public Support

My theory proposes that judges will aim to build public support in situations characterised by a lack of a culture of judicial independence, high levels of judicial delegitimation as well as

high levels of public scrutiny. In order to achieve this, judges will seek both diffuse and specific support. In other words, I argue that judges will be attentive to opinion leaders who are able to shape the public views on the general image of a court, and to influence public reactions to decisions over socially sensitive rulings. The core prediction is that the Justices' levels of aggression will increase when the public appears likely to be more supportive. In this section I discuss how the search for public support will influence the Justices' use of the different types of remedies and how I will measure such influence.

In preceding chapters I showed that the Justices were aware of the high level of popular mistrust of the Court. I also demonstrated that the new Justices both conceived public support as a protective mechanism and that they were aware of the need to build such support. Further, I presented evidence suggesting the Justices attempted to create the conditions, legitimacy and transparency that is necessary to put public support to work. In terms of legitimacy, the Justices aimed to portray the Court as (i) an activist agency committed to solving sensitive social concerns and the enhancement of human rights protection (*activism*); (ii) an independent agency from the government (*independence*); (iii) and a transparent and accountable institution (*transparency*). In order to show that the attempts to build public support affected how Justices decided their cases, it is crucial to determine when a ruling results in an increase or decrease of public support, that is, when the public appears to be more supportive.

Given the lack of systematic polls gauging the level of support or confidence in the Court, I use public reactions as a proxy to capture whether a decision increased or decreased public support. Although I am interested in mass public opinion, I rely on opinion leadership and media coverage for this purpose. As discussed in chapter one, the mass media is regarded as the primary means by which the public learns about political events. In turn, what is covered and the views expressed in the media are heavily shaped by opinion leaders, that is, by a certain number of people (small in proportion to the population as a whole) who, for various reasons, can exercise more influence on what is reported, and how it is reported, than most citizens. Hence, opinion leaders, through their influence on media coverage surrounding a judicial decision, play a central

role in shaping the public's view on a particular decision and in a court in general. In this light, I propose that what people think of a court is filtered by what the mass media reports.

As a result, it is perfectly logical to think that, in anticipating mass public reactions to their decisions, the Justices will be attentive to opinion leaders. This applies to both diffuse and public support. For example, think of a case in which a court evaluates whether or not to decriminalise abortion. In contexts dominated by particular religious beliefs, judges will be attentive to the opinion of the head of the dominant religious institution in order to anticipate public reactions to the ruling. This logic also applies to diffuse support. Take the case of a court seeking to build support on impartiality grounds in a context in which judicial *watchdog* think-tanks strongly influence the political debate. The judges will be attentive to the opinion of these institutions when evaluating popular sentiment towards them.

In addition, I incorporate the evidence presented in the preceding chapter in relation to diffuse support. In that chapter I demonstrated that the Justices sought to build diffuse support by showing the Court as transparent, independent, and activist. Here, I concentrate on the last two aspects, because *transparency* is unlikely to affect judicial decisions. That is because this image was clearly intended to show that the Justices managed their internal affairs transparently, as I previously discussed. As a result, I will assess whether opinion leaders' reactions enhance or undermine both/either images of activism and independence. As discussed in chapter three, the image of activism is constituted by two extremes: the development of a working agenda mindful of social concerns as well as the enhancement of human rights protection. Hence, the activist image is linked to the view that judges use the law to transform society. Meanwhile, the image of independence was mainly addressed to show the Court was not aligned with the Government, and that decisions made by the Court were not influenced by official interests.

As a result, I classify opinion leaders' reactions along three dimensions. I initially classify public reactions according to their impact on public support in general. As result I have:

- ***Positive public reactions:*** this type of reaction takes place when media reports enhance the image of independence and activism of the Court and/or welcome any other aspect of a decision.
- ***Negative public reactions:*** this type of reaction occurs when media reports opinion leaders' statements undermining the images of independence and/or activism, and/or criticise particular aspects of a decision.

Second, positive public reactions can be further classified according to their nature. They can be either explicit or implicit:

- **Explicit Positive Public Reactions:** these take place when the media reports opinion leaders' statements explicitly linking a specific ruling either to images of activism and independence of the Court, or both.
- **Implicit Positive Public Reactions:** this type of reaction occurs when the media does not report opinion leaders' statements undermining either, or both, the image of the Court as independent or activist. Here, I consider that implicit support is produced when a decision does not cause negative opinions that undermine the images of independence and activism. The positive impact occurs because if the Justices have already put in place a strategy to portray the Court in a particular way, the inexistence of statements contradicting or undermining these images can be seen as implicitly reinforcing these images.

Additionally, negative reactions as well as positive reactions, explicit or implicit, can be also categorised according to the types of support they affect:

- ***Explicit Positive Views Enhancing Diffuse Support*** occurs when the media reports explicit statements from opinion leaders that enhance the image of activism or independence of the Court.

- ***Explicit Positive Views Enhancing Specific Support*** occurs when the media reports statements by opinion leaders that welcome any other aspect of the ruling.
- ***Implicit Positive Views Enhancing Diffuse Support*** occurs when the media reports that no statements by opinion leaders have been made that undermine the image of activism or independence of the Court.
- ***Implicit Positive Views Enhancing Specific Support*** occurs when the media reports that no critiques were made by opinion leaders on any aspect of the ruling.
- ***Negative Views Undermining Diffuse Support*** occurs when the media reports statements by opinion leaders that undermine the image of activism or independence of the Court.
- ***Negative Views Undermining Specific Support*** occurs when the media reports critiques by opinion leaders on any other aspect of the ruling.

Although this categorisation follows a logical pattern, it does not necessarily fit with actual public reactions. Sometimes such reactions have simultaneously positive and negative effects on public support. This is because a decision might be seen as an example of the Court's activism but at the same time be worthy of criticism because, for example, it is technically poor. Hence, public reactions to can be mixed as they can have a positive impact on one type of support and a simultaneously negative impact on another type of support. For example, take the cases of the *Poblete* and the *Mazzeo* decisions, discussed in the following chapter. The Justices declared unconstitutional the amnesty laws and decrees preventing the prosecution of systematic human rights violations committed during the last dictatorship and permitted the re-opening of criminal trials — a policy put in place by the government. The evidence suggests that these rulings provoked explicit positive public reactions, following statements by opinion leaders enhancing the image of *activism*. However, the decisions were criticised by conservative opinion leaders on the grounds that re-opening criminal prosecutions would not permit social reconciliation. This example shows that measuring the impact of public reactions in creating public support for the Court thus

requires capturing the potential for contrary impact of a decision on the two types of support. For this purpose, I classify public reactions as follows:

- **Strong explicit positive public reactions:** These are reactions which have a positive impact on both types of support. Hence, they take place when the media reports statements by opinion leaders that explicitly enhance the images of independence and activism, as well as instances where no statements have been made criticising any other aspect of the ruling.
- **Strong implicit positive public reactions:** As in the previous case, these reactions have a positive impact on both type of support. However, they differ only in terms of the implicit impact on diffuse support.
- **Moderate positive explicit public reactions:** These reactions have a positive impact only in diffuse support. I still regard the impact of this type of reaction as positive, because, as discussed in the theoretical chapter, diffuse support is a more dominant element for judges struggling to build public support. Thus, these reactions happen when the media reports statements by opinion leaders explicitly enhancing the images of independence and activism, but also when statements are made criticising other aspects of the ruling.
- **Moderate positive implicit public reactions:** As in the previous case, these reactions have a positive impact only on diffuse support. However, they differ only in terms of the implicit impact on diffuse support.
- **Negative public reactions:** These are decisions with a negative impact on diffuse support, regardless of their impact on specific support. As with moderate public reactions, I take the impact on diffuse support as the dominant element characterising these reactions as negative.

In conclusion, public reactions to Justices' decisions can be categorised according to their impact on public support, their nature, and their simultaneous impact on both types of support. Now, I need to elaborate on how the Justices' calculation of public reactions affects their levels of

aggression. Before that, it is important to make explicit two important assumptions. First, I assume judges aiming to build public support will always attempt to avoid negative impacts on diffuse support, at least until they build such support. Thus, my expectation is that the Justices will regularly aim to increase diffuse support, at least until they are confident they have reached an acceptable level of public support. Second, it is unrealistic to think that judges will manage to please all sectors of society and receive specific support in each decision. As a result, I assume that the Justices are aware of this and, thus, strategically seek to make only the most aggressive modes of intervention less contested in the public realm. Having in mind these assumptions and the three level of aggression used by the Justices, I expect that:

- *The least aggressive mode of involvement, ICR+, will produce moderate, implicit or explicit positive public reactions;*
- *The moderate aggressive modes of involvement, DIR/IIR, will produce at least moderate, explicit or implicit, positive public reactions; and,*
- *The most aggressive mode of intervention, ICR-, will provoke strong, explicit or implicit, positive public reactions.*

Government's tolerance interval to decisions against its preferences

As I discussed in the theoretical chapter, building public support takes time for highly discredited courts. Thus, while support is built, they still need to protect the court from retaliations likely to arise in contexts marked by a lack of respect for judicial independence. Thus, following my argument, courts might avoid engaging in political conflicts by calculating the government's tolerance interval. In this section I discuss how the two aspects of such intervals are measured in the Argentine context.

Before this, I must clarify that I use the term Government as referred to the totality of pro-government forces, which is conveyed informally by the Argentine slang term *oficialismo*. Of course, the President who seats at the Executive Power in Argentina is regarded as the indisputable leader of the *oficialismo*, or for the sake of this work, of the government. In Latin America, despite

the formal constitutional text, the functional separation of powers is weak or absent and power is concentrated heavily in the Executive branch (O'Donnell, 1999). In particular, the case of Argentina has been referred as a case of “*presidencism*” in which the President is at the centre of the political, social, and institutional arena (Serrafero 2011: 23). The case of Nestor Kirchner (2003-2007) and Cristina Fernández (2007-2011) of the *Frente para la Victoria* (hereinafter FPV) were not an exception to this. In fact, some scholars consider that the degree of centrality and verticality increased during their administrations.⁸⁰ In the introduction to the first scholarly edited volume seeking to assess the *Kirchnerist* administrations, Tonelli (2011: 10) remarks that a feature of these two administrations was *an unprecedented concentration of power at the apex of a, already steep, pyramid of government*. In the same vein, Serrafero (2011: 33) affirms that a series of institutional reforms permitted, among other conditions, the Presidents to sit in *aquasi-hegemonic* Executive branch. In this highly concentrated political system, the influence of the Presidents reached the national government as well as the provincial governorships. Tonelli (*Ibid*) affirms that the structure of the *Kirchnerist* governments was characterised by a central core occupied by Kirchner and Fernández from which orders for members of Cabinet, members of the Congress, and Governors were emanated. In fact, a salient innovation that occurred in these years was, according to Gervasoni (2011: 116), *the increasing subordination of the provincial governments to Kirchner and Fernández*. Taking all these elements into consideration, in this thesis I refer to the government as the totality of pro-governments forces which are lead vertically by the President.

The first factor of the tolerance interval refers to the strength of the Government, particularly whether it might be able to afford the popular backlash of launching retaliation against the Court. In other words, this factor involves measuring whether the Government might be able to afford incurring a loss of support. I discussed in chapter two, changes in the post-crisis scenario made retaliation more costly for the Government. However, it does not mean that retaliation should

⁸⁰ Although the formal name of the party of the Presidents was *Frente para la Victoria*, it has been known as *Kirchnerismo*. The surname of Nestor Kirchner became an adjective in everyday politics and has been generally used to qualify policies, governments, ideology, partisan preferences, etc.

be ruled out. It just means that in particular circumstances the Government would not be willing to retaliate due to the fear of popular backlash. Consequently, it also means that in other circumstances such backlash might be irrelevant.

My study covers the complete term of President Kirchner (2003- 2007) and most of the first term of Fernández (2007-2010). Their government were regarded as dissimilar in terms of political power. During Kirchner's administration, the Government was marked by its political weakness. Kirchner took power with only 22 percent of the vote share (Cherny, Feierherd, and Novaro 2010, 24). Although his party had the majority in both chambers of the Congress, it was highly fragmented. At least three factions of the party were in place, which initially prevented Kirchner from enjoying a parliamentary majority (Cherny, Feierherd, and Novaro 2010, Ibidem; Levitsky and Murillo 2008). Also, former President Duhalde's support for Kirchner's candidacy was crucial for his electoral victory. Duhalde aimed to exert determinant political influence over the new administration and, consequently, Kirchner's political autonomy was seen as highly restricted (Cherny, Feierherd, and Novaro 2010). In such a context, Kirchner's administration could not afford a loss of public support. The new President Kirchner successfully aimed to reconstitute his own political power and reverse his initial weakness. He rapidly managed to convert the *FPV* coalition in a strong political coalition which included the most powerful factions of the Justicialista Party and a wide range of non-Justicialista parties (Cherny, Feierherd, and Novaro 2010). Also, some parties did not formally join the FPV but became close Kirchner allies. In October 2007, the result of the national and provincial election reflected the magnitude of his success. Cristina Fernandez, the newly elected President, received 45 percent of the votes (Levitsky and Murillo 2008). Also, the ruling FVP won more than three-quarters of the Governorships of the country (Levitsky and Murillo 2008). In the Congress, the outcome secured an ample majority in both chambers. In the Deputy Chamber, 160 out of 257 seats were won by the FVP and its allies; in the Senate the number was 47 out of 74 (Levitsky and Murillo 2008). President Fernandez led the second phase of *Kirchnerismo* in which its power was consolidated. Through this phase the government enjoyed relative strength and, in such conditions, it could

afford a temporary loss of support while still maintaining a powerful position. In fact, although in 2011 Fernandez was re-elected with 54 percent of the vote, the FVP decreased its number of seats in the 2009 mid-term election, losing its ample majority but still maintaining the condition of its first minority (Catterberg and Palanza 2012).⁸¹ After this electoral defeat, the government was able to recover its political strength, win the presidential election and recover a majority in both chambers (Catterberg and Palanza 2012).

The second aspect of the tolerance interval refers to the salience of the case for the government. Measuring salience is also a difficult task. I am interested here in contemporary salience. In other words, I am interested in what is considered salient to the government when events actually occur. Thus, my measure cannot rely on *ex ante* documents such as party platforms. Apart from being quite vague, they do not exhaustively cover the range of important issues for a government over the course of its tenure. Also, the political dynamics of day-to-day politics might convert an insignificant issue into a relevant one or vice versa. In the same light, the government might find that changes in the political arena provide opportunities to introduce vital policies that were not originally set as priorities. Likewise, my interest in contemporary salience prevents the use of scholarly work or political analysis that assesses past happenings and *expost facto* identifies issues that are salient to the government. Also, I am interested in what the government considers salient for its own interests not what other actors such as media regard as important for the government.

As a result, I elaborate an ad-hoc mechanism to measure salience. I consider that a Court's decision relates to a salient issue in the Government's agenda when a member of the Government or *oficialismo*, particularly a member of the Executive, a member of the Congress affiliated to the FVP, or a Governor also affiliated to the FVP makes a public declaration in relation to such decision. As discussed at the beginning of this section, the *Kirchnerist* administration covered in this study has been characterised by a high level of verticality. This leads one to assume that

⁸¹ In the 2011 election the *FPV* was also able to recover the majority in both chambers (Catterberg and Palanza 2012).

whoever is in charge of conveying the official views will follow strict instructions from the political centre of the government structure, in this case the President. In other words, I consider that only voices authorised by the top authorities of the government are permitted to convey its views to the public and, most importantly, that the content and type of public declarations reflect the instructions dictated from above. In addition, it would be misleading to think that only the president or members of the cabinet in which the government formally resides will make public declarations conveying the official opinion. In a highly centralised and vertical structure of government, those outside the Executive such as members of parliament or governors can express such views providing they follow the strict instructions from the centre. In fact, this might be highly convenient for a government aiming to circumstantially shield the President from media exposure. As mentioned above, during the *Kirchnerist* governments, the Presidents exerted a strong control over cabinet members, members of the parliament affiliated to the FPV, governors allied to the national government and other institutional actors. In a context marked by a strong political control exerted from the President, public declarations of any of these actors are regarded as representing the official position of the government. Thus, whoever makes public declarations about a particular issue indicates the salience of the issue for the government.

Should these declarations occur, they are likely to be reported by the three main newspapers used as sources in my thesis. As a result, and given that these public declarations might occur either before or after a decision is issued, I consider the following public declarations to be indicative of salience: (i) a defense of the policy or government position under judicial review; (ii) a critique of the Court's decision for affecting official policy; and (iii) welcoming the decision as it validates official policy. In conclusion, I measure whether an issue is salient or not to the government based on my analysis of the influential character of the government or party officers in charge of defending the policy, and/or attacking or welcoming the Court's decision.

The combination of the government's strength and case salience suggests that the width of the interval can be measured on a three-point scale.

- **Long tolerance interval:** occurs when the issue at hand is not salient to a powerful government;
- **Medium tolerance interval:** occurs when the issue is salient to a weak government or when the issue is not salient to a powerful government; and,
- **Short tolerance interval:** occurs when the issue at hand is salient to a powerful government.

However, only two types of intervals may happen in each period as determined by the government's strength. This is because the measure of strength is constant in such periods, 2004-2007 and 2007-2010. Hence, what determines variation in the width of the interval within each period is the salience of the case to the government's official agenda. As a result, in the first period only medium and long intervals can occur, but only medium and short intervals can happen in the second period.

Now the question is how the Justices will distribute their modes of involvement in each period as constituted by two intervals. Given that the salience of a case is, at least theoretically, supposed to be the motivating factor that triggers retaliation, the question becomes the following: how will the Justices decide cases of salience for the official agenda? Given that the risk of retaliation increases when the a case is salient to the official agenda , I expect for the first period that the Justices will resolve salient cases using the least aggressive modes of intervention at hand, in this case, *DIR/IIR* and *ICR+*. As a result, I expect that the Justices will not render *ICR-* when the government's tolerance interval is medium in such period. Similarly, for the second period when the government remains powerful, I expect the Justices to reduce the risk of retaliation by issuing *DIR/IIR* and *ICR-* when the tolerance interval is medium. As a result, I expect that their calculation of the government's tolerance interval will lead judges to distribute their modes of involvement as Table 5 shows:

Table 5 - Distribution of Modes of Involvement across the Two Periods

		Periods marked by Government's strength	
		First Period	Second Period
Interval's width	Short Tolerance Interval		ICR+
	Medium Tolerance Interval	ICR+ and DIR/IIR	ICR- and DIR/IIR
	Long Tolerance Interval	ICR-	

Source: Elaborated by the author.

Hypotheses Refinement

Now it is time to finally refine the hypotheses I put forward. For this, I first state each hypothesis in its original formulation before refining it. The refined hypotheses are boxed for a better understanding of this process.

The main hypotheses of my work read as follows:

The 'level of aggression' of a court will increase when:

- (a) Other things being equal, the government's tolerance is higher;*
- (b) Other things being equal, the public appears to be more supportive.*

This hypothesis was originally unfolded into three hypotheses determined by the different modes judges can use to regulate their level of aggression:

H1: The 'level of aggression', measured by judges' use of a different type of remedy, will increase when:

- (a) Other things being equal, the government's tolerance is higher;*

(b) Other things being equal, the public appears to be more supportive.

The refinement of this hypothesis reflects the discussion of each extreme described in the preceding section. It mainly captures the two periods in which the government's strength varies as well as the type of public reactions and length of tolerance interval expected for each mode of remedies. As a result, this sub-hypothesis is broken down into two refined hypotheses:

(RH1) During the period July 2004 – September 2007, the Justices will render:

- *ICR+ when public reactions are moderate and the government's tolerance interval is medium;*
- *DIR/IIR when public reactions are at least moderate and the government's tolerance is medium;*
- *ICR- when public reactions are strong and the government's tolerance is long.*

This is illustrated by Table 6:

Table 6 - RH1 for the First Period

First Period		Public Reactions	
		Moderate Explicit or Implicit Positive	Strong Explicit or Implicit Positive
S Government's tolerance interval	Medium	ICR+ and DIR/IIR	
	Long		ICR-

Source: Elaborated by the author.

(RH2) During the period October 2007– October 2010, the Justices will render:

- *ICR+* when public reactions are moderate and the government's tolerance interval is short;
- *DIR/IIR* when public reactions are strong and the government's tolerance is medium;
- *ICR-* when public reactions are strong and the government's tolerance is medium.

This is illustrated by Table 7.

Table 7- RH2 for the Second Period

Second Period		Public Reactions	
		Moderate Explicit or Implicit Positive	Strong Explicit or Implicit Positive
Government's tolerance interval	Short	<i>ICR+</i>	
	Medium		<i>DIR/IIR</i> and <i>ICR-</i>

Source: Analysis elaborated by the author

Secondly, **H2** was originally formulated as follows:

The ‘level of aggression’, measured by judges’ alteration of some features of the same type of remedy, will increase when:

(a) Other things being equal, the government's tolerance is higher;

(b) Other things being equal, the public appears to be more supportive.

This sub-hypothesis should be also redefined. Only *ICR+* can be altered in order to reach a higher level of aggression. This is because the other two types of remedies are expected to happen when the tolerance interval is the highest and public reactions are the strongest or moderate in each period. Thus, for these cases, the tolerance interval cannot get higher and the public cannot be more supportive. As a consequence, **RH3** read as follows:

RH3

During the first period under study, Justices will alter features of ICR+ to increase their level of aggression when the government’s tolerance is high and public reaction strong.

Likewise, during the second period Justices will alter features of ICR+ to increase their level of aggression when the government’s tolerance is medium.

Furthermore, the original version of **H3** should be also redefined. It originally reads as follows:

The ‘level of aggression’, measured by judges’ alteration of some features of the same type of remedy, will decrease when:

(a) Other things being equal, the government's tolerance is shorter;

(b) Other things being equal, the public appears to be less supportive.

Like the previous one, this hypothesis only applies to a restricted number of remedies. Only the level of aggression of DIR/IIR and ICR- can be altered in light of a shorter tolerance interval and less supportive public reactions. This is because they are expected to occur under the highest tolerance interval and provoke the strongest public reactions in each period. As a consequence, **RH4** read as follows:

RH4

During the first period, Justices will decrease the level of aggression of DIR/IIR and ICR- by altering the features of these remedies when the government's tolerance interval is medium and public reaction moderate

Conversely, for the second period Justices will decrease the level of aggression of DIR/IIR and ICR- by altering the features of these remedies when the government's tolerance interval is short and public reaction is moderate.

The original **H4** does not need redefinition. As stated in the chapter discussing the theoretical framework of this work, it seeks to capture the legal constraints judges face to choose from different modes of involvement. The preceding discussion on public reactions and the government's tolerance interval does not substantially change the direction and substance of this hypothesis. Hence, it stands as it was originally formulated. However, to keep a consistent nomenclature I label it as **RH5**:

RH5

Judges will become as aggressive as permitted by conditions of the legal culture in which they operate.

The Forms of Involvement used by the Justices

The sample of my study is comprised of 38 decisions of contemporary public salience. This sample falls into three types of involvement as shown in Table 8. The least aggressive form of intervention was represented by nine decisions. Under this form, characterised as *Indirect Collective Remedies(+)* (ICR+), the Justices validated policies already in place, as discussed in chapter one. The collective result was an attribute of decisions taken by courts whose rulings are empowered with *erga omnes* effects. However, in the case of courts whose decisions are granted with only *intra-party* effects, the decisions in this type of involvement result in effective collective effects. I say “effective” because this validation is formally valid only for the case under discussion and the decision is only meant to affect the situation of the parties involved. Nonetheless, the collective effect of the decisions is produced by the fact that the government is one of the parties that is actually implementing the policy under discussion.

In addition, the Justices dictated 18 decisions constituting the moderately aggressive mode of intervention, *Direct Individual Remedies* (DIR) and *Indirect Individual Remedies* (IIR). These are remedies with individual impacts, which, in spite of invalidating a government policy, have fewer costs of implementation than the more aggressive ones. *DIR* occurs when the decision directly designs the solution for the case under dispute, and *Indirect Individual Remedies* (IIR) occur when it leaves the design of such a solution in the government’s hands. This was the most frequent form of intervention used by the Justices.

Finally, 11 decisions are characterised as *Indirect Collective Remedies(-)* (ICR-), the most aggressive mode of intervention. In this type of intervention the Justices delegate the design of the solution to the elected branches and their effects go beyond the parties of the case, or they affect collective groups whose individuals are not necessarily identified in the legal case. This form of intervention was non-existent in the Court’s jurisprudence and was created by the Justices for the purposes of intervening in structural violations of rights.

Table 8 - Remedies Distributed by Type of Remedies

<i>Indirect Collective Remedies (+)</i>	
<i>Arancibia Clavel (Arancibia Clavel, Enrique Lautaro y otros s/ asociación ilícita, intimidación pública y daño y homicidio agravado 2004a)</i>	The ruling established that crimes against humanity are not subject to a statute of limitations, nor to prescription.
<i>Bustos (Bustos, Alberto Roque y otros c/ Estado Nacional y otros s/amparo 2004b)</i>	The ruling declared constitutional a key economic policy, the so called <i>pesification</i> , subsequently implemented by the government in the aftermath of the country's crisis in 2001.
<i>Poblete (Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc 2005b)</i>	The ruling declared unconstitutional two amnesty laws.
<i>Massa (Massa, Juan Agustín c/ Poder Ejecutivo Nacional 2006a)</i>	The ruling implicitly validated the <i>pesification</i> policy subsequently implemented by the government since the aftermath of the country's crisis in 2001.
<i>Mazzeo (Mazzeo, Julio Lilo y otros s/ rec. de casación e inconstitucionalidad 2007e)</i>	The ruling declared unconstitutional a decree granting impunity to several individuals involved in the perpetration of crimes against humanity.
<i>Tejerina (Tejerina, Romina Anahí s/ homicidio calificado 2008f)</i>	The ruling confirmed a lower judge sentence to 14 years in jail for a young woman who was raped, got pregnant, and killed her son right after giving birth.
<i>Arriola (Arriola, Sebastián y otros s/ causa 2009)</i>	The ruling declared that it was unconstitutional to punish marijuana consumers, if that action does not harm third parties.
<i>Fondo Bicentenario (San Luis, Provincia de c/ Estado Nacional s/amparo 2010b)</i>	The ruling declared that the Province of San Luis lacks the legal standing to claim the unconstitutionality of a national government's decree.
<i>Thomas (Thomas, Enrique c/ E.N.A. s/ amparo 2010d)</i>	The ruling established that Mr. Thomas lacked the legal standing to challenge the constitutionality of the Media Law.

<i>Direct Individual Remedies/ Indirect Individual Remedies</i>	
Zavalía (Zavalía, José Luis c/ Santiago del Estero, Provincia de y Estado Nacional s/ amparo. 2004d)	The decisions declared unconstitutional the call for constitutional convention in the province of Santiago del Estero.
Vizzoti (Vizzoti, Carlos Alberto c/ AMSA S.A. s/despido 2004c)	The ruling declared unconstitutional the ‘cap on severance pay’ established by the Article 245 and established a threshold for the calculus of such pay.
Aquino (Aquino Isacio c/ Cargos Servicios Industriales S.A. s/accidente Ley 9688 2004)	The ruling declared unconstitutional an article of the Risks in the Workplace Act. The article established a limitation on the worker’s right to claim full compensation from the employer for damages suffered due to an accident at work and exempted employers from civil responsibility.
Municipalidad de San Luis (Ponce, Carlos Alberto c/ San Luis, Provincia de s/ acción declarativa de certeza 2005)	The decision resolved a conflict between the provincial government and an opposition party. It ruled that the election of a member of the opposition as mayor of the provincial capital was valid.
Sánchez (Sánchez, María del Carmen c/ ANSeS s/ reajustes varios 2005a)	The ruling established that retired people’s pensions should be automatically updated
Bussi (Bussi, Antonio Domingo c/ Estado Nacional (Congreso de la Nación - Cámara de Diputados) s/ incorporación a la Cámara de Diputados 2007a)	The ruling stated that the Congress had no powers to prevent an elected Congressman to take his seat. This applied to the case of Mr Bussi, a former military governor allegedly involved in human rights violations during the last dictatorship. He was eventually elected to the Congress in 1999 but was blocked from taking his seat due to these allegations.
Badaro II (Badaro, Adolfo Valentín c/ ANSeS s/ reajustes varios 2007)	The decision established a new mechanism to calculate an adjustment to Mr. Badaro’s pension. This criterion guaranteed a proportional relationship between employed workers’ current salaries, retirements and pensions.
Patitó (Patitó, José Á. y Otro c/Diario La Nación y Otros 2008c)	The ruling revoked a lower judge’s judgment that had ordered the newspaper <i>La Nación</i> to pay an indemnity for moral damages after publishing an editorial that questioned the functioning of the Forensic Medical Corps of the

	Judiciary.
Patti (Patti, Luis Abelardo s/ promueve acción de amparo c/ Cámara de Diputados de la Nación 2008d)	The ruling stated that the Congress had no powers to prevent an elected Congressman from taking his seat. This applied to the case of Mr Patti, a former military officer allegedly involved in human rights violations during the last dictatorship. He was elected to the Congress but was blocked from taking his seat due to these allegations by the Congress.
ATE (Asociación Trabajadores del Estado c/Ministerio de Trabajo s/ Ley de Asociaciones Sindicales 2008)	The decision declared the unconstitutionality of a section of the Union Association Law. This section specified that all candidates for personnel representation must be affiliated to the union enjoying union representation.
AMIA (Telldín, Carlos Alberto y otros s/ rec. de casación 2009f)	The ruling ordered the reopening of the criminal investigation into the so-called ‘local connection’ involved in the 1994 bombing of the Argentine-Jewish Mutual Association (AMIA).
Prieto I (Gualtieri Rugnone de Prieto, Emma Elidia y otros s/ sustracción de menores de 10 años 2009a)	The ruling stated that judges may not force people to give blood samples for genetic testing to determine whether or not they are children of the disappeared during the last dictatorship.
Prieto II (Gualtieri Rugnone de Prieto, Emma Elidia y otros s/ sustracción de menores de 10 años 2009b)	The ruling established that despite <i>Prieto I</i> , less invasive ways of obtaining the DNA, such as seizing personal items, are constitutional.
Rossi (Rossi, Adriana María c/Estado Nacional - Armada Argentina 2009d)	The ruling established that Article 41.a of Law on Trade Union Organisations was unconstitutional because it granted the most representative trades unions certain privileges to the detriment of merely registered trade unions, which covered all or part of the same activity as the former.
Sosa IV (Sosa, Eduardo Emilio c/ Provincia de Santa Cruz 2009e)	Upon non-compliance with previous decisions, the ruling ordered to the Province of Santa Cruz that the General Prosecutor, Mr Sosa, must be reinstated in office within 30 days Mr. Sosa was illegally removed from his position by the provincial government.
AFIP (Administración Federal de Ingresos Públicos c/ Intercorp S.R.L. s/ ejecución fiscal)	The ruling established that that the <i>Agencia Federal de Ingresos Públicos (AFIP)</i> , the government’s administrative agency in charge of administering the federal income tax system, had no powers to issue freezing

2010)	injunctions over debtors' personal assets.
DNU (Consumidores Argentinos c/ EN - PEN - Dto. 558/02-SS - ley 20.091 s/ amparo ley 16.986 2010a)	The ruling declared unconstitutional the President's use of Decrees of Necessity and Urgency (Decretos de Necesidad y Urgencia or <i>DNUs</i>). These decrees were largely used by democratic presidents and were regarded as the Executive overstepping into Congressional powers.
Sosa V (Sosa, Eduardo Emilio c/ Provincia de Santa Cruz 2010c)	Upon Governor Peralta's non-compliance with previous Court's decisions, the ruling initiated a legal criminal investigation against the Governor for the alleged dismissal of the Provincial General Prosecutor. It also requested the National Congress to study the case and to sanction the Province of Santa Cruz.
<i>Indirect Collective Remedies (-)</i>	
Vertbisky (Verbitsky, Horacio s/ habeas corpus 2005c)	The ruling required the creation and implementation of a prison public policy aimed at solving a systemic violation of human rights incurred under the prison system of the province of Buenos Aires.
Riachuelo I (Mendoza, Beatriz Silvia y otros c/ Estado Nacional y otros s/ daños y perjuicios (daños derivados de la contaminación ambiental del Río Matanza - Riachuelo) 2006b)	The ruling requested to the municipal, provincial and national governments to create a specific and coordinated policy to avoid future damages and to start the cleaning of the <i>Riachuelo</i> river.
Badaro I (Badaro, Adolfo Valentín c/ ANSeS s/ reajustes varios 2006)	The decision requested the government to enact a bill establishing a pension adjustment criterion guaranteeing a proportional relationship between employed workers' current salaries, retirements and pensions.
Lavado (Lavado, Diego Jorge y otros c/ Mendoza, Provincia de y otro s/ acción declarativa de certeza 2007d)	The decisions required the national and provincial governments to adopt urgent measures to protect the lives and physical integrity of the individuals detained in prisons in the Mendoza province.
Rosza (Rosza, Carlos Alberto y otro s/ recurso de casación 2007f)	The ruling requested to both the Congress and the Executive to create a new mechanism for the appointment of temporary judges.
Editorial Río Negro (Editorial Río Negro S.A. c/	The ruling prohibited the Río Negro provincial government from discriminating against news media by arbitrarily

Neuquén, Provincia del s/ acción de amparo 2007c)	withdrawing or reducing placement of official advertising. It requested the government to create and implement a new policy on the matter.
<i>Defensor del Pueblo</i>(Defensor del Pueblo de la Nación c/ Estado Nacional y otra (Provincia del Chaco) s/ proceso de conocimiento 2007b)	The ruling requested the national and provincial governments implement a series of policies to protect the rights of an aboriginal community.
<i>Riachuelo II (Mendoza, Beatriz Silvia y otros c/ Estado Nacional y otros s/ daños y perjuicios (daños derivados de la contaminación ambiental del Río Matanza - Riachuelo) 2008b)</i>	The ruling requested the municipal, provincial and national governments implement a specific and coordinated policy to avoid future damages and to start the cleaning of the <i>Riachuelo</i> river. Such policy was elaborated by the implicated state agencies in response to <i>Riachuelo I</i> .
<i>Desmonte Salta (Salas, Dino y otros c/ Salta, provincia de y Estado Nacional s/ amparo 2008e)</i>	The ruling upheld a petition by seven indigenous communities and an organisation of small producers from Salta Province. It ordered the preventative measure of stopping deforestation of aboriginal lands in the province of Salta.
<i>Fundacion Sur (García Méndez, Emilio y Musa, Laura Cristina s/ causa N° 7537 2008a)</i>	The ruling requested the Congress and the Executive enact legislation complying with international human rights standards in matters related to juvenile detention.
<i>Halabi</i>(Halabi, Ernesto c/ P.E.N. - ley 25. dto. 1563/04 s/ amparo ley 16.986 2009c)	In an action brought by an individual, the ruling declared unconstitutional with <i>erga omnes</i> effects a law authorising the tapping of telephones and internet communications.

Source: Analysis elaborated by the author.

Explaining Justices' Level of Aggression: An Overview of the Findings

I present here an overview of the findings to test the hypotheses put forward in this work. I first discuss patterns of strategic behaviour to suggest that Justices used their rulings to build public support and to avoid engaging in political conflicts with the government. I then discuss evidence supporting my main claim that such Justices' calculus determined the selection of the different forms of intervention. By doing this, I present data confirming four of the five refined hypotheses put forward in this work. I end the section by separately analysing the relations between public support and levels of aggression as well as the relation between the government's tolerance interval and levels of aggression.

Patterns of Strategic Calculations: Increasing Public Support and Avoiding Conflicts with the Government

In relation to the Justices' calculus of public reactions, I show that the Justices anticipated the reaction of opinion leaders who were thought likely to be able to both shape public views on the general image of a court (diffuse support), and influence public reaction to decisions over socially sensitive rulings (specific support). In addition I show that public reactions to their decisions did not damage the images put forward by the Justices to build and maintain public support. Rather, most of these decisions enhanced the images of independence and activism. The evidence also suggests that the Justices calculated the Government's tolerance to decisions contrary to its own interests. From this, one can infer that they anticipated that the risk of retaliation decreased if the Court avoided ruling against powerful governments in issues of particular salience to the official agenda. This suggests that the Justices' concerns with the Court's protection led them not only to build public support but also to avoid conflicts with the government.

In terms of public support, I observe that the Justices succeeded in maintaining their images of independence and activism – key aspects of the Justices' strategy to build diffuse support. In fact, 21 (55.2 percent) of the decisions provoked strongly positive public reactions, and

15 (39.4 percent) moderately positive ones, which suggests that only two decisions brought a negative impact on the either of these images, as showed in Table 9.

Table 9- Number and Percentage of Decisions by Type of Public Reactions

Type of Public Reactions	Number and Percentage
Strongly Positive	21 (55.2%)
Moderately Positive	15 (39.4%)
Negative	2 (5.26%)

N38

Source: Calculation elaborated by the author

Source:

Moreover, most of the rulings enhanced their images of independence and activism. I found that 30 rulings, 78.9 percent of the total, were explicitly linked to the images of activism and/or independence, as shown in Table 10. In particular, 7 decisions explicitly enhanced the image of independence, 12 the image of activism, and 11 both images. Only *Bustos* undermined the image of independence and *Fundacion Sur* the image of activism. In relation to specific support, the evidence confirms an expected outcome, that the Justices would not be able to please all sectors able to reach the media to express their discontent with some rulings. Overall, this evidence suggests that the Justices managed to build public support through their decisions and to enhance their images of independence and activism. These are crucial for the construction of diffuse support, as most of the decisions were linked to one or both images.

Table 10 - Decisions enhancing and undermining public support

Decisions enhancing and undermining public support	
Decisions linked to the image of independence	7
Decisions linked to the image of activism	11
Decisions linked to both images	12
Decision undermining the image of independence	1
Decision undermining the image of activism	1

N38

Source: Calculation elaborated by the author.

Source:

The evidence is also consistent with the expectations regarding the Justices' calculations of the government's tolerance interval. In line with the theoretical expectations, the findings suggest that the Justices dismissed the option of preventing rulings that go against the government's

interests in order to avoid retaliation. Theoretically, as I already discussed in chapter one, the fact that Justices sought to build public support implicitly suggests that they would avoid appearing deferent to the Government. In this way, not ruling against the government is usually taken as a sign of deference and, thus, I expect that the Justices will dismiss this strategic course of action. In fact, the Justices challenged the Government's interests in 22 (73.3 percent) decisions of the 30 cases in which the national government was involved.⁸² Also, the Justices defied the government even when it was powerful, that is between 2007 and 2010. Of the 24 decisions occurring in this period, the Justices ruled against its position in 13 cases (81.2 percent) while only three times in its favour.⁸³ However, I observe the Justices' tendency to avoid ruling against the government in issues salient to its agenda. There were only 16 decisions over such issues, from which only eight were against the government. This means that the Justices ruled against the government in only 8 (26.6 percent) cases of the 30 in which the government was involved. This number represents only 21 percent of the total sample of this study. Similarly, few of these decisions occurred when the issue was salient to a powerful Government. Only four salient decisions occurred when the government's tolerance interval was low. All this information is summarised below.

Table 11- Calculus of the government's tolerance interval

Calculus of the government's tolerance interval	
Decisions in which the government was involved	30
Decisions against the government	22
Decisions referred to salient issues	16
Decisions against the government in salient cases	8

⁸² I consider that the Government is involved in a legal case in two situations. First, when it is "formally involved" as it is one of the parties. I use the text of the decisions to code decisions as "formally involved" or "not formally involved". In addition, I regard that the Government is involved when its position in the solution of a case is publicly known, regardless its formal involvement. I use media reports to investigate the Government's position in each case. When the Government is not formally involved and its position is not publicly known, I regard that in such specific cases the Government is not involved. Please note the distinction between decisions over issues salient to the official agenda from decisions in which the government has a preference for a particular solution. All decisions over salient issues are necessarily decisions in which the government has a particular position on the dispute. Meanwhile, not all the decisions in which the Government has a given position are necessarily salient to its agenda. In order to capture this difference I code as "salient to the official agenda", as already discussed, when a newspaper article reports on the declaration of a top government's official referring to the issue addressed by the ruling. Meanwhile, I code as "ruling in which the government has a preference for a particular outcome" those decisions in which newspaper articles report on the government's preferences without citing government's top officers. Using this criterion, I found that the Government was not directly involved in eight decisions.

⁸³ The Government was not involved in four decisions in this period, and in two it was not possible to assert the Government's position.

Drawing some pieces of the evidence presented above together, an interesting aspect of the Justices' behaviour and its impact on public support should be remarked upon. Overall, the Justices managed to enhance the image of independence and, thus, to build public support. However, the evidence suggests that they did not hit the government on issues salient to its agenda in a significant proportion of cases. In fact, they ruled against the government's position on only 8 cases that were salient to its agenda. Meanwhile, it ruled against the government's interests 22 times on non-salient cases. This suggests that the Justices' strategy to rule against the government in a high number of cases (22 decisions) but doing so in only few (8) cases of salience to its agenda was successful in preventing conflicts with the government while increasing public support.

The evidence discussed in these paragraphs suggests, at least preliminarily, that the Justices' behaved strategically. I observe that they managed to issue a high number of decisions largely welcomed in the public realm. Combined with the evidence confirming that the Justices saw public support as a protective mechanism, this observation allows me to infer they behaved strategically to build public support. Also, I can also infer that the Justices behaved strategically to avoid political conflicts with the government in order to protect the institutional security of the Court. These preliminary inferences are further supported by the evidence presented in the following section, in which I demonstrate that the Justices strategically chose different levels of aggression.

Overview of the Empirical Test of the Hypotheses

A significant number of decisions support my theory. The hypotheses put forward are empirically supported by 31 out of 38 decisions, that is, 81.58 percent of the decisions in my sample. Table 12 below provides information on which decisions and how many of them supported each hypothesis. As shown there, the Justices increased their level of aggression when the public appeared to be more supportive and the government's tolerance interval was higher in each period under study 26 times (RH1 and RH2). They decreased their level of aggression by altering some

features of a given remedy when the public appeared to be less supportive and the government's tolerance interval was shorter two times (RH4). Their level of aggression was limited by legal constraints and, thus, they got as aggressive as permitted by conditions of the legal culture in which they operated three times (RH5).

Table 12 - Decisions Confirming Hypotheses

Hypotheses		Decisions confirming each hypothesis		
RH1	ICR+ occurs when public reactions are moderate and the government’s tolerance interval is medium.	1. Arancibia Clavel 2. Poblete	3. Massa 4. Mazzeo	13
	DIR/IIR occurs when public reactions are at least moderate and the government’s tolerance is medium.	5. Zavalía 6. Sánchez	7. Bussi	
	ICR- occurs when public reactions are strong and the government’s tolerance is long.	8. Vertbisky 9. Riachuelo I 10. Lavado	11. Rosza 12. Editorial Rio Negro 13. Defensor del Pueblo	
RH2	ICR+ occurs when public reactions are moderate and the government’s tolerance interval is short.	1. Arriola	2. Thomas	13
	DIR/IIR occurs when public reactions are at least moderate and the government’s tolerance is medium.	3. Patito 4. ATE 5. AMIA 6. Prieto I	7. Prieto II 8. Rossi 9. Sosa IV 10. DNU	
	ICR- occurs when public reactions are strong and the government’s tolerance is medium.	11. Riachuelo II 12. Desmonte Salta	13. 14. Halabi	

RH4	During the first period, Justices will decrease the level of aggression of DIR/IIR and ICR- by altering their features when the government's tolerance interval is medium and public reaction moderate. Conversely, for the second period Justices will decrease the level of aggression of DIR/IIR and ICR- when the government's tolerance interval is short and public reactions is moderate.	1. Badaro I	2. Patti	2
RH5	<i>Judges will become as aggressive as permitted by conditions of the legal culture in which they operate.</i>	1. Vizzoti 2. Aquino	3. Municipalidad de San Luis	3

Source: Analysis elaborated by the author.

Similarly, I find consistent evidence when I disaggregate the findings and analyse each of the forms of involvement, as shown in Table 13:

- In relation to the least aggressive mode of involvement, the *ICR+* decisions, I found that six out of nine (66.67 percent) supported my hypothesis as shown in table 9. Four decisions confirmed ***RH1*** and two ***RH2***;
- Likewise, most of the *DIR/IIR* decisions, 15 out of 18 (83 percent) confirmed several hypotheses. Three decisions confirmed ***RH1*** and eight do so for ***RH2***. Meanwhile, one decision supports ***RH4***, and three confirm ***RH5***;
- Finally, 90.9 percent of the *ICR-*, 10 out of 11, support three of my hypotheses. Six decisions confirm ***RH1*** while three do for ***RH2***. One decision supports ***RH4***.

Table 13 - Remedies by Hypotheses

<i>ICR+</i>	
<i>Hypothesis</i>	<i>Decisions</i>
<i>RH1</i> : <i>ICR+</i> occur when public reactions are moderate and the government's tolerance interval is medium	<i>Arancibia Clavel, Massa, Poblete, Mazzeo</i>
<i>RH2</i> : <i>ICR+</i> occur when public reactions are moderate and the government's tolerance interval is short.	<i>Arriola; Thomas</i>
<i>DIR/IIR</i>	
<i>Hypothesis</i>	<i>Decisions</i>
<i>RH1</i> : <i>DIR/IIR</i> occurs when public reactions are at least moderate and the government's tolerance is medium.	<i>Zavalía, Sánchez, Rossi</i>
<i>RH2</i> : <i>DIR/IIR</i> occurs when public reactions are at least moderate and the government's tolerance is medium.	<i>Patitó; ATE; AMLA; Prieto I; Prieto II; Rossi; Sosa IV; DNU</i>
<i>RH4</i> : For the second period Justices will decrease the level of aggression of <i>DIR/IIR</i> and <i>ICR-</i> when the government's tolerance interval is short and public reaction is moderate.	<i>Patti</i>
<i>RH5</i> : Judges will become as aggressive as permitted by the conditions of the legal culture in which they operate.	<i>Vizzoti; Aquino; Municipalidad de San Luis</i>
<i>ICR-</i>	
<i>Hypothesis</i>	<i>Decisions</i>

RH1: ICR- occurs when public reactions are strong and the government's tolerance is long.	Verbitsky; Riachuelo I; Lavado; Editorial río Negro; Rosza; Defensor del Pueblo
RH2: ICR- occurs when public reactions are strong and the government's tolerance is medium.	Salas, Riachuelo II; Halabi
RH3: During the first period, Justices will decrease the level of aggression of DIR/IIR and ICR- by altering their features when the government's tolerance interval is medium and public reaction moderate.	<i>Badaro I</i>

Source: Analysis elaborated by the author.

Only seven decisions fall outside the remit of my theory. However, three of them do so because of errors in measurement. As discussed in my theoretical chapter, I must simplify reality because most models explain judicial behaviour from a strategic angle. I assume that judges operate in a context of complete and perfect information. Hence, I assume that judges are able to collect necessary information to anticipate public reactions to their decisions as well as measure the two elements constituting the government's tolerance interval. However, things are more complicated in real life. Judges live in uncertain worlds and, hence, face the unavoidable problem collecting information. This, as a result, might lead judges to miscalculate reactions to their decisions from both the public and the government, and, thus, behave in unpredictable ways. Four decisions confirm that the Justices indeed were confronted with this type of problem. In *Fondo Bicentenario* and *Fundación Sur* the Justices miscalculated reactions from opinion leaders. In the first the decision provoked strong public reactions rather than the expected moderate ones, as I discuss in more detail in chapter five. Likewise, as I discuss in length in chapter seven, *Fundación Sur*, characterised as ICR-, was expected to provoke strong public reactions. However, it received negative ones due to criticism undermining the image of activism. Similarly, in *AFIP* and *Sosa V* the Justices miscalculated the government's tolerance interval. As I discuss in detail in chapter six, these decisions were expected to occur under a medium tolerance interval, but rather did so under a short one.

The other three decisions reveal that the Justices may be motivated by concerns other than those proposed here. Characterised as an *ICR+*, *Bustos* validated a key government official policy in 2004. As I discuss in chapter five, the ruling provoked negative views undermining the Court's image of independence. It therefore disconfirmed RH1, which predicts that *ICR+* will produce moderately positive public reactions. Meanwhile, *Tejerina*, also an *ICR+*, is a case in which the issue at hand was not salient to the government, which also contradicts the first refined hypothesis. Finally, *Badaro II*, rendered in 2008, is a case of *DIR/IIR* in which the Justices ruled against the government in an issue salient to its agenda, as discussed in chapter seven. This runs against the **RH2**, which predicts that this type of remedy will revolve around issues that are not salient to the official agenda. This small number of cases shows that my theory faces some limitation, although they do not crucially diminish its analytical power. No single theory is expected to explain all aspects of reality.

The evidence I discussed here provides an initial empirical ground confirming my argument. Most of the decisions confirm four of the refined hypotheses. In short, the data reveals that the Justices increased their level of aggression by using different modes of involvement when the public appeared to be more supportive and the government's tolerance interval was higher during both periods. Also, it shows that the Justices decreased their level of aggression by altering the features of the same remedy. Finally, it shows that existing legal constraints prevented Justices from becoming more aggressive. In the following section, I will further analyse the evidence looking at whether the level of aggression increased when the public appears to be more supportive.

Calculating Opinion Leaders' Reactions

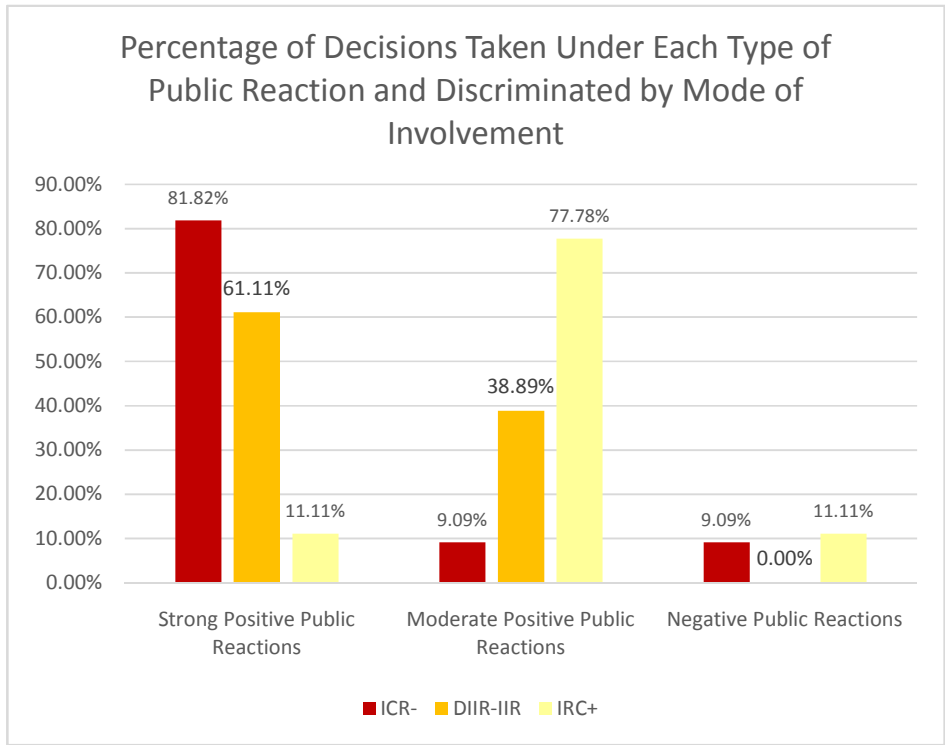
In terms of public support, I have already presented evidence confirming that the Justices behaved strategically in order to build and maintain public support. Now, I show that the level of aggression increased when the public appeared to be more supportive in most of the cases.

Although I observe a majority of decisions of the three forms of involvement provoking strong and

moderately positive public reactions, I observe substantive differences among the forms of involvement when I discriminate by type of reactions.

In fact, the differences are more evident if I look at strong positive reaction. In this case I found that the most aggressive modes of involvement received the highest percentage of strong public reactions, while the least aggressive modes of intervention received the lower percentage of this type of reaction, as shown in Figure 5. Particularly, I found that only one (11.1 percent) of the least aggressive forms of involvement, *ICR+*, as well as 11 (61.1 percent) of the moderately aggressive type of decision, *DIIR/IIR*, provoked strongly positive public reactions. Finally, as expected, nine (81.8 percent) *ICR-* decisions triggered strongly positive reactions. Conversely, the most contested decisions were the least aggressive (77.7 percent), then the moderately aggressive ones (38.8 percent), and finally the most aggressive ones (18.1 percent). Overall, this suggests that the most aggressive forms of involvement received more support than others.

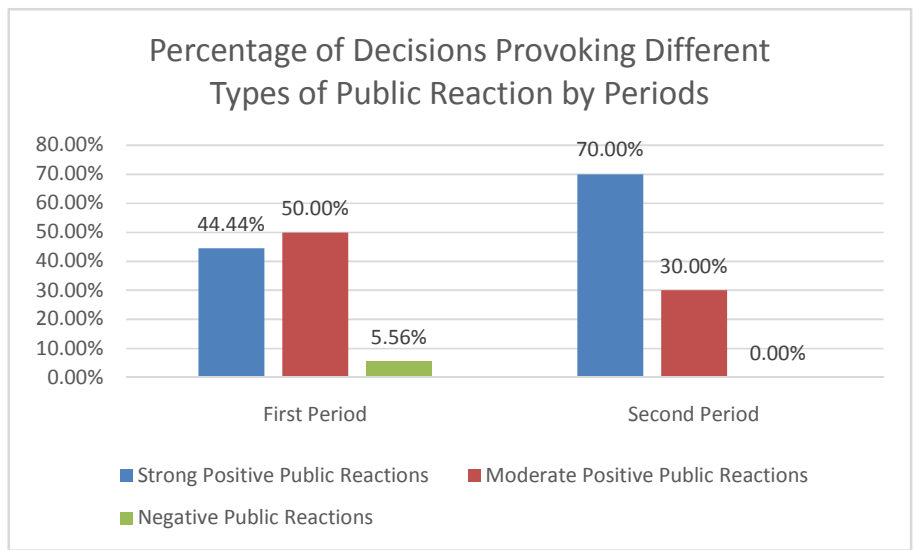
Figure 5- Percentage of decisions occurred under each type of increase and discriminated by mode of involvement



N38
Source: Calculation elaborated by the author.

Looking at the two periods marked by the government’s strength permits me to see an interesting pattern. It was during the second period where most of the decisions received strongly positive reactions, as described by Figure 6. In other words, the Justices’ decisions received less criticism over this period than in the first one. Tentatively, this could be a consequence of the Justices’ intention to raise more popular support during a period in which the government was powerful and the risk of retaliation increased.

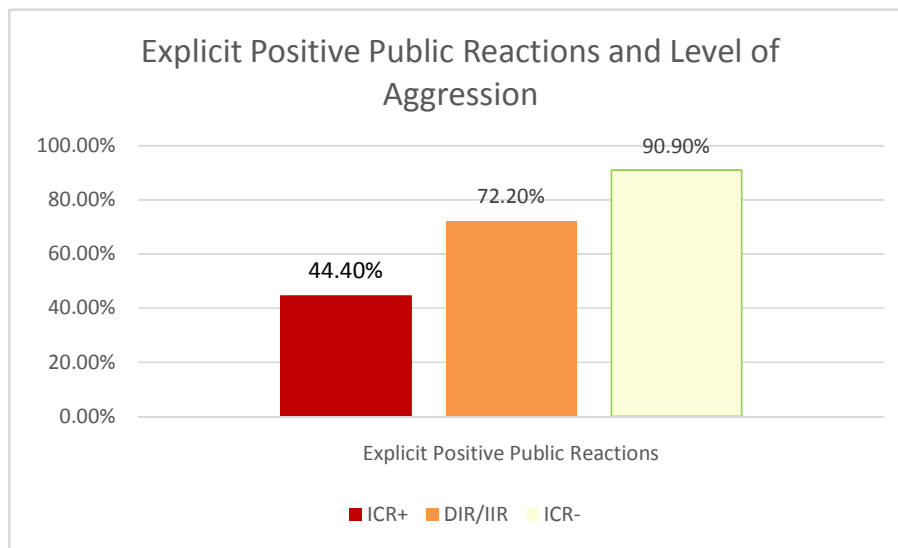
Figure 6 - Percentage of Decisions Provoking Different Types of Public Reaction by Periods



N=38
 Source: Calculation elaborated by the author

Consequently, the increase in aggression is also positively related to the increase of explicit support. As discussed previously, some decisions might not be negatively criticised by opinion leaders and, on the contrary, might be explicitly linked to the images of independence and activism. In such a case, I regard this type of reaction as explicitly positive. As expected, 44.4 percent (four) *ICR+* decisions; 72.2 percent (13) moderately aggressive decisions, *DIR/IIR*; and 90.9 percent (ten) were respectively linked to either the image of independence or that of activism, or both. These figures show that the level of aggression increased when there was explicit support of Justices’ decisions, as shown by Figure 7.

Figure 7 - Explicit Positive Public Reactions and Level of Aggression

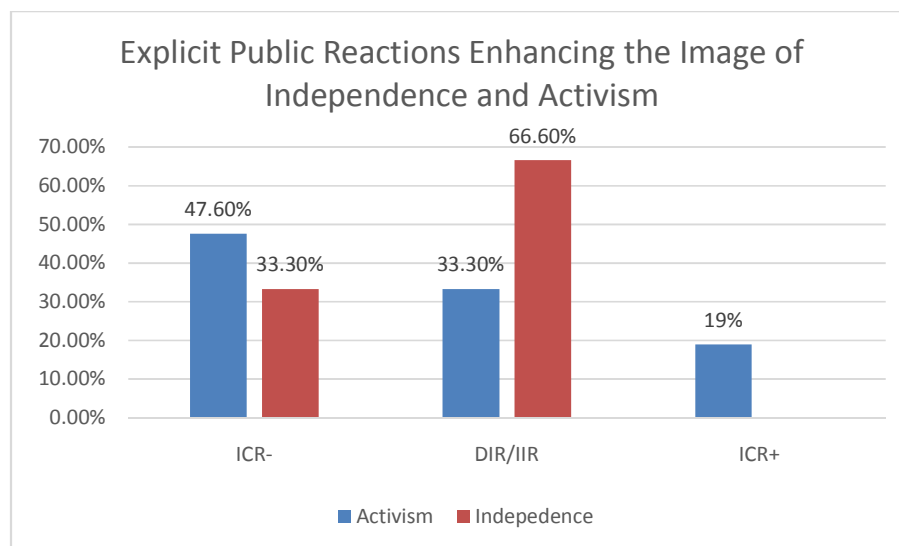


N=38

Source: Calculation elaborated by the author

The evidence observed also underscores how the Justices used their rulings to build diffuse public support. I found that the *ICR-* decisions were crucial in making the Court be perceived as activist, as 47.6 percent of my sample is linked to this image against 33.3 percent and 19.0 percent to the *DIR/IIR* and *ICR+* respectively, as shown in Figure 8. Meanwhile, *DIR/IIR* decisions were key for the perception of independence. As also shown in Figure 8, 66.6 percent of the decisions linked to this image belong to this group, against 33.3 percent of the *ICR-* decisions. The different impact of these two types of remedies could be attributed to their nature as well as the context in which were decided. As I will discuss in chapter 8, *ICR-* are Justices' innovative jurisprudential creations. They are aimed at involving the Court in the solution of structural institutional deficits provoking human rights violations. As such, it makes perfect sense to see them being perceived as enhancing the image of activism. They probably had less impact on the image of independence due to the fact that they were mostly used in contexts of longer tolerance intervals, when the issue at hand was salient neither for a weak nor a powerful government. Meanwhile, *DIR/IIR* decisions were issued mainly in contexts of medium intervals, and even in some cases in contexts of short ones that might help to portray the Court as independent.

Figure 8- Explicit Public Reactions Enhancing the Image of Independence and Activism



N=38

Source: Calculation elaborated by the author

Conversely, the *ICRs+* had a mixed impact on the Justices' strategy to build diffuse support as also summarised in Figure 4. On the one hand, they contributed nothing to the image of independence, which is probably due the fact that most of these decisions validated policies salient to the official agenda. In fact, the only decision producing explicitly negative public reactions was the *Bustos* decision, an *ICR+* validating a key economic policy of the government's. On the other hand, this type of decision was useful for the Justices in building the image of activism, as 44.4 percent (4) of them were linked to the enhancement of the protection of human rights.

In addition, the analysis of the evidence distributed over the two periods of this work indicates the Justices' were slightly more active in the first period. In that period, 83.3 percent of their decisions had a positive impact in both images, against 60.0 percent in the second. Conversely, during the first period only three (16.6 percent) decisions were not linked to either images while the number rose to eight (40.0 percent) in the second period. This is an expected development, I argue, given that the Justices had to start building diffuse support and breaking well

established negative views of the Court during the first period. Furthermore, it was during this period that the Justices issued the highest number of *ICR+* decisions, including the *Bustos* decisions, which had negative effects on the image of independence. In this context, it is plausible that the Justices devoted more effort to building their image in a context that was still marked by distrust of the High Court. This conclusion is consistent with what several observers pointed out in interviews with the author. For example, two legal scholars and experts in the Court's affairs observed that between 2008 and 2010 the Justices were more cautious in their decisions, and decreased the number of relevant decisions in terms of the protection of both fundamental rights and the constitutional structure of checks-and-balances. In the same line, a think-tank leader (CSL1 2010)(CC1 2010) claimed that the relevance of the Justices' decisions decreased over the second period under analysis. However, the interviewee acknowledged, the Court's performance in this period was assessed against its performance in the first period, which is a very high standard for a constitutional tribunal.

Calculating Government's Tolerance Interval

I finally explore whether the Justices indeed calculated the Government's tolerance interval. The findings show that the Justices avoided conflicts with the Government, only increasing their level of aggression when the Government's tolerance was higher. As discussed earlier in this chapter, only two types of intervals in each period determined by the Government's strength are possible. Medium and long intervals can occur during the first period, while medium and long for the second.

For the first period, when eighteen decisions were issued, most of the data confirms the expectations that only *ICR+* and *DIR/IIR* will occur under the medium interval as shown. The data confirms this expectation. Only one case of *ICR-* occurred under such interval, the *Badaro I*. However, as explained in another section of this chapter and in chapter seven in more detail, this represents a case of the strategic reduction of aggression by means of alterations in the basic features of the remedy at hand. Moreover, I found that all *ICR+* were rendered under a short interval as expected by the theory. Finally, I expected that only *ICR-* will occur under a long

interval. However, three DRI/IIR occurred under such an interval, but as explained in length in chapter six, these are cases in which legal constraints prevented a more aggressive resolution. In conclusion, after subtracting those four rulings explained by my theory in other respects, the remaining ones occurred under the expected interval width.

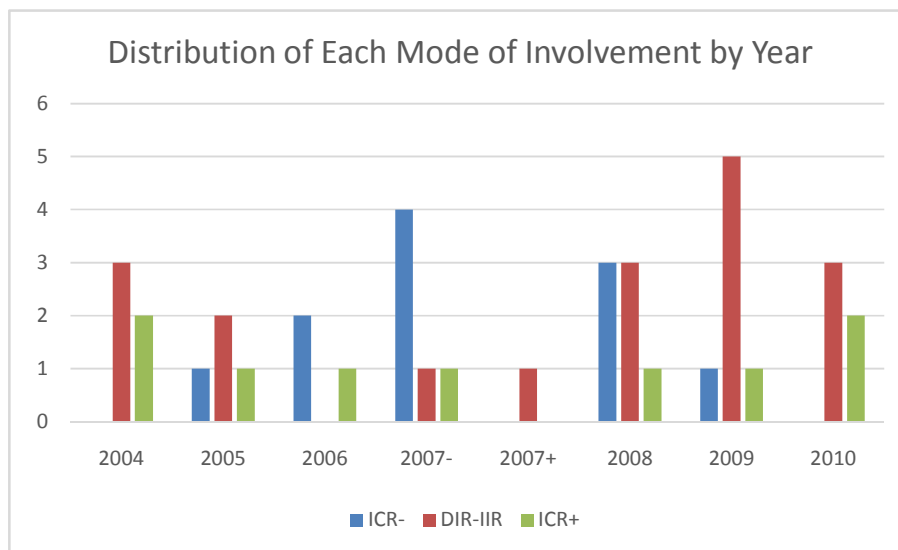
For the second period, in situations where the Government was powerful, I also find supporting evidence as per my expectations. First, I expected that only ICR+ would occur under a short interval. Three out of four of these decisions occurred under these conditions while the *Tejerina* ruling fell outside my theory. Second, I expected DIR/IIR to occur under the medium interval. This was the case in 8 out of 12 decisions. The other four occurred under the short interval. Beyond these, the Patti decision is another example of Justices' strategic reduction of their aggression by means of altering the features of a remedy, as I explain in length in chapter six. The remaining three decisions fall outside the remit of my theory. Finally, all ICR- of this period occurred under expected scenarios, that is, the medium interval. In conclusion, removing *Patti*, from the count, 15 out of 19 decisions occurred under the government's expected tolerance interval.

In addition, the evidence suggests that the Justices responded strategically to the government's increase of power. However, such response did not involve deference. I observe that the Justices did not substantially decrease the number of aggressive decisions in the second period. Combined ICR- and DIR/IIR decisions amounted to 13, which represented 72.2 percent of the decisions dictated in this period; and 16 decisions, 80.0 percent of those occurred in the second (Figure 7). In the same vein, the Justices did not increase the number of decisions validating the government's policies in this period. Indeed, the number of ICR+ decisions decreased from five to four in the transition from one period to another (Figure 3). In fact, from these four decisions, in *Tejerina* the government was not involved. Thus, the effective number of decisions in favor of the government was three; 15.0 percent of the decisions dictated in the second period. In light of this, the Justices did not substantially increase the number of rulings in which the government was not

involved. The increase was marginal, from three to five, representing 17.6 percent and 23.8 percent of the total decisions dictated in each period respectively.

The strategic behaviour arose from the calibration of the level of aggression. The Justices switched the most frequent mode of involvement in the second period. In the first, *ICR-* decisions were slightly more frequent than the *DIR/IIR* ones, representing 38.8 percent and 33.3 percent respectively (Figure 7). In the second period this distribution changed as *DIR/IIR* reached 60.0 percent and the percentage of *ICR-* decisions decreased to 20.0 percent. This shows that the Justices preferred to diminish the number of the most aggressive decisions in a context in which the government was powerful (Figure 9).

Figure 9- Distribution of Modes of Involvement per Year



N=38
author

Source: Calculation elaborated by the

The findings also suggest an inconclusive but interesting pattern. The Justices were willing to validate more of the government's policies in the first period rather than in the second. In the first period, five *ICR+* decisions occurred over issues salient to the official agenda. Meanwhile, only three occurred in the second. This can be attributed to the Justices' strategic thinking. Potentially, the Justices wanted to show the government that, while they issued a high number of *ICR-*, their aggression did not mean that they would attack the government's key policies.

However, the small number of decisions does not permit us to make a firm conclusion in this regard.

The evidence discussed here suggests that the Justices strategically avoided conflicts with the government, and this, in turn, affected their choice over the different forms of involvement. The findings show that the Justices increased their aggression when the Government's tolerance was high. In particular, they show a tendency to avoid deciding against a powerful government's position when the issue at hand is salient to its official agenda. Also, the evidence shows the Justices' predisposition to issue the most aggressive intervention in circumstances where the government either lacked the capacity or interest to retaliate, or both. Furthermore, the Justices issued moderately aggressive forms of involvement when the likelihood of retaliation decreased. This occurred either when the government lacked the capacity to retaliate, because it was weak, or when it lacked the interest to do so as the issue at hand was not salient to its agenda. Finally, the findings suggest, although preliminarily, that the Justices were more active in validating the Government's policies in the first period than in the second. This might be a consequence of the Justices' desire to transmit a message to the government about their intention to avoid political conflicts.

Conclusion

In this chapter I sought to present an overview my findings. After refining the original hypotheses put forward in this work, I empirically tested the refined hypotheses. In terms of the Justices' different modes of involvement, I found that 38 decisions fell into three types of involvement. Nine decisions were characterised as *ICR+*, the least aggressive mode of intervention. The moderately aggressive mode of intervention was then constituted by 18 decisions represented by *DIR* and *IIR*. Finally, 11 decisions configured the most aggressive mode of intervention, *ICR-*. Furthermore, I found that 31 decisions out of 38 confirmed the refined hypotheses. Four decisions fell outside my theory due to measurement errors, and another three suggest that Justices do not always engage in the type of strategic behaviour predicted by my model.

The analysis of these decisions suggests three important points. First, I found patterns of behaviour from which I can infer that the Justices anticipated the reaction of opinion leaders who are able to both shape the public views of the general image of a court (diffuse support), and influence public reaction to decisions over socially-sensitive rulings (specific support). In addition, the evidence shows Justices' decisions enhanced the Court's images of independence and activism. All these elements indicate that the Justices' attempts to build and maintain public support were also reflected in their decisions. In addition, the evidence suggests that the Justices avoided engaging in political conflict with the Government. For this, they calculated the government's tolerance interval. In line with the theoretical expectations, the findings suggest that the Justices dismissed the option of avoiding ruling against the government's interests. They did this in order to avoid retaliation while they challenged the Government's interests in a high number of cases. However, I observe that in most of the cases the Justices avoided ruling against the Government on issues salient to its agenda. The evidence therefore allows me to conclude that Justices anticipated that the risk of retaliation decreased if the Court avoided ruling against powerful governments in issues of particular salience to the official agenda. This suggests that the Justices' concerns with the Court's institutional security led them to not only build public support but also avoid conflicts with the government.

Second, the evidence indicates that Justices' strategic calculations determined the selection of the different forms of intervention the Justices used. In other words, this evidence confirms that the Court's level of aggression increased when the Government's tolerance was higher and the public appeared to be more supportive. I found that most of the decisions falling into each type of remedy confirmed most of the refined hypothesis. In general terms, I found that the Justices increased their level of aggression by using different modes of involvement when the public appeared to be more supportive and the Government's tolerance interval was higher during both periods. Also, it shows that the Justices decreased their level of aggression by altering the features of the same remedy. Finally, it shows that existing legal constraint prevented Justices from becoming more aggressive.

Thirdly, my core argument is also confirmed by the analysis between the level of aggression and public support on the one hand, and level of aggression and the government's interval on the other. The evidence indicates that the level of aggression increased when the public appeared to be more supportive in most of the cases. When looking at decisions that provoked strong positive reactions I found that the least aggressive modes of involvement were the least supported and, conversely, the most aggressive ones were the most supported. Similarly, the evidence indicated that the level of aggression increased when there were explicit positive reactions. The least aggressive modes of intervention were the least linked to either or both images put forward by the Justices to build support. Contrary to this, the most aggressive modes of intervention were most linked to the images of independence and activism by opinion leaders.

Likewise, the evidence also suggests that the Justices' level of aggression increased when the government's tolerance interval was longer. I observed three patterns of behaviour in this direction. In the first place, the evidence suggests that Justices tended to avoid deciding against a powerful government's position when the issue at hand was salient to its official agenda. Also, the evidence showed the Justices' predisposition to issue the most aggressive forms of intervention when the government either lacked the capacity and interest to retaliate, or just the interest to do so. Furthermore, the Justices issued moderately aggressive forms of involvement when the likelihood of retaliation decreased. This occurred either when the government lacked the capacity to retaliate, because it was weak, or when it lacked the interest to do so as the issue at hand was not salient to its agenda.

In conclusion, the findings suggest two important patterns of the Justices' behaviour. First, that Justices engaged in strategic behaviour in which they calculated the impact of their decisions on public opinion and on the government's interests. Second, this calculation determined the selection of the different forms of intervention the Justices used to intervene in the public realm. Together, these patterns confirm the main causal hypothesis I put forward in this work. In the following chapters I further underscore the Justices' strategic behaviour. In each chapter I present an overview of the findings and a narrative analysis of a number of rulings. The narrative analysis

aims to underscore the salient features of each mode of involvement and different practices that permitted Justices to protect their Court, explore the constraints the Justices faced in developing their strategic behaviour, and demonstrate the limitations of my theory.

Chapter 5 – The Least Aggressive Mode of Involvement: *Indirect*

Collective Remedies (+)

Introduction

In this chapter I analyse the least aggressive forms of involvement used by Justices, characterised as *Indirect Collective Remedies(+)*. As previously discussed, this type of decision is characterised by the validation of a policy already in place. The collective effect is attributable to decisions taken by courts whose rulings are empowered by *erga omnes* effects. However, in the case of courts whose decisions are granted with only inter-party effects, the decisions result in *ineffective* collective effects. I say “effective” because this validation is formally valid only for the case under discussion and the decision is only meant to affect the situation of the parties involved. Nonetheless the collective effects of the decision are produced by the fact that this type of ruling validates public policies which, by nature, are thought to have collective effects.

The Justices dictated 9 decisions characterised as *ICR+*, the least aggressive mode of involvement. These decisions addressed relevant issues ranging from criminal prosecutions of human rights perpetrators to the regulation of the media business. Five decisions took place in the first period, while four took place in the second, as shown in Table 14.

Table 14 - *ICR+* Decisions

<i>Indirect Collective Remedies (+)</i>	
First Period	
<i>Arancibia Clavel</i>	The ruling established that crimes against humanity are not subject to the statute of limitations, nor to prescription.
<i>Bustos</i>	The ruling declared constitutional a key economic policy, the so-called <i>pesification</i> , subsequently implemented by the Government in the aftermath of the country’s crisis in 2001.
<i>Poblete</i>	The ruling declared two amnesty laws unconstitutional.
<i>Massa</i>	The ruling implicitly validated the <i>pesification</i> policy subsequently implemented by the Government in the aftermath of the country’s crisis in 2001.

<i>Mazzeo</i>	The ruling declared unconstitutional a decree granting impunity to several individuals involved in the perpetration of crimes against humanity.
Second Period	
<i>Tejerina</i>	The ruling confirmed a lower judge sentence of 14 years in jail for a young woman who was raped, got pregnant, and killed her son right after giving birth.
<i>Arriola</i>	The ruling declared that it was unconstitutional to punish marijuana consumers if that action does not harm third parties.
<i>Fondo Bicentenario</i>	The ruling declared that the Province of San Luis lacks legal standing to claim the unconstitutionality of a national Government's decree.
Thomas	The ruling established that Mr. Thomas lacked legal standing to challenge the constitutionality of the Media Law.

Source: Analysis elaborated by the author

Validating the Government's policy was a delicate issue for the Justices given the risk of retaliation and their attempt to build public support. As discussed in chapter two, the likelihood of retaliation was still real in the political context in which the Justices operated. Thus, they had incentives to engage in deferent behaviour in order to protect their Court from political attacks. However, such behaviour might endanger their attempt to build public support. As discussed in chapter three, Justices sought to reverse an extended public image in which the Court was identified with the Government of the day. In such a context, a ruling in favour of the Government might have a negative impact on the public perception of the independence of the Justices. That is because, given the particular scenario in which the Justices are embedded, one might speculate that the public will consider the Court to be independent when it opposes the Government on crucial issues. Although a single decision might not be enough to shape popular perceptions, it is also true that it might have an incremental effect on the configuration of such perceptions. This is because, as discussed in chapter one, over time the support that an individual exhibits for a court is, at least in part, a function of how that person evaluates the outcomes of the Justices' many decisions. A given decision has both short-term impacts and implications for future support. Thus, ruling in favour of the Government's interests might jeopardise attempts to build and maintain long-term public support.

I discuss in this chapter how the Justices' strategy determined the use of the least aggressive mode of intervention. I present evidence showing two important developments. First, I show how the Justices successfully used this mode of involvement to avoid engaging in conflicts with the Government while at the same time building public support. Second, the findings confirm that the level of aggression of the Justices increases when the Government's tolerance interval is longer and the public appears to be more supportive. Additionally, I present a narrative analysis of four decisions. The analysis on the *Poblete* decision underscores the main features of this mode of involvement and how Justices managed to issue them without affecting the Court's image of independence. Also, the narrative analysis reveals some patterns of behaviour, enhancing our understanding of the Justices' strategic use of *ICR+* decisions. Particularly, I discuss how Justices strategically crafted their decisions in order to avoid conflicts with the Government and to avoid negative public reactions to the images put forward in an effort to build popular support.

For these purposes, the chapter proceeds as follows. In the first section I further discuss the findings presented in chapter four in relation to *ICR+*. In the second section I discuss the *Poblete* decision, a paradigmatic example of an *ICR+* decision occurring under ideal scenarios. In the third section I analyse three decisions, *Bustos*, *Massa*, and *Thomas*. In doing so, I describe how a ruling text is crafted for strategic purposes. I conclude by summarising the most important aspects discussed in this chapter, and I also briefly introduce the following chapter.

Overview of the Findings

Overall, the evidence supports this theoretical claim. Six out of nine decisions confirmed two hypotheses, ***RH1*** and ***RH2***, as shown in Table 15. I expect that Justices' attempts to avoid political conflicts with the Government will be restricted by their simultaneous efforts to build public support. This restriction, I argue, operates in two directions. First, I expect that Justices validate only policies which are salient to the Government. As discussed earlier, the most effective way to avoid conflicts with the Government is to avoid ruling against its interest. However, this course of action is likely to portray the Justices as deferent to the Government, which runs against the Justices' attempts to build public support. As a result, I expect that the Justices will limit the

number of *ICR+* decision to strictly necessary situations in which the Government is more likely to retaliate if a decision contrary to its interests occurs. Second, I expect that Justices will make *ICR+* decisions over issues salient to the official agenda when this does not affect the images of independence and activism. As a consequence, I expect that Justices will strategically choose the cases in which they will validate the Government's policy.

These expectations were formulated in the form of two refined hypotheses in chapter four and read as follows:

- ***RH1*** predicts that in the first period *ICR+* will happen when the Government's tolerance interval is medium and that they provoke moderately positive public reactions. These include decisions over issues salient to a weak Government that do not produce media reports containing statements by opinion leaders seeking to undermine the image of independence and activism.
- ***RH2*** predicts for the second period that this type of decision occurs when the Government's interval is short and public reactions moderately positive. These include decisions over issues salient to a powerful Government that do not produce media reports containing statements by opinion leaders seeking to undermine the image of independence and activism.

Table 15 - ICR+ by Hypotheses

Hypotheses		Decisions
RH1	ICR+ occurs when public reactions are moderate and the Government's tolerance interval is medium.	14. <i>Arancibia Clavel</i> 15. Poblete 16. Massa 17. Mazzeo
RH2	ICR+ occurs when public reactions are moderate and the Government's tolerance interval is short.	15. Arriola 16. Thomas

Source: Analysis elaborated by the author.

Three decisions of this kind fall outside my theory. Two of them provoked unexpected public reactions. *Bustos* provoked negative public reactions that undermined the Court's image of

independence, as I discuss in the last section of this chapter. Conversely, *Fondo Bicentenario* received strongly positive public reactions instead of the expected moderate ones. In this case, the analysis of newspaper articles I conducted revealed that the media did not report statements by opinion leaders that were against the rulings, which tentatively suggests that the Justices underestimated the positive impact of the decision on the public.

Likewise, in *Tejerina*, rendered in the second period, the Government was not involved, and, thus, its tolerance interval was long and not medium as expected.. This is the only *ICR+* decision in which the national Government was not involved.

All other decisions were salient to the Government's official agenda in periods when it was either weak or powerful. Thus, as predicted by the theory, the decisions occurred in the context of a medium tolerance interval in the first period, and a short tolerance interval in the second. This suggests that the Justices ruled in favour of the Government when it was strictly necessary as the risk of retaliation increased. In addition, the Justices managed to avoid negative reactions to diffuse public support in all but one, the *Bustos* decision, that is, in 88.8 percent of the cases.

Furthermore, the evidence confirms the claim that the Justices' level of aggression increased when the Government's tolerance interval was longer and the public appeared to be more supportive. If we compare this set of rulings against the other forms of intervention, I observe that these decisions occurred in a context of the shortest tolerance interval possible in each period marked by the Government's strength. Only the *Tejerina* decision occurred in the context of a longer interval, given that the issue under discussion was not salient to the official agenda. In addition, as I showed in chapter four, these decisions were less supported than others if I consider that, overall, they provoked the lowest number of strongly positive public reactions and the highest number of moderate ones. In addition, one of only two decisions in this study provoking negative public reactions belongs to this mode. In the same vein, these decisions contributed little to the enhancement of the image of independence. No decisions in this group were linked to this image. In fact, one of them, the *Bustos* decision, undermined it. Meanwhile, four of these decisions were

linked to the image of activism put forward by the Justices, the lowest number compared to the number of decisions belonging to the other modes of intervention linked to activism.

The findings briefly discussed above indicate two important developments. First, the Justices successfully used this mode of involvement to avoid engaging in conflicts with the Government while at the same time building support. In regard to this last point, although these decisions validated official policies, they did not provoke negative reactions to the image of independence in all but one decision. Second, the findings confirm that the level of aggression of the Justices tended to increase when the Government's tolerance interval was longer, and when the public appeared to be more supportive. These decisions, characterised as the least intensive mode of involvement, occurred in the shortest tolerance interval possible and received the lowest level of public support.

A qualitative analysis of the decisions enhances our understanding of the Justices' strategic use of *ICR+* decisions in particular, and their strategic behaviour in general. I now want to discuss a paradigmatic case of *ICR+*. The *Poblete* decision illustrates how the Justices were able to validate salient official policies without affecting diffuse support. In the following section I underscore the Justices' behaviour in more detail, particularly in relation to the attempt to build public support. Particularly, I show that building diffuse support sometimes required Justices to carefully craft their decisions. I conclude by highlighting the key issues discussed in this chapter.

A Paradigmatic *ICR+* Decision Occurring Under an Ideal Scenario: The *Poblete* Decision

In June 2005, the Justices rendered the *Poblete* decision (Simón, Julio Héctor y otros *s/* privación ilegítima de la libertad, etc 2005b), in which they declared two amnesty laws unconstitutional: the 'Full Stop' and the 'Due Obedience' Laws, which granted immunity to those accused of massive human rights violations that occurred during the last dictatorship. Also, it declared constitutional the legislative annulment of these amnesties established by Law 25.779 in 2003. With this ruling, the Justices validated one of the most emblematic policies implemented by the Kirchner administration: the re-opening of criminal trials against those involved in the

violations of human rights during the last dictatorship. Although validating a crucial official policy might have been highly costly for the Justices' attempt to build public support, the evidence suggests that there was no coverage by the media reporting opinion leaders' criticisms of the image of independence and activism. This example can therefore be understood as representing an increase in diffuse support. There were, nonetheless, reactions affecting specific support to the rulings. The media coverage reported criticisms of the ruling from conservative sectors of society. These critiques were not related to the images of independence and activism. In other words, the decision, in line with my theoretical expectations, did not provoke a political conflict with the Government, though it did cause a shallow increase in public support.

Between 1976 and 1983 Argentina was ruled by a *de facto* Government which implemented a cruel repressive plan which included the estimated disappearance of 30,000 people, hundreds of exiles, thousands of illegal detentions, and the systematic use of torture, among other atrocities.⁸⁴ This historic ruling settled an issue of paramount political relevance in Argentine politics since 1983 and reopened criminal trials against hundreds of perpetrators of such atrocities.

In relation to the human rights crimes committed by the *de facto* Government and its allies, the country has gone through an '*ebb and flow*' process in which subsequent Governments implemented disparate policies in relation to the use of criminal prosecution for these crimes (Engstrom and Pereira 2012). Soon after the collapse of the authoritarian regime, democratic President Alfonsín launched a restricted criminal accountability policy. However, the latent military threat against democratic institutions led the President to restrict its policy even more by the end of its administration. As a result, his government passed the Full Stop and the Due Obedience Laws which substantially limited the scope of prosecution. Later, President Menem foreclosed any hope for judicial accountability by the early 1990s. He dictated decrees pardoning those already convicted and amnesty decrees for those under prosecution. In line with the desires of both Alfonsín's and Menem's governments, this legal corpus received constitutional validation

⁸⁴ All these and other types of crimes were reported by the Truth Commission in its final report called "Nunca Mas" (CONADEP 1986).

by the Justices in 1987 and 1991 (Engstrom and Pereira 2012). As a reaction to this impunity policy, active and creative human rights groups carried out an aggressive strategy both to circumvent and neutralise it (Engstrom and Pereira, *Ibid*: 97-104). However, the core aspects of the policy remained in place.⁸⁵

The scenario radically changed in 2003 when President Kirchner unexpectedly took power.⁸⁶ He unconditionally embraced the largely advocated agenda of Memory, Truth and Justice pushed by human rights groups, which included the re-opening of human rights trials.⁸⁷ This agenda became a crucial policy for both Kirchner and his successor, Cristina Fernandez. The Government gained the confidence of human rights groups which saw, for the first time, a national government as an ally in the struggle against impunity (Lessa 2013).⁸⁸ This resulted in the support of the most salient human rights organisations for the Government, which, in turn, was crucial for an administration in need of gaining legitimacy. In the realm of criminal prosecutions, the Kirchner Government was the first one ever to push for an unrestricted accountability policy. In his most

⁸⁵ Nonetheless, the anti-impunity strategy succeeded partially as international agencies, such as the Inter-American Commission of Human rights of the Organization of American States and the Human Rights Committee of the United Nations, declared the legal measures were in breach of international human rights standards (Engstrom and Pereira, *Ibid*). Also, in the domestic arena, human rights were able to push criminal prosecution for the stealing of babies, crimes that were not covered by the amnesties, and the creation of “Truth Trials” aimed at investigating the occurrence of human rights violation and punishing their perpetrators (Engstrom and Pereira, *Ibid*).

⁸⁶ As Engstrom and Pereira (*Ibid*) discuss advances in the pursuit of justice were unforeseen in a country, where, in the aftermath of the 2001-2002 crisis, half of the population was living below the poverty line and several interim leaders failed to retain power beyond a few days. Furthermore, little was known about Kirchner’s view on the human rights issue.

⁸⁷ In fact, Kirchner embraced the “Memory, Truth, and Justice” agenda of human rights groups. In May 2003, for example, Kirchner forced the military top leadership to retire (Gallo 2003). In September 2003, in a speech to the UN General Assembly, Kirchner sought to connect his government with the human rights struggles of the past by claiming that all Argentinians are “the sons and daughters of the Mothers and Grandmothers of Plaza de Mayo” (Kirchner 2003). In addition, Kirchner reversed Argentina’s policy on extradition, ordering cooperation with extradition requests for those not facing charges in Argentina. He also ratified the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, which prohibits statutes of limitations for crimes against humanity. In addition, the Kirchner government also gave its support to memory projects promoted by some HROs, which has resulted in the construction of a number of memory sites to commemorate the disappeared (Lessa 2013). Finally, the reparation policy, earlier implemented by other governments, was extended to victims who were not covered previously (Lessa, *Ibid*).

⁸⁸ The most salient human rights groups have traditionally advocated unrestricted criminal prosecutions policy. However, their claims were never endorsed by a National Government. As mentioned before, in the early 80s, President Alfonsín implemented a restrictive policy and Menem foreclosed accountability in the 90s. Thus, Kirchner’s willingness to push for unrestricted criminal prosecutions had a good reception among human rights activists as stated by several human rights leaders in interviews with the author (Buenos Aires, 2010).

remarkable measure in this matter, the President led the Congress to vote in favor of nullifying the impunity laws in August 2003 (LaNacion 2003).

However, the implementation of the unrestricted accountability policy required judicial validation. This put the Justices at the centre of the public scene. The effect of the reopening of prosecutions by a legislative act was limited because the power of the Congress to annul laws was alleged to be in breach of constitutional principles. As a result, reopening the trials for human rights violations necessitated a judicial decision declaring either, or both, the judicial nullification of the amnesty laws or the constitutional validation of the legislative nullification. The Justices had in its docket some cases in which lower judges had declared the amnesties unconstitutional. As a consequence, both the Government and society in general directed its attention to the Justices. In fact, since the renewal of the Justices' membership, several journalists and analysts insistently claimed that the Justices had to resolve the issue as soon as possible.⁸⁹ The newly elected Justices were aware of political and social expectations, and they publicly anticipated, even before taking their positions, that the Justices would settle this controversy in the short term.⁹⁰ It was in this context that the *Poblete* decision was dictated.

In parallel, the decision took place at the onset of the process in which Justices sought to regain public support. Thus, at this stage, it was crucial for the Justices that they were not perceived as merely serving the interests of the Government. The political context in which the decision was dictated suggests that the Justices were able to anticipate public reactions. At the time of the ruling it was plausible that a vast sector of society would react positively to a decision reopening the human rights trials. Indeed, the whole human rights policy, largely announced and incrementally implemented by President Kirchner, proved popular with the electorate. By July 2003, Kirchner had risen to an approval rating of 75 percent (Mallinder 2009). This public support for the trials was maintained over time. A poll published in 2012 showed that Kirchner's human rights policy was regarded as one of the greatest achievements of the two successive Kirchnerist

⁸⁹ See for example, Clarín (2004); Ventura (2004a); *La Nación* (2004f); *Página 12* (2004); and *Página 12* (2004).

⁹⁰ See for example, Fioriti (2004); Wainfield (2004); and Hauser and Grinsberg (2004).

administrations.⁹¹ However, re-opening the trials faced opposition. A survey conducted in September 2003 cited by Mallinder (*Ibid.*: 119) indicated that 70 percent of respondents ‘acknowledged that human rights violations had been committed by the dictatorship.’ But opinion was divided on how these violations should be addressed: 40 percent favoured judicial action, whereas 23 percent said that ‘it would be enough for the armed forces to apologise for their crimes’. In a context in which the Government’s policy was still controversial, for the Justices the validation of this policy could have done some damage to the Court’s reputation.

However, the Justices were able to validate the official policy without endangering the Justices’ image of independence, although negative reactions against the ruling were in place. The media coverage of the ruling shows that there were no reports of opinion leaders arguing that the ruling was a sign of a lack of independence. In this sense, the *Poblete* decision increased diffuse support.⁹² However, the ruling was criticised by those against the re-opening of the trials. In particular, the conservative newspaper *La Nación* expressed opposition to the ruling, mainly through editorials. However, most of the critiques were focused on an alleged legal misinterpretation of the relationship between international and domestic constitutional human rights principles (Ventura 2005s; *La Nación* 2005c). Also, the newspaper asserted that the re-opening of criminal prosecutions would push the country into a scenario reigned by revenge and hatred, and requested the Justices to re-open criminal trials against former member of guerrillas groups (*La Nación* 2005d). Although the Justices validated a Government’s key policy, they were not perceived by opinion leaders to have a lack of independence. As a result, the critique did not revolve around the lack of independence. Rather, it lamented an alleged circumstantial ideological

⁹¹ A poll published in 2012 reveals 89 percent of the respondents supported trials and imprisonment of state officials involved in human rights violations (Kollman 2012).

⁹² As expected, the decision triggered a great number of positive popular reactions which resulted in an increase of diffuse support. It had ample popular acceptance. It was widely welcomed by members of most political parties, even from those in opposition; salient figures of the legal academy; renowned journalists; and leaders of social movements.⁹² Also, it brought international prestige to the Justices, as it was seen as a model judicial decision in the struggle against impunity for crimes committed by authoritarian rule by renowned human rights activists and international media. See for example, Veiras (2005a); and Clarín (2010).

convergence between the Justices and the Government (LaNacion 2005e).⁹³ Thus, the Justices were perceived as following their sincere preferences and for not being influenced by the Government's interests.

The absence of negative media references alleging a lack of Court independence might be a consequence of several factors. First, the Justices took advantage of the President's anxiety for the final resolution of the issue to remark on their independence publicly. On several occasions, President Kirchner made public his desire that the Justices resolve the issue as soon as possible (LaNacion 2005f). This provoked the reaction of some of the Justices. For example, Justice Fayt remarked that the Justices were independent from the Government and that no one, including the Government, can set a timeframe for its decisions (LaNación 2005g, 2005h; Página12 2005). Secondly, and in relation to the ruling, each of the Justices who joined the majority wrote his own opinion. This had many interpretations among political and legal analysts. One was that by writing their own opinions, the Justices showed society that they were highly convinced, by their own arguments, that the amnesties were unconstitutional.⁹⁴ Finally, each of the opinions were heavily grounded in standards set by different international human rights bodies, particularly those which concluded that the Argentine amnesty laws were in breach of international human rights law in previous instances.⁹⁵ According to legal analysts and journalists interviewed for this work, this had a positive impact on society as the Justices showed that their decision was not discretionary.

On the Government's side, the ruling was widely welcomed. President Kirchner's words praising the ruling in a crowded public meeting were eloquent:

'The Supreme Court of our country has taken a decision that brings back the faith in justice, [it] declared unconstitutional the laws of Full Stop and Due Obedience which filled us with shame.' (LaNacion 2005i)

⁹³ The effects of these critiques might have had limited effects among the newspaper's readers. It reproduced an extended interview in which Chief Justice Lorenzetti was given the chance to highlight the most relevant decisions and initiatives taken by the new Court. Among them, the Justice mentioned the *Poblete* decision. He rebutted the legal arguments reproduced by the newspaper in earlier issues and added that the incorporation of international human rights standards into domestic law was not at the discretion of the Justices. It was required by the Constitution and is a feature of any modern legal system (Ventura 2005).

⁹⁴ This was remarked upon by several interviewees during the author's field work interviews.

⁹⁵ International bodies such as the UN Human Rights Committee and the Inter-American Human Rights Commission of the OAS reached this conclusion at several opportunities (Engstrom and Pereira, *Ibid*).

Apart from validating the Government's core human rights policy, the rulings had the additional effect of pleasing the Government. As mentioned before, the legislative nullification of the amnesties law led by Kirchner was highly controversial under constitutional principles. Under the Constitution, the Congress only has the faculty to derogate laws, not to nullify them, which was a judiciary's faculty. A formalist interpretation of the Constitution suggested that the Justices had to declare unconstitutional both the amnesties and also their legislative nullification. In fact, the Justices acknowledged this. However, they argued that because such nullification coincided with what they were doing, namely nullifying the amnesties, what was done by the Congress had to be regarded as constitutional (Simón, Julio Héctor y otros *Ibid*: parag 34). According to human rights activists (CSL2 2010; CSL4 2010; CSL5 2010; CSL6 2010) and legal practitioners (LP3 2010; LP4 2010) interviewed during my fieldwork, this innovative form of constitutional interpretation was considered unconventional in legal circles. This indicates the Justices' efforts to maintain not only the core of the policy but the vehicle used by the Government. Note that the re-opening of the trials necessitated only the declaration of unconstitutionality of the amnesties from the Justices. Given the type of reaction against the ruling and the human rights policy, one can speculate that confirming the validity of the nullifying law saved the Government from criticism in regard to a potential lack of respect for the republican division of power. Tentatively, the Justices' efforts do not invalidate the legislative nullification of the amnesties, which represented a positive signal from the Justices to the Government regarding how it would treat its key initiatives.

In line with the theory put forward in this work, the evidence suggests that the Justices managed to validate a crucial Government policy without endangering their attempt to gain public support. Although the Justices removed the legal obstacles to the re-opening of the human rights trials — a crucial policy of President Kirchner's — there were no media reports of opinion leaders arguing that the rulings were a sign of a lack of independence. Tentatively, the latter aspect can be attributed to the fact that Justices carried out some activities in order to stress their independence. In this sense, the ruling caused an increase in diffuse support. Notwithstanding, the ruling received public critiques which meant a decrease in specific support. As a result, the ruling provoked a

shallow increase in public support. Finally, opinion leaders perceived *Poblete* as a sign of the Justices' commitment to the protection of human rights, which enhanced the image of activism put forward by the Justices.

Crafting Judicial Decisions for Strategic Purposes: The *Massa* (and *Bustos*) and *Thomas* Decisions

The political context in which the *Poblete* decision occurred did not present serious challenges to the Justices' strategy to build public support while at the same time avoiding political conflicts with the Government. In this case, the salient policy enjoyed relatively popular support. However, the Justices also had to decide over issues in more complex situations such as when the policy at hand was negatively viewed by vast sectors of society. The *Bustos*, the *Massa*, and the *Thomas* decisions occurred in such a context. In these instances, ruling in favour of the Government in policies that were crucial to the official agenda put the image of independence at risk. Indeed, the *Bustos* decision confirms that such a risk was real. This is the only decision of the whole study that compromised the image of independence. However, in the other two decisions, the Justices managed to avoid negative public reactions. In these instances, the Justices carefully crafted their decisions to validate the policies without reviewing their constitutionality. In this section I discuss in detail the Justices' strategic craft of decisions to avoid political conflicts with the Government while at the same time avoiding negative views from the public. The discussion on *Massa* includes *Bustos* as they address the same economic policy, and they show the dissimilar impact on public views in two different instances in which the same policy is validated.

The *Massa* (and the *Bustos*) Decision

The *Massa* decision is particularly illustrative of the Justices' strategic use of writing techniques to avoid negative public reactions and conflicts with the Government, particularly if I analyse it against the preceding *Bustos*. In both *Bustos* and *Massa*, the Justices validated an economic policy that was subsequently implemented in the aftermath of the country's crisis in 2001. However, these decisions had a different impact on public views. The first one, dictated in October 2004, undermined the image of independence put forward by the Justices. Meanwhile, the second one, dictated in October 2006, did not provoke negative views on this direction. The two

decisions differed in a particular aspect, the way the Justices wrote their decisions. In *Bustos* the Justices explicitly validated the economic policy declaring its constitutionality. In *Massa*, the justices did not declare the constitutionality of the policy but rather asserted that it was not in violation of the constitution. In addition, they found a practical solution that avoided citizens' property rights from being harmed.

Since 2001 the subsequent governments of De la Rúa, Duhalde and Kirchner implemented a controversial economic plan in order to reverse the effects of the crisis. By 2001 the country had lost the confidence of investors, capital was fleeing and bank liquidity decreasing (due in part to individuals withdrawing pesos, buying dollars, and keeping them out of the financial system), internal and external debt was growing, and unemployment was rising. In an attempt to staunch the flow of money out of the country and avoid a run on banks, the De la Rúa administration (1999-2001) passed Law 25.466 (Law of Intangibility of Deposits, published 25 September 2001). Less than two months later, however, the government changed gears dramatically, imposing a bank freeze (via Decree 1570, published 03 December 2001) that would subsequently become known as the *corralito*. After De la Rúa's resignation due to the increase of popular demonstrations and the worsening of the economic situation, the economic plan was further sharpened by the subsequent President Duhalde, who tightened the *corralito*, abolished convertibility which meant that the peso would no longer be pegged to the dollar, prohibited further judicial decisions regarding the execution of injunctions against the *corralito* for six months, and forcibly converted bank deposits in dollars to (by then) devalued pesos, which was known as *pesification*.⁹⁶ In particular, *pesification*, implemented by presidential decree 214/2002, combined with the devaluation of the peso resulted in citizens' bank deposits decreasing initially by 40 percent with respect to the U.S. dollar (Hirigoyen 2008).

The whole plan was highly unpopular and was challenged by society at large during and after the crisis. Bank depositors organised a widespread social and political mobilisation that

⁹⁶ As Herrero (*Ibid*) notes, this package, and particularly *pesification*, was a reaction to the fact that Argentina's economy had been de facto dollarised and as of 2002, 70 percent of bank deposits were in US dollars.

included banging pots and pans, assaults on banks, and popular assemblies (Herrero, *Ibid*: 32). Their discontent was brought to courts where the plan was massively disputed.⁹⁷ As Smulovitz (2005: 166) reports, legal actions against all or some aspects of the plan amounted to 337,952 by the end of 2002.⁹⁸ By June 2004, 264,557 of such claims received favourable responses through injunctions issued by judges (Smulovitz, *Ibid*). Thousands of cases relating to some aspects of the plan reached the Justices. In relation to *pesification*, several cases reached the Justices. In March 2003, the Court Justices issued the *San Luis* decision declaring *pesification* unconstitutional. The case was brought to the Justices by the governor of San Luis claiming the return of 247 million U.S. dollars deposited in the largest state-owned bank (Banco de la Nación Argentina). However, this ruling did not settle the controversy regarding the policy as it only applies to cases in which provinces were involved.

Resolving the *pesification* issue posed challenges to the Justices' attempt to build public support without endangering the Justices' institutional stability. Ruling in favour of the Government would bring negative popular reactions against the Justices given the unpopularity of the policy. Also, it ran the risk of been portrayed as being too deferential to the Government's interests. On the other hand, invalidating the policy would mean creating tension with the President. *Pesification* was still the cornerstone of the Executive's macroeconomic policy and was crucial for ensuring steady economic growth (Herrero, *Ibid*: 313). Additionally, the unconstitutionality of this measure could be interpreted as indicating that the whole post-crisis economic package was also unconstitutional, as pointed by the Dean of the most prestigious Argentine Law School (Alterini 2007d).

In October 2004 the Justices issued the *Bustos* decision (*Bustos, Alberto Roque y otros c/ Estado Nacional y otros s/amparo* 2004b). The Justices' majority declared the constitutionality of the *pesification*. As Rosenkrantz (2011: 1565) summarises, they argued that the economic

⁹⁷ In fact, the case of citizenship challenges to this policy in Courts was taken as an illustration of the intense process of legal mobilisation that has been occurring in Argentina in the last few decades (Smulovitz 2005).

⁹⁸ The vast number of legal actions were primarily grounded on the claim that the policy imposed an unconstitutional limitation on property rights and that the Executive had no constitutional power to implement it by decree (Herrero 2008).

emergency justified the costs imposed upon creditors and decided that the decree was not constitutionally prohibited, even though the presidential decree restricted remedies for vindicating property rights. Justice Zaffaroni, writing his own opinion, joined the majority by establishing that the ruling applied only to individuals claiming for the *pesification* of deposits above 70,000 U.S. dollars. As a result, the policy was explicitly validated but its application was restricted to a minority of cases estimated in only 20 percent of the total of *pesified* bank deposits.⁹⁹

The decision had a negative impact on both specific and diffuse support. In terms of specific support, the ruling was highly criticised by both legal experts and the general public. From a technical point of view, the ruling resulted in strongly negative views because the five Justices who joined the majority did not unanimously support it. In fact, three of the Justices wrote their own arguments, which resulted in a majoritarian decision with four sets of arguments. The Justices' arguments were alleged to be substantially different, and sometimes, contradictory. On these grounds, numerous legal experts claimed publicly that the Justices failed to establish a legal doctrine and, thus, lower judges should not follow this precedent (LaNacion 2004g, 2004h). Grounded on this lack of clarity, several lower judges followed the same line of thought by declaring the *pesification* constitutional in numerous decisions (LaNacion 2004i). As a result, the ruling was followed by a rare case of judicial disobedience (Pagina12 2004).

Furthermore, the public's reception of the rulings was also negative. In fact, a group of bank savers were present in the Court House when the rulings were released. They rapidly organised a spontaneous demonstration which turned into a violent confrontation between protesters and the police (LaNación 2004j). Subsequent public demonstrations against the ruling followed for several days. Some of them targeted individual Justices. For example, Justice Maqueda reported to the police that a group of protesters, congregated in front of his house, threatened his physical integrity (Clarín 2004a).

⁹⁹ More than 80 percent of the deposits were below US \$70,000 (Sued 2004).

Expectedly, the ruling also damaged the image of independence put forward by the Justices. The allegedly poor legal arguments and the lack of clarity of the text led opinion leaders to speculate on the true reasons behind the decision. The ruling was dictated when the Government was seeking to renegotiate its public debts with foreign private creditors. To that end, the Government needed to remove any trace of uncertainty regarding its domestic economic policies. In such a context, *Bustos* was perceived by some editorialists as the Justices' contribution to official macroeconomic policy (LaNacion 2004o). This view was shared by prominent politicians of the opposition. They alleged that the ruling was a clear sign that a new pro-Government Court was constituted. For example, the President of the UCR, the second major national party, (LaNacion 2004k) argued:

‘[The ruling] is the result of a new automatic majority of the Court, now in the hands of President Kirchner.’

In the same vein, Carrió, the leader of *ARI*, another prominent political party, charged against individual Justices. She alleged that the opinion of at least two Justices were the outcome of an illegal agreement between them and the President. According to her allegations, Kirchner guaranteed the Justices that their tenure would not be interrupted during his term (LaNacion 2004k).

It is unlikely that the Justices miscalculated public reactions to their ruling, at least in relation to the image of the Court's independence. The *pesification* was an emblematic policy about which citizens complained during the post-crisis scenario. As I discussed above, popular discontent towards it was translated in a massive turnout claiming the unconstitutionality of legal actions. The Justices knew that validating the policy would have a negative public reception. It is possible, however, that they had hoped to temper, not to dissipate, the negative effects of the decisions for public opinion. Some elements point in this direction. For example, Justice Zaffaroni's restriction in regard to the applicability of the ruling can be understood in this light. However, the fact that such a restriction was not explicitly endorsed by his colleagues undermined the effectiveness of this attempt. Also, the Justices seem to have attempted to temper the negative

impact of the ruling for public opinion by releasing *Bustos* just after a series of rulings that were extensively welcomed by the public. In September and October of 2004 the Justices ruled *Vizzoti*, *Zavalía*, and *Aquino*, which did not trigger negative reactions from opinion leaders. Moreover, as I discuss in chapter six, they enhanced the image of independence of the Court explicitly and had a long lasting effect on public opinion. As a result, the timing of *Bustos* suggests that the Justices attempted to cushion the negative impact of this ruling for the public. They released it just after a series of decisions enhancing the image of independence.¹⁰⁰ I discuss in detail this strategic practice in the next chapter.

Why did the Justices expose the Court to such negative public reactions? No conclusive response arises from the evidence collected in this work. Tentatively, as suggested by opinion leader's reactions discussed above, the Justices validated this policy in order to secure institutional stability. An alternative, but still speculative, response was proposed by some analysis in field work interviewees. A legal scholar (LS4 2010) argued that the Justices did not want to provoke an economic chaos as they knew that the invalidation of the policy would be highly harmful to the country's recovery in the post-crisis scenario. In the same line, a civil society leader (CSL7 2010) claimed that *Bustos* arose from the Justices' desire to avoid a collapse of the economy.

The fact that that the issue remained unsettled also was a matter of concern in the public realm (Cabot 2004). One of the consequences of *Bustos* was that the conflict regarding the constitutionality of the *pesification* was not definitively closed. Justice Zaffaroni's opinion stated that the policy was constitutional only in cases where the bank deposits were above 70,000 U.S. dollars. This implicitly suggests, as many analysts and journalists pointed out,¹⁰¹ that Zaffaroni would not validate the policy in cases below this threshold. Hence, this meant that there was not a majority of five Justices ready to uphold the policy in subsequent cases. In this context, an increasing public expectation for a final resolution of the *pesification* matters started to pervade the reputation of the Justices. Numerous newspaper articles insisted that the unsettled issue

¹⁰⁰ In subsequent chapters I offer more examples revealing a recurrent strategic use of this resource.

¹⁰¹ See, for example, *Clarín* (2004b).

necessitated a final resolution. Also, as time passed and no final decision on the issue arose, some media articles suggested that anxiety for the decision was turning to discontent for the Justices' delay. As a result, not ruling or further postponing the final resolution of the issue started to damage the Court's reputation.

A final decision on the issue of small savings did not occur until December 2006. This time, the Justices moved astutely in the *Massa* decision (*Massa, Juan Agustín c/ Poder Ejecutivo Nacional* 2006a).¹⁰² Here, the Justices found a course of action which gave final closure on the issue protecting bank savers' property rights while not affecting the validity of the policy. Although declaring the unconstitutionality of *pesification* was thought to be the only way to protect property rights, the Justices avoided doing so. Rather, they went for an unconventional resolution. According to the *pesification* rules, as described by the Justices (Bustos Alberto Roque y otros, *Ibid*: Parag 13), savings should be returned to pesos at ARS \$1.40 for each U.S. dollar, plus an adjustment rate set by the *Coeficiente de Estabilización de Referencia* (C.E.R), a coefficient published by the Central Bank to adjust debts and savings affected by the 2002 *pesification*. In addition, a 2% annual interest was applicable. The Supreme Court cleverly noticed that as time went by — almost four and a half years had passed since *pesification* was enacted — the result of the application of the aforementioned update formula got closer to the market value of U.S. dollars. In its decision, the Justices, in order to meet the market value of the dollar, decided a 2 percent annual interest rate was not equitable and replaced it with a 4 percent rate.¹⁰³ With that change, the value of U.S. dollars and *pesified* dollars met in December 2006. Thus, the return of the deposit in ARS according to the Justices' application would allow Mr Massa to purchase the same amount of dollars he deposited in the market.

¹⁰² Mr Massa was the holder of deposits in Bank Boston NA (in Argentina), which on December 31, 2001 had a balance of U.S. \$184,475.75. He was affected by the emergency laws promulgated during the crisis by President Duhalde. Massa's deposits were pesified and therefore his case reached the Justices after he obtained a favourable injunction which forced the bank to return his savings and which was appealed by the State and the Bank.

¹⁰³ According to the Justices, the 2 percent set by the *pesification* rules was only a minimum interest and that a higher rate could be established by the contractual parties. Given that in the case at hand there was a conflict between these parties, the Justices argued that it has the powers to readjust the interest rate and increase it to 4 percent (*Massa, Juan Agustín Ibid*; paragraphs 16-18).

Although the Justices did not declare *pesification* constitutional, the ruling was also auspicious for the Government. As in *Bustos* and in thousands of legal claims against banks and the state, the alleged unconstitutionality of *pesification* was a key aspect of plaintiff's argument. First, Mr Massa alleged that the policy was in breach of property rights. Second, he alleged that the presidential decree implementing the policy represented a presidential overstep of its boundaries by acting in a legislative manner.¹⁰⁴ However, the Justices explicitly avoided referring to the constitutionality of *pesification*.¹⁰⁵ The Justices declared that the application of the proposed formula for the return of deposits meant that the policy did not intrude on a citizen's private property because it did not alter the intrinsic value of their bank deposits (Massa, Juan Agustín, *Ibid*: paragraphs 20 and 21). Regarding the powers of the Executive to dictate a decree of this kind, they argued that the Court had a long history of jurisprudence validating this type of measure. Reviewing such jurisprudence and eventually reversing it would bring important negative institutional effects to the economy. The Justices concluded that, in light of the mentioned circumstances, it had no reason to review the constitutionality of the decree, particularly because no harm would be inflicted on property rights if the new formula could be applied in all cases.

More importantly for the Government, the Justices guaranteed that it would not review the validity of the policy for cases similar to the one at hand in the future, or that it would apply the same formula.¹⁰⁶ It explicitly offered reassurances of this in the text. The Justices clarified early in the text of the ruling that the decision was meant to give a final resolution to a controversy affecting thousands of cases (Massa, Juan Agustín, *Ibid*: paragraph 8). This anticipated that it would apply such formula to the thousands of cases under review.¹⁰⁷ Additionally, after the ruling was

¹⁰⁴ For a discussion on the plaintiff's arguments, see Hirigoyen (*Ibid*).

¹⁰⁵ Three legal scholars interviewed in my field work (LP1 2010; LP2 2010; LP4 2010) argued that the Justices were aware that the legal arguments in favour of constitutionality were highly controversial. Thus, they speculated, the Justices did not want to endorse legal arguments which could not be solidly defended.

¹⁰⁶ As discussed above, the *Massa* decision revolved around the situation between an individual and a private bank. The Justices still had to rule over another situation where individuals had deposits in private and public entities different from private banks. However, this type of case was marginal compared with the ones similar to Mr Massa's case.

¹⁰⁷ Although this promise does not irrevocably bind either lower courts or the Justices in future cases, it can be considered as a political signal to the Government. In relation to lower judges, as discussed by Herrero (*Ibid*) and Smulovitz (2005), most of the legal claims found a positive response in courts. Thus, it was very unlikely that lower judges would challenge the Justices' decision.

issued, the Justices announced the creation of an internal task force to speed up the resolution of each case on its docket (Fernández Moores 2007). Such a resolution was crucial in order to maintain the equivalence between the *pesified* deposits and the value of the U.S. dollar in the market. In conclusion, the ruling was beneficial for the Government, because although the Justices did not say that the policy was constitutional, they maintained its validity by refusing to assess its constitutional character. They also foreclosed such analysis for future cases, stipulated a fixed formula to calculate deposits for future cases, and committed to resolving all remaining cases in the short term.

As in *Bustos*, the evidence suggests the Justices used their ample powers to regulate its docket to serve their strategic goals. However, this time they used it in a different direction. In this case, there were 50,000 legal cases waiting to be resolved for several years on the Justices' docket (Clarín 2006b; Hauser 2006a). The passage of time permitted the Justices to wait until the U.S. dollar exchange reached a given value amid a situation of constant fluctuation.

Unsurprisingly, the ruling was welcomed in the public realm and was regarded as one of the most transcendent decisions in recent years (Clarín 2006b). In this regard, the Justices managed to reverse the negative views provoked by *Bustos*. In particular, the media coverage remarked on three aspects. First, the Justices put an end to a conflict that had lasted for several years. Second, they guaranteed that the savers' rights were effectively vindicated. And third, they ensured that the solution found by the Justices would not damage the economy. Illustrative of this are the remarks of a senior staff member from a prestigious law firm published in *Página12* (Rodríguez Simon 2007):

'The first thing to celebrate is that the Massa judgment occurred, as this is not a minor event in the current political context. Also, it is noteworthy that it was the new members of the Justices who put more effort into resolving the issue. In addition, [we should celebrate] they have been able to find a consensus formula. Finally, [we should celebrate] that the resolution, in terms of distributive justice, is relatively pragmatic, balanced and sensible.'

In short, *Massa* is an example of how the Justices managed to validate key Government policies without risking its reputation. The evidence suggests that the Justices learnt from the precedent of

Bustos. By including an unusual formula in the text of the ruling, they found a practical solution to validate a salient policy to the official agenda and meet the public demand. As a result, *Bustos* enhanced the Court's image of activism. In addition, the discussion of the evidence suggests that the Justices made use of their powers to manage their docket discretionally. In this light, the text of the ruling and how the Justices benefited from the pass reinforces the strategic character of the decision.

The Thomas Decision

The *Thomas* decision (Thomas, Enrique c/ E.N.A. s/ ampar 2010d) is a case in which the Justices had to decide over a highly divisive issue, the regulation of media law. Such regulation was a crucial policy of the Government and enjoyed a great deal of support. At the same time, it was also highly disputed publicly and in courts by economic media groups and the party opposition. In *Thomas* the Justices found a clever way to resolve the case. They carefully crafted the text of the decision by avoiding references to the constitutionality of the law. In doing so, they avoided negative reactions from both the Government's top officers and from opinion leaders.

In October 2009 President Fernandez's Government passed the Audiovisual Communication Services Law (Ley de Servicios de Comunicación Audiovisual), known as the *Media Law*. The law established a new regulatory media framework that, according to the text of the act, intended to democratise the audiovisual media in Argentina by de-concentrating media ownership and by reserving parts of the broadcast spectrum for non-profit groups.¹⁰⁸ The law sought to reform a sector that was largely dominated by a few number of private companies under a media policy characterised by deregulation and the withdrawal of the state from the broadcasting

¹⁰⁸The new framework, among other issues, reserved a portion of the spectrum for non-profit civil society organizations, imposed public service obligations on private media, specifically granted native communities the right to receive radio and TV licences, included regulations to facilitate media access for people with visual or hearing impairments, created an independent regulatory authority, added transparency requirements to licence holders, established limits for concentration and for broadcasting cross-ownership, and prohibited telephone companies from holding media licences (Becerra, Marino, and Mastrini 2012).

sector (Marino, Becerra, and Mastrini 2010).¹⁰⁹ The law was regarded as a significant shift in the domestic media policy realm (Macrory 2008).

Unlike the *corralito* and the re-opening of human rights trials discussed earlier, regulation of the media was a highly divisive issue. On the one hand, the Media Law enjoyed a high level of support by a vast sector of society (Marino *et al*, *Ibid*: 7). In fact, the initiative was a proposal of a strong national civil society lobby that advocated for media reform for several years. The *Coalición por una Radiodifusión Democrática* (CRD; Coalition for Democratic Broadcasting), created in 2004, laid out the principles needed for reforming broadcasting regulation and provided the basis for the future Media Law (Macrory, *Ibid*: 183; (Porto 2013)).¹¹⁰ The Government adopted these principles and drafted a bill that reflected their core aspects (Álvarez Ugarte 2013). In addition, the Government attempted to extend popular support for the initiative. It held forums to debate the content of the proposal in each of the 24 provinces. Different actors related to the media, social communication issues and a wide range of social movements analysed the proposal (Porto, *Ibid*:9). In the same vein, the legislative discussion was also highly participative as several public hearings were held in both the Deputy and Senate Chambers (Porto, *Ibid*). As the consequence, the core aspects of the bill were supported by the CRD and a variety of actors, including small community media groups, the two main union organisations, several public universities, the most salient human rights organisations, numerous NGOs that were not part of the CRD, and numerous groups of artists, intellectuals, journalists, and media experts (Marino *et al*: 12).¹¹¹

On the other hand, there was also strong resistance to the law from the main media conglomerates and some prominent political parties. This resistance was brought to the public agenda and to the courts. In particular, the limitations on concentration and broadcasting cross-

¹⁰⁹As Becerra *et al* (*Ibid*: 8) discuss in an Open Society Report, the concentration of ownership and market domination by the leading operators is a pervasive trend extending to almost all platforms in Argentina. The concentration of property in multimedia groups, such as the Clarín Group, that have dominant positions in print, radio, and free-to-air and pay television, also restricts diversity.

¹¹⁰The coalition was comprised of university departments of communication studies, trade unions, human rights organizations, and community radio groups (Macrory, *Ibid*: 183).

¹¹¹The bill did not necessarily satisfy all the expectations of the different social actors supporting it. However, their crucial claims were incorporated into its text. Thus, albeit some minor discrepancies, these groups backed up the bill (Porto, 2013).

ownership were taken as the Government's attempt to restrict the influence of opposing media.¹¹² Such limits mainly impacted the interests of the biggest media group, the Clarín Group, which runs afoul of all the major anti-monopoly clauses of the law (Macrory, *ibid*: 184).¹¹³ In this line, opposing politicians, journalists, and businessmen took the new regulation as the Government's retaliation against the Group.¹¹⁴ They alleged that the regulation punished the Clarín Group for its overt stand against almost all official key policies since 2008.¹¹⁵ This precipitated a public battle between the Fernandez administration and the media conglomerate, in which the Media Law was at the centre of the conflict.¹¹⁶ Criticism of the Media Law occupied a prominent space in the editorial line of media outlets belonging to the Group.¹¹⁷

Opposition to the law was brought to courts. As Alvarez Ugarte (*Ibid*:5) remarked, the Clarín Group would attempt to resist implementation of the law by judicial means. There were approximately 30 legal cases open in courts around the country against the law at the time the case of Mr *Thomas* reached the Justices (Alfie 2010a; Hauser 2010). Most of them were brought by media businesses arguing the full or partial unconstitutionality of the law. The most common argument grounding these claims was that the de-concentration process established by the law

¹¹² As Macrory (*Ibid*: 184) summarises, the Media Law imposed limits on the number of each different type of media outlet any one company can own, and distinctions are made between national and local broadcasting. At the national level, it establishes that a single company cannot provide services to more than 35 percent of the country's population or subscribers. In addition, if a company holds a licence for a satellite television provider, it is illegal to hold any other type of audio-visual media licence.

¹¹³ Under the new legislation, the new regulatory agency could require Clarín to voluntarily, and forcefully upon denial, sell off broadcast licences as well as its majority stake in other media companies.

¹¹⁴ For examples of opposing politicians warning about the alleged negative consequences for freedom of expressions, see Clarín (2009). Once the law was promulgated, one of the strategies used by the opposing political parties was to obstruct the election of authorities of the new agency created by the law, as discussed by Marino *et al* (*Ibid*)

¹¹⁵ Becerra and Mastrini (2010: 10-13) critically evaluate how the Clarín Group's media covered different policies implemented by the Government, particularly the ones implemented in 2008 aimed to tackle the effects of the international financial crisis on the domestic economy. They concluded that in all the cases the media belonging to Clarín was consistently against the Government's initiatives.

¹¹⁶ The conflict between the government and the Media Group initiated in March 2008 when the Government launched a controversial tax increase for the export of agricultural products. The move was largely resisted by landowner and producers who protested against the measures with strikes and roadblocks (Becerra *et al*, *Ibid*). The conflict ended when the Government reversed its attempt due to the lack of congressional approval. In this conflict, the Grupo Clarín aligned itself with the protests, and its media outlets covered the ensuing crisis with limited impartiality (Becerra *et al*, 2010: 619. President Fernandez blamed the coverage of the crisis in Clarín for the setbacks to her party in the congressional elections of June 2009 (Macrory, *Ibid*: 182).

¹¹⁷ The Clarín Group's advocacy against the law started as soon as the bill was introduced to the Congress (Becerra *et al*, *Ibid*). Several experts, particularly journalists, stated that the media strategy of the Group effectively framed the issue as a freedom of expression issue (interview with the author).

violates property rights. Also, there were a few cases brought by political leaders from the opposition. The Governor of the province of San Luis, on behalf of the interests of his province, and some members of the Congress who voted against the law disputed its constitutionality as well.

To fully understand the context in which the *Thomas* decision was issued, it is important to remark that the legal disputes against the Media Law occurred in a context defined by the increasing judicialisation of political conflicts led by political elites. In the last few years of the Fernandez administration, political parties, interest groups, and business groups, resorted to the judiciary in order to set limits on the national Government or to invalidate some of its policies. In several cases judges responded positively to such legal actions and issued injunctions suspending the implementation of the Government's policies.¹¹⁸ The increased use of this resource was perceived as excessive by the Government who expressed its discontent publicly, suggesting that judges' decisions were politically motivated (Hauser 2010; Wainfield 2010).

In this context, the resolution of the legal cases revolving around the constitutionality of the Media Law was not easy in light of the Justices' strategy. The Media Law became a highly divisive issue in which the Government, the main media conglomerates and the most prominent political parties had strongly contrary interests. The Justices faced a complex scenario in which maintaining public support while avoiding political conflicts with the Government appeared to be difficult. On the one hand, the cases were perceived by some legal experts (LP2 2010; LP3 2010) and a leader of a right organisation (CSL1 2010) as a test for the independence of the Justices. In the public realm, the political opposition and the opposing media framed the conflict in terms of whether the Justices would validate a law which is perceived as an instrument to restrict freedom of expression and property rights, and to expand the Government's political power, as pointed out by the interviewees cited before. Thus, what was at stake here was the image of the Justices as an independent institution, a key element of the Justices' strategy to build public support. Particularly

¹¹⁸ An injunction is a preventive judicial measure that, although not resolving the conflict at hand, is intended to prevent the occurrence of irreparable damage until a final decision on the dispute is reached. Judges issue injunctions only when necessity exists. It must be readily apparent to the Justices that some act has been performed, or is threatened, that will produce irreparable injury to the party seeking the injunction.

for the *Thomas* case, those opposing the law expected that the Justices would maintain its suspension and that the Justices would not accept the Justices' jurisdiction over the case, because according to procedural rules, the Justices' lacked the jurisdiction to review injunctions issued by lower judges (Clarín 2010c; Wainfield 2010). On the other hand, a decision affecting the interest of the Government would lead to a political conflict with the President given the salience of the policy to the Government's agenda. In particular for the *Thomas* case, as stated by several top officials, the Government expected the decision to be overturned, thus fully suspending the law and the eventual constitutional validation of the law (Ginzberg 2010). In addition, the Media Law enjoyed significant levels of popular support. Thus, ruling against the law could also have negative effects on public support for the Justices. In fact, several massive public demonstrations were held subsequently in 2010 in which not only the Government's close allies but citizens in general advocated for a definitive judicial validation of the law (Wainfield 2010; Pagina12 2010).

Although the political circumstances posed serious constraints on the Justices' strategy, in the *Thomas* decision they managed to avoid both damaging the Justices' image and engaging in a conflict with the Government. The case was brought to courts by a member of the Deputy Chamber of the National Congress, Mr *Thomas*, who voted against the Media Law. The case reached the Justices after a Federal Appeal Court of the Province of Mendoza suspended the full implementation of the Media Law through an injunction. The full suspension of a law with *erga omnes* effects by means of an injunction was an unusual measure under Argentine law. However, the Federal Appeal Court grounded its decision on the alleged fact that Mr *Thomas*'s right to fully participate in the legislative debate was obstructed by a series of irregularities in the legislative process.

In their decision, the Justices deliberately avoided assessing the constitutionality of the law. They argued that the conflict at hand was whether an injunction suspending the full implementation of the Media Law was valid or not (Thomas, Enrique *ibid*:paragraph 2). For this purpose, they stated, citing Court precedents, that although the Justices lacked the powers to review the lower court's injunctions, the incumbent case configured an exception to such a rule

(*Ibid*). This is because, the Justices followed, the Appeal Court's decision fully suspended a law which seems to fall outside the powers of any judge. Thus, they considered that the decision might violate the constitutional division of powers as judges are not empowered to do so (*Ibid*).

The decision overturned the full suspension of the law. For this, the Justices carefully avoided making any reference to the law itself. They grounded their decision in two main arguments. First, they concluded that Mr *Thomas* lacked the legal standing to bring the case to court. The claimant grounded its petition in the fact that, as both a citizen and a member of the Congress, the alleged irregularities of the legislative process violated his rights to participate in such a process (Thomas, Enrique *Ibid*: paragraph 3). As a citizen, the Justices highlighted, Mr *Thomas* failed to demonstrate that he suffered an immediate, concrete, and direct affectation of his rights, which is crucial for the configuration of a judicial controversy (*Ibid*: paragraph 5). Thus, the Justices concluded, it is not legally possible for the Justices to intervene when there is a controversy of this kind. The Justices also concluded that the claimant lacked legal standing. They stressed that the representative character of his position as a congressman did not include the capacity to represent its constituencies in courts (*Ibid*: paragraph 5). Finally, they added that no irregularities were found in the legislative process which, thus, meant that no rights were restricted (*Ibid*).

The Justices' second main argument related to the judges' lack of powers to declare the *erga omnes* suspension of laws. The Justices emphatically stressed that the Argentine legal system empowers judges to declare the unconstitutionality of laws with effects only to the parties involved in the case under revision (*Ibid*: paragraph 7). Thus, such a declaration has no *erga omnes* effects. The Justices concluded that judges lacked the powers to declare a law unconstitutional with *erga omnes* effects, let alone doing it by means of injunction (*Ibid*). As a result, the injunction issued by the lower courts was not valid.

Although the decision cancelled the *erga omnes* suspension of the Media Law, it did not damage the image of the Justices as independent from the Government. Media coverage, even that

opposing the Government, did not report any explicit mention or accusation in this direction by political leaders, editorialists, influential academics or civil society leaders. This means that the ruling increased diffuse support for the Justices. This increase might be attributed to the content of the decision, the context in which it was dictated, and the legal arguments used by the Justices. In relation to the first, the Justices did not assess the constitutionality of the media law as was wished by top Government's officials, which might have been perceived as a sign of their lack of independence. In addition, a second element may account for the lack of public criticism toward the ruling. Although the decision overturned the decision suspending the full implementation of the law, other aspects of the legislation remained suspended by other judicial injunctions. Thus, in practice, the law could not be taken as fully valid yet. Third, according to three legal experts (LP1 2010; LP2 2010; LP3 2010) and leaders of two rights organisations (CSL1 2010; CSL7 2010) interviewed by the author in his fieldwork, the legal arguments used by the Justices were sound from a technical point of view, which made it difficult to build a case on the lack of independence of the Justices.¹¹⁹ In fact, the coverage of the ruling by *Clarín* and *La Nación* remarked on all these aspects, which suggests that they probably attempted to present the decision as something other than a victory for the Government (Clarín 2010d; Ventura 2010).

The decision was more or less welcomed by the Government. The President herself praised the rulings for reinstating the authority of the Congress, strengthening the authority of the institutional order, and respecting the constitutional division of power (Pagina12 2010b). In addition, although the law was partially suspended by other judges, the Government took the ruling as an implicit validation of the law. Some top officials argued that the ruling meant the removal of all legal obstacles to implement the new legal framework (Pagina12 2010c). Finally, top officials saw it as a positive development that the Justices set clear limits on the judges' power to suspend the effect of a law by means of judicial injunctions (Hauser 2010a).

¹¹⁹ In addition in the views of a number of legal experts pointing out the legal soundness of the ruling, there was no interviewee criticising *Thomas* from legal point of view. I should stressed that one of the interviewees was a legal representative of the Clarín Group.

As in the *Poblete* and the *Massa* decisions, the *Thomas* one is another example of how the Justices managed to validate a crucial Government policy while maintaining public support. The ruling was dictated under circumstances not favourable to the Justices' strategy of building support while avoiding conflicts with the Government. The issue at hand was very controversial. On the one hand, it was a key policy for the Government supported by a vast sector of society. On the other, there were strong positions against it, particularly represented by the main media group and the main political parties in the opposition. The Justices found a way to validate the policy while avoiding any reference to the constitutional character of the law. For this purpose, they carefully crafted the text of the ruling.

Conclusion

In this chapter I discussed the least aggressive forms of involvement used by Justices, characterised as *Indirect Collective Remedies(+)*. These decisions involved the validation of the Government's policies. Validating such policies was a delicate issue for the Justices' strategy of building public support while avoiding conflicts with the Government, particularly when the policy was salient to the official agenda. Ruling in favour of the Government might have a negative impact on public perceptions on the independence of the Justices.

In my overview of the findings, I showed that the evidence indicates the occurrence of two important developments. First, the Justices successfully used this mode of involvement to avoid engaging in conflicts with the Government while at the same time building support. Second, the findings confirmed that the level of aggression of the Justices increased when the Government's tolerance interval was longer and the public appeared to be more supportive.

The narrative analysis of *Poblete* underscored the main features of these remedies by type and the context in which they occurred. In *Poblete* the Justices removed legal obstacles to the re-opening of the human rights trials — a crucial policy of President Kirchner — and there were no media reports of opinion leaders arguing that the rulings were a sign of the Justices' lack of independence. Tentatively, the latter aspect can be attributed to the fact that Justices carried out

some activities in order to stress their independence. In this sense, the ruling occurred under conditions of increasing diffuse support. Notwithstanding, the ruling received public critiques from conservative opinion leaders which meant a decrease in specific support. As a result, the ruling provoked a shallow increase in public support. Finally, opinion leaders perceived *Poblete* as a sign of Justices' commitment to the protection of human rights, which enhanced the image of activism put forward by the Justices.

Furthermore, the analysis of *Massa (and Bustos)* and *Thomas* revealed that their strategic behaviour was facilitated by their ability to craft the text of their rulings. Certainly, the political context in which the *Poblete* decision occurred did not present serious challenges to the Justice's strategy to build public support while at the same time avoiding political conflicts with the Government. In this case, the salient policy enjoyed relatively popular support. However, the Justices also had to decide over issues in more complex situations such as when the policy at hand was negatively viewed by vast sectors of society. In these instances, ruling in favour of the Government in crucial policies to the official agenda put the image of independence at risk. I found that the Justices managed to avoid negative public reactions by means of carefully crafting their decisions in which policies were validated without reviewing their constitutionality.

Three *ICR+* decisions were not explained by my model. In relation to *Bustos*, the question of why the Justices exposed the Court to negative public reaction remains unanswered. However, some tentative and not mutually exclusive explanations arise from the evidence. As suggested by opinion leader's reactions, the Justices validated this policy in order to secure institutional stability. Alternatively, some analysis in field work interviewees claimed that *Bustos* arose from the Justices' desire to avoid a collapse of the economy. In any case, these tentative responses suggests that in some cases the Justices prefer to validate the Government's policies even when this runs against their own attempt to build public support. *Fondo Bicentenario* illustrates the obstacles Justices face in collecting information to anticipate public reactions to their rulings. This case tentatively suggests that the Justices underestimated the positive impact of the decision on the public.

In the following chapter I will describe the moderately aggressive mode of involvement used by the Justices. In doing so, I will discuss another practice carried out by the Justices which was originated on strategic grounds, the constraints they face to get appropriate information to calculate reactions from the Government's top officers, and the limitations of my theory.

Chapter 6 – The *Moderately Aggressive Modes of Intervention: Direct*

Individual Remedies and Indirect Individual Remedies

Introduction

This chapter discusses the *moderately aggressive forms* of intervention used by the Justices. These are remedies with an individual impact that invalidate government policies, but have lower costs of implementation than the most aggressive one. These types of decisions are characterised as *Direct Individual Remedies (DIR)* when the Court directly designs the solution for the case under dispute, and *Indirect Individual Remedies (IIR)* when it leaves the design of such a solution to the government. The Justices rendered 18 decisions of this kind, six during the first period and twelve in the second, as shown in Table 16.

Table 16 - DIR/IIR Decisions

<i>Direct Individual Remedies/ Indirect Individual Remedies</i>	
First Period	
<i>Zavalía</i>	The decisions declared unconstitutional the call for a constitutional convention in the province of Santiago del Estero.
<i>Vizzoti</i>	The ruling declared unconstitutional the ‘cap on severance pay’ established by the Article 245, and established a threshold for the calculus of such pay.
<i>Aquino</i>	The ruling declared unconstitutional an article of the Risks in the Workplace Act. The article established a limitation on the worker’s right to claim full compensation from the employer for the damages suffered due to an accident at work, and exempted employers from civil responsibility.
<i>Municipalidad de San Luis</i>	The decision resolved a conflict between the provincial government and an opposition party. It ruled that the election of a member of the opposition as mayor of the provincial capital was valid.
<i>Sánchez</i>	The ruling established that retired people’s pension should be automatically updated.
<i>Bussi</i>	The ruling stated that the Congress had no powers to prevent an elected Congressman from taking his seat. This applied to the case of Mr Bussi, a former military governor allegedly involved in human rights violations during the last dictatorship. He was eventually elected to the Congress in 1999 but was blocked from taking his seat due to these allegations.
Second Period	

<i>Badaro II</i>	The decision established a new mechanism to calculate a pension adjustment to Mr Badaro's pension. This criterion guaranteed a proportional relationship between employed workers' current salaries, retirements and pensions.
<i>Patitó</i>	The ruling revoked a lower judge's judgment that had ordered the newspaper <i>La Nación</i> to pay an indemnity for moral damages after publishing an editorial that questioned the functioning of the Forensic Medical Corps of the Judiciary.
<i>Patti</i>	The ruling stated that the Congress had no powers to prevent an elected Congressman from taking his seat. This applied to the case of Mr Patti, a former military officer allegedly involved in human rights violations during the last dictatorship. He was elected to the Congress but was blocked from taking his seat due to these allegations by the Congress.
<i>ATE</i>	The decision declared the unconstitutionality of a section of the Union Association Law. This section specified that all candidates for personnel representation must be affiliated to the union enjoying union representation.
<i>AMIA</i>	The ruling ordered the reopening of the criminal investigation into the so-called 'local connection' involved in the 1994 bombing of the Argentine-Jewish Mutual Association (AMIA).
<i>Prieto I</i>	The ruling stated that judges may not force people to give blood samples for genetic testing to determine whether or not they are children of the disappeared during the last dictatorship.
<i>Prieto II</i>	The ruling established that despite <i>Prieto I</i> , less invasive ways of obtaining the DNA, such as seizing personal items, are constitutional.
<i>Rossi</i>	The ruling established that Article 41.a of Law on Trade Union Organisations was unconstitutional because it granted the most representative trade unions certain privileges to the detriment of merely registered trade unions, which covered all or part of the same activity as the former.
<i>Sosa IV</i>	Upon non-compliance with previous decisions, the ruling ordered to the Province of Santa Cruz that the General Prosecutor, Mr Sosa, must be reinstated in office within 30 days. Mr Sosa was illegally removed from his position by the provincial government.
<i>AFIP</i>	The ruling established that that the <i>Agencia Federal de Ingresos Publicos (AFIP)</i> , the Government's administrative agency in charge of administering the federal income tax system, had no powers to issue freezing injunctions over debtors' personal assets.
<i>DNU</i>	The ruling declared unconstitutional the President's use of Decrees of Necessity and Urgency (Decretos de Necesidad y Urgencia or <i>DNUs</i>). These decrees were largely used by democratic presidents and were regarded as the Executive overstepping into Congressional powers.
<i>Sosa V</i>	Upon Governor Peralta's non-compliance with previous Court's decisions, the ruling

	initiated a legal criminal investigation against the Governor for the alleged dismissal of the Provincial General Prosecutor. It also requested the National Congress to study the case and to sanction the Province of Santa Cruz.
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Source: Analysis elaborated by the author.

The use of this form of intervention is likely to bring complications for the Justices' strategy of avoiding political conflicts with the government while simultaneously building public support. Although *DIR* and *IIR* lack the features of the *ICR*-, their aggressiveness should not be underestimated. These decisions not only prevent the government from applying an official policy or practice to an individual case, which is already a relevant development, but they also have an indirect impact on similar cases brought to courts. If a high court, like the Argentine Court, rules in a particular direction, it is expected from a legal point of view that lower judges and the court itself will follow this direction in subsequent decisions over similar cases¹²⁰.

Meanwhile, for the same reasons, the government might see this type of decision as a challenge to its authority. Thus, these moderate forms of intervention are likely to bring about political conflicts for the Court, and, as a result, increase the risk of retaliation in contexts characterised by a lack of a culture of judicial independence. Of course, the Justices can choose not to use this form of intervention or to use it to avoid ruling over legal cases in which the government is formally involved or has a preference for a particular outcome. However, this course of action might affect the image of independence put forward by the Justices. In fact, the evidence suggests that this was not an option for the judges as the government was involved in 14 out of 18 cases.

¹²⁰ This expectation is real in the Argentine context. Although the domestic legal system was largely influenced by the civil law tradition in which judges' rulings are not binding, the Argentine Supreme Court established the binding character of its own decision for lower judges. However, this binding effect must be qualified as it does not constitute a proper *stare decisis* doctrine as known in common law systems. As Sagues (2006) notes the Court expressly emphasised that lower judges are due to follow its decision by an "institutional mandate" and that in case of deviation, lower judges should justify expressly why they deviate and offer new arguments able to refute Court's main ones. Consequently, Court's decision has a binding effect for lower judges though there is room for deviation in exceptional cases. In this light, the Court is not only the last authoritative voice in terms of constitutional interpretation but also its decisions have authority beyond the case under discussion.

I discuss in this chapter how the Justices' strategy determined the use of this moderately aggressive form of intervention. In particular, I show that the Justices behaved strategically by issuing this kind of remedy in response to public reactions and the Government's tolerance interval. I show that most decisions support several hypotheses put forward in this work. The Justices dictated most decisions of this kind when the Government's tolerance interval was medium, that is, when a decision addressed either a salient issue to a weak Government or a non-salient issue to a powerful Government. Also, they strategically reduced the aggression of their intervention using the same type of remedy in one case as a response to the Government's short tolerance interval. In doing so, the Justices decreased the likelihood of retaliation. In addition, most of these decisions provoked at least moderately positive public reactions. The use of this form of involvement was crucial for the Justices' attempts to build public support, as most of the decisions provoked explicitly positive reactions. Furthermore, three decisions confirmed that judges are not able to increase their level of aggression due to obstacles arising from the legal system or culture. Finally, the analysis also reveals that the Justices face real obstacles in terms of collecting appropriate information to measure the Government's tolerance interval.

The chapter proceeds as follows: In the first section I present an overview of the findings related to this mode of intervention. I present an overview of the findings in relation to *DIR/IIR*. The following four sections build on a narrative analysis of a number of decisions. In the second section I discuss the Justices' obstacles to collecting information that may allow them to appropriately calculate the Government's tolerance interval. In the third section I show that the Justices' strategically released controversial rulings in order to shape and influence reactions to their rulings. In the fourth section I discuss a case involving a strategic reduction of aggression within the same type of remedy, which is a tactic used by the Justices in response to a decrease in the risk of retaliation. In the final section I discuss a case that suggests that the Justices sometimes engage in a different type of strategic calculation. In the conclusion I summarise the findings of the chapter.

Overview of the findings

Most of the *DIR/IIR* decisions, 15 out of 18 (83 percent) confirmed several refined hypotheses as illustrated in Table 17. Three decisions confirmed ***RH1*** and eight do so for ***RH2***. Putting these hypotheses together, I expect that the moderately aggressive forms of intervention will occur when the government interval is medium, that is, when the issue at hand is either salient to a weak government or non-salient to a powerful government. Additionally, I predict that these decisions will produce at least moderately positive public reactions. As a result, I expect that *DIR/IIR* decisions over issues relevant to the official agenda will happen in the first period under study. Meanwhile, I expect that decisions of little relevance to the government's agenda will happen in the second period under study. Finally, I expect that these decisions will not produce media reports containing statements by opinion leaders that undermine the images of independence and activism put forward by the Justices.

Table 17 - *DIR/IIR* by Hypothesis

<i>DIR/IIR</i>	
<i>Hypothesis</i>	<i>Decisions</i>
<i>RH1</i> : <i>DIR/IIR</i> occurs when public reactions are at least moderate and the government's tolerance is medium.	Zavalía, Sánchez, Rossi
<i>RH2</i> : <i>DIR/IIR</i> occurs when public reactions are at least moderate and the government's tolerance is medium.	<i>Patitó</i> ; <i>ATE</i> ; <i>AMIA</i> ; <i>Prieto I</i> ; <i>Prieto II</i> ; <i>Rossi</i> ; <i>Sosa IV</i> ; <i>DNU</i>
<i>RH4</i> : For the second period Justices will decrease the level of aggression of <i>DIR/IIR</i> and <i>ICR</i> - by altering the features of these remedies when the government's tolerance interval is short and public reactions is moderate.	<i>Patti</i>
<i>RH5</i> : Judges will become as aggressive as permitted by conditions of the legal culture in which they operate.	<i>Vizzoti</i> ; <i>Aquino</i> ; <i>Municipalidad de San Luis</i>

Source: Analysis elaborated by the author.

As shown, one decision supported ***RH4***. I will discuss later in this chapter that *Patti* represents a case involving a strategic reduction of aggression by altering the features of this type of remedies. In that regard, it confirms the expectation that for the second period Justices will

decrease the level of aggression of *DIR/IIR* when the Government's tolerance interval is short and public reaction is moderate.

Finally, three decisions confirm ***RH5***. I therefore show that Judges will become as aggressive as permitted by conditions of the legal culture in which they operate. For example in *Vizzoti* and *Aquino*, dictated in September 2004, a more aggressive form of intervention was not materially possible. This is because Justice Lorenzetti, who did not join the Court until December 2004, was a proponent of the *ICR-*, the most aggressive type of intervention used by the Justices. As discussed in chapter six, *ICR-* was jurisprudentially created by the Justices. In interviews with the author, Court clerks (CC2 2010; CC3 2010; CC4 2010) and a legal scholar (LS3 2010) affirmed that Justice Lorenzetti was the first to propose the use of these remedies to his colleagues in the Court. Although any other Judge on the bench could have proposed their use, the legal scholar speculated that Justice Lorenzetti's background in environmental and consumer law proves his familiarity with this uncommon type of remedy. Because Justice Lorenzetti was among the first to incorporate these remedies into the Court's jurisprudence, it was materially impossible for *ICR-* decisions to have occurred before he sat on the bench in December 2004. Similarly, the *Municipalidad de San Luis* decision was also dictated following a long interval but this time in 2005. Here, an increase in aggression was prevented by the facts of the case, leading Mr Ponce to request the Court's decision on whether an election was valid or not. Given that the Court validated it, no further actions could have been taken. As a consequence, because of material and legal constraints, these three decisions could have not taken the form of *ICR(-)*.

In relation to the decisions not reached by the scope of my theory, *AFIP* and *Sosa VI* show that the Justices face constraints when they anticipate the Government's reactions to their rulings. Thus, their rulings can be explained by error measurement as I discuss later in this chapter. *Badaro II*, however, falls outside of this theory. In a way that could not be predicted by my theory, the decision of the Justices in this case went against the interests of a powerful government concerning an issue that was salient to its agenda. As such, this case is not resolved by a strategic reduction of Justices' aggression within the same type of remedy. As I discuss in the last section of this chapter,

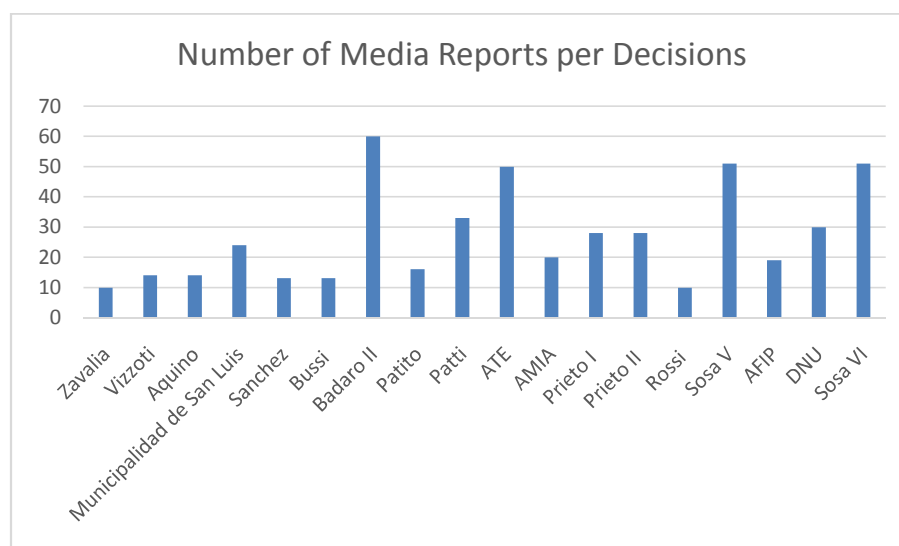
Badaro II seems to be a case in which the Justices preferred saving the Court from a high level of public criticism rather than exposing it to a potential conflict with the Government.

In terms of the Justices' calculus of public reactions and its impact on public support, the evidence also indicates that they successfully anticipated reactions from opinion leaders. We observe that each of the 18 decisions produced positive reactions, ten produced strong reactions, and seven produced moderate ones. In addition, the evidence suggests that the use of this *moderately aggressive* mode of involvement was crucial to the Justices' strategy of building public support as 14 of these decisions were regarded as signs of independence from the Government (11) or activism (7) by opinion leaders. Four of the decisions were explicitly linked to both images, and only three decisions were not explicitly linked to either. These findings suggest that the strategy of ruling against the Government in salient issues when it was weak, and in non-salient issues when it was powerful, was not an obstacle to maintaining the image of independence. This may be due to the fact that the Justices did not avoid ruling against the Government in a high number of cases. Equally, the evidence suggests that using moderately aggressive forms of intervention did not affect the image of activism presented by the Justices. This result may be a consequence of the nature of the issues addressed by the Justices and their decisions, which were regarded as having high social relevance on several occasions as mentioned above. Finally, these developments also suggest that the Justices were effective at both choosing the right cases to rule over, and deploying the right communication policy to publicise them.

Looking at the two periods determined by variations in the Government's strength, interesting patterns of the Justices' strategy can be observed. The first period was crucial for the Justices as they had to start building public support from scratch, and indeed the evidence suggests that the Justices were effective at dictating decisions that were widely welcomed in the public arena and had long term effects on the public perceptions of both images. I found that three of the five decisions of this kind provoked strong and explicitly positive reactions occurred during this period. *Vizzoti*, *Aquino*, and *Sanchez* were explicitly considered as decisions indicating independence and activism. In addition, the six decisions dictated during these first years were

regularly cited as examples of either or both images by media reports throughout the two periods under study.¹²¹ In relation to the second period, I observe a tendency among Justices to dictate decisions with explicit impact on the public perceptions of the Court's independence. In this period, six decisions were linked to this image compared with only three linked to the image of activism. In the same way, when looking at the number of media reports per decision, I found that the decisions with the highest level of media attention occurred during this period and in all the cases they were exclusively related to the image of independence from the Government. As the Figure 10 indicates, the *Sosa IV* and the *Sosa V* decisions, the *ATE* decision, the *Patti* decision, and the *DNU* decision ranked first among the moderately aggressive forms of intervention.

Figure 10 - Number of Media Report per Decision



Source: Calculation elaborated by the author.

In terms of the Government tolerance interval, the evidence suggests that the Justices avoided ruling against the Government when the risk of retaliation was high, that is, when the tolerance interval was short. As already mentioned, 11 decisions were dictated when the Government tolerance interval was medium and three when it was long. In addition, it was in only three decisions that the Justices exposed themselves to retaliation as they ruled against the interests

¹²¹ For opinion leaders' reactions related to: *Aquino* see Hauser (2004; 2004) and Krakowiak; *Zavalia* see Hauser (2004, 2004d); *Municipalidad de San Luis* (2005a); *Vizzotti* Verbitsky (2006) and Boschi (2004b); *Sánchez* see *La Nación* (2009) and Verbitsky (*Ibid*).

of the Government when it was powerful and the issue was salient to its agenda. From these three, two decisions, *AFIP* and *Sosa V* are explained by measurement errors as discussed in the next section. And one decision, *Patti*, is an example of Justices' strategic reduction of their aggression within the same type of remedy as a response to the Government's short interval.

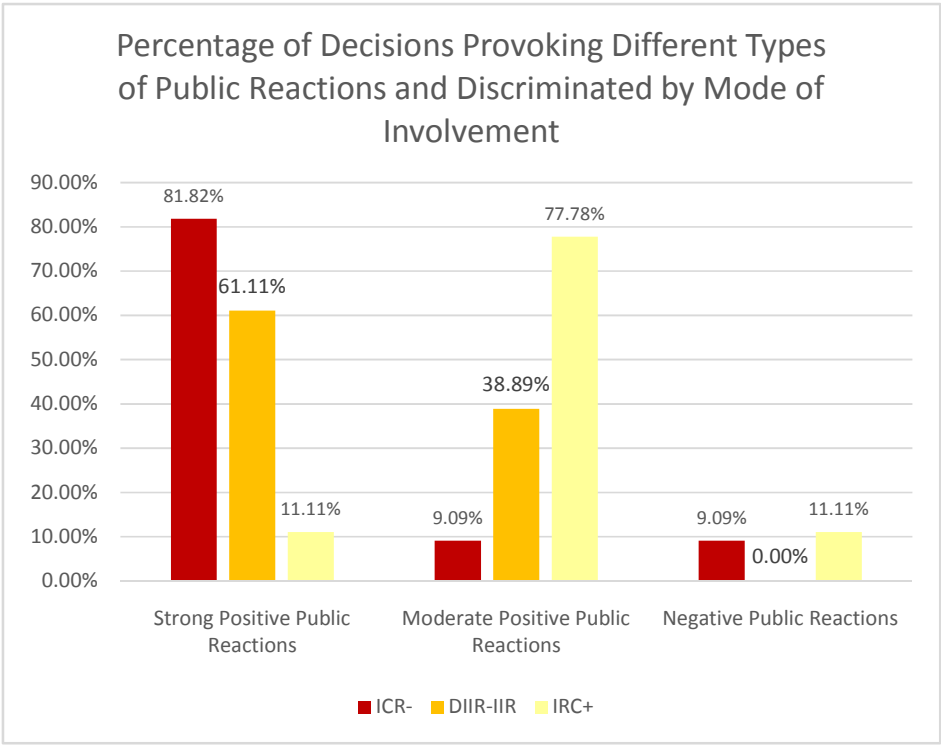
During the first period of Government weakness, Justices felt protected to rule against the Government in issues salient to its agenda given its lack of power to retaliate. The Justices did so in the *Zavalía*, *Sanchez*, and *Bussi* decisions, all of which addressed issues relevant to the official agenda. The three remaining decisions in this period, the *Vizzoti*, *Aquino*, and *Municipalidad de San Luis* decisions, referred to issues not relevant to the official agenda, that is, when the tolerance interval was long.

The Justices also behaved strategically during the second period in which the Government consolidated its political power. They did rule against the Government in ten out of 11 decisions, which demonstrates that the Justices did not play a deferential role in the context of the Government's increasing power. However, 8 of these decisions were related to issues not salient to the official agenda, that is, they were dictated under an ideal scenario. As the theory puts forward here, the Justices felt protected in ruling against the government over non-salient issues. Also, in the *Patti* decision, the Justices altered the features of this type of remedy as a response to a shorter tolerance interval. In the case of the two remaining decisions, *AFIP* and *Sosa VI*, the evidence suggests that the Justices failed to anticipate the Government's reactions to their rulings as I discuss below. During this period, only *Badaro II* falls outside my theory, as I discuss in the last section of this chapter.

Compared against the other modes of involvement, the evidence confirms that the level of aggression increases when the public appears to be more supportive and the Government's tolerance is higher, as described in Figure 11. In terms of public support, these moderately aggressive modes of intervention were moderately supported. For example, these decisions ranked

between the most and least aggressive modes of involvement in terms of strongly positive reactions as illustrated in Figure 11.

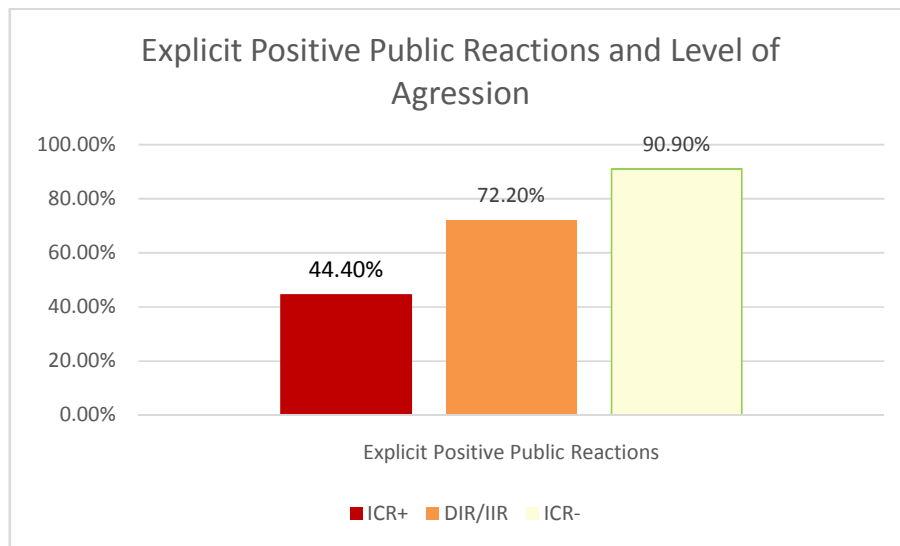
Figure 11- Percentage of decisions provoking different types of public reactions and discriminated by mode of involvement



N=38
Source: Calculation elaborated by the author

The same pattern is observed when looking at explicitly positive reactions. The number of *DIR/IIR* decisions linked to the images of activism and independence fall in between the numbers of *ICR+* and *ICR-* decisions linked to these images, as shown in Figure 12.

Figure 12- Explicit Positive Public Reactions and Level of Aggression



N=38

Source: Calculation elaborated by the author

Similarly, in terms of the Government's tolerance interval, I observe that most of these decisions occurred in the context of a medium tolerance interval. During the first period, the most aggressive modes of involvement occurred when the tolerance interval was long, as already discussed, while three moderately aggressive decisions occurred when it was medium. Recall that three other decisions of this type occurred under a long tolerance interval due to the fact that it was not materially possible to convert them to *ICR-* as already discussed. During the second period, most of these decisions, eight out of 14, occurred in the context of a medium tolerance interval rather than a short one.

In conclusion, an overall analysis of the Justices' use of *DIR/IIR* suggests that most decisions support several hypotheses put forward in this work. The Justices dictated most decisions of this kind when the Government's tolerance interval was medium, that is, when a decision addressed either a salient issue to a weak Government or a non-salient issue to a powerful Government. Also, they strategically reduced the aggression of their interventions using the same type of remedy in one case as a response to the Government's short tolerance interval. In doing so, the Justices decreased the likelihood of retaliation. In addition, most of these decisions provoked at

least moderate positive public reactions. In addition, the use of this form of involvement was crucial for the Justices' attempts to build public support, as most of the decisions provoked explicitly positive reactions. Furthermore, three decisions confirmed that judges are not able to increase their level of aggression due to obstacles arising from the legal system or culture. Finally, the analysis also reveals that the Justices face real obstacles when it comes to collecting appropriate information to measure the Government's tolerance interval.

In the following sections I further explore the dynamics behind the use of DIR/IIR through a narrative analysis of several decisions. First I show some of the constraints Justices face in performing their strategic behaviour, particularly in relation to their ability to collect information in order to calculate the Government's tolerance interval. Second, I discuss the strategic release of controversial rulings, a practice developed by the Justices to shape reactions from the Government's top officers and opinion leaders. Third, I discuss the case of a strategic reduction of aggression within the same type of remedy that confirms **RH4**. Finally, I discuss *Badaro II*, a case in which the Justices appear to be engaged in a strategic calculation different from the others proposed in this work.

Obstacles to the Justices' Strategic Behaviour: the Constraints in Calculating the Government's Reactions

As discussed in chapter one, I assume that judges are able to collect necessary information to anticipate public reactions to their decisions as well as measure a government's tolerance interval. In this study the assumption has empirical grounds. The decisions included here are regarded as being of high public relevance. They were subject to intense media coverage. Frequently, this media coverage covered a relevant issue even before the Justices' ruling.¹²² Also, the intense communication policy deployed by the Justices included a practice that permitted them to know public's reactions and the degree of relevance of an issue to the official agenda. As discussed in chapter three, frequently Justices indicated to journalists that a ruling over a particular issue would be issued in the near future. Also, in many cases, before a ruling, Justices issued

¹²² For example, see the discussion on the *DNU* decision in this chapter. A potential ruling on the constitutionality of the Executive's faculty to dictate a specific type of decree was discussed in the media for many years before the actual ruling.

procedural measures which received ample media coverage.¹²³ In all these cases, it is likely that media coverage of the issue under discussion included statements from opinion leaders or Government officers that permitted Justices to calculate reactions to their decisions. Nonetheless, all these mechanisms might fail for different reasons: because media coverage does not include information about the public's or the Government's preferences; because the issues were of no interest to the media; or simply because the preferences of different actors are not fixed and their views change along with modification in the political environment. As a result, the unavoidable problem of collecting information might lead judges to miscalculate both public and government's reactions to their decisions and, thus, to behave unpredictably from my theoretical point of view.

In this section I discuss two cases in which the Justices failed to calculate the Government's tolerance interval due to the abovementioned problems. As I discussed, I use two extremes to measure whether an issue is salient or not to the official agenda. I look at whether there are reactions from Government officers criticising the decisions or defending the policy at hand and at the rank of the officer. In these two cases, the evidence suggests that the Justices failed to get the appropriate information on the relevance of the issue at hand to the official agenda.

The AFIP decision

In June 2010 the *AFIP* decision determined that the *Agencia Federal de Ingresos Publicos* (*AFIP*), the Government's administrative agency in charge of administering the federal income tax system, had no powers to issue freezing injunctions over debtors' personal assets (*Administración Federal de Ingresos Públicos c/ Intercorp S.R.L. s/ ejecución fiscal* 2010). This type of injunction was widely used by the *AFIP* in administrative processes against fiscal debtors. Before the ruling, the Justices held a public hearing and also requested additional information from the *AFIP*. Both measures were subject to intense media attention, as I discuss below.

¹²³ For example, as discussed later in this chapter, before the Justices rendered the *AFIP*, the Justices held a public hearing. The call for the hearing and its occurrence were subject to intense media coverage. Actually, the decision *per se* received less media attention than these aspects, as I also show below.

The decision was not welcomed by the Government. It was criticised by President Fernández, which indicates that the issue was of salience to the official agenda. Thus, given that the ruling occurred in a context of a powerful Government, the decision occurred under conditions of the Government's short tolerance interval. The President referred to the ruling in a public event (Braslavsky 2010). *Clarín* then accused the Justices of issuing the ruling on pragmatic grounds. She argued that the Justices ruled against the Government just for the purpose of showing their independence to the public. A few days before the *AFIP* decision, the Justices issued a decision validating a Government's key policy.¹²⁴ Fernández accused the Justices of ruling against the Government for the sole purpose of dissipating any public suspicion on their independence from the Government.

Several elements suggest that it was plausible that the Justices did not expect such a reaction from the President or any other top officers. The media coverage of the decision suggests that the issues could have been perceived as uncontroversial from a political point of view. 19 newspaper articles referred to the issue under discussion. However, an analysis of their contents conducted by the author reveals that what caught public attention was not the content of the decision or the issue at hand *per se* but the fact that a public hearing before the Court was held one year before the actual decision was dictated. The dispute in the *AFIP* case was one of the first in which the Justices implemented this new procedure. In fact, 12 articles either announced the hearing or reported the developments as they occurred. None of these articles included a single mention to whether the case under dispute was of salience to the Government. As a result, the media coverage did not permit the Justices to conclude that the issue at hand was of relevance to the Government. Also, the lack of political relevance of the case is also suggested by the fact that the media analysis shows that the ruling was not referred to as one of the decisions that explicitly contributed to maintaining the image of independence. One expects that decisions against a powerful Government in issues salient to its agenda would be regarded as a sign of judicial independence. However, no mention of opinion leaders referring to the ruling was reported.

¹²⁴ The *AFIP* decision was preceded by *Thomas* which was discussed in chapter five.

Similarly, none of the author's interview transcripts contain evidence suggesting that this decision was politically relevant to the Government or that it was regarded as a decision intended to increase the image of the Court's independence.

These elements suggest that it was reasonable for the Justices to think that the issue under discussion was not salient to the official agenda or that the Government's tolerance interval was short. Indeed, the evidence suggests that the issue had no such relevance and that President Fernández overreacted, but no conclusive evidence to this effect was found. In both circumstances, whether the issue was salient to the official agenda or whether President Fernández overreacted, the facts show that the Justices were not able to calculate the Government's reaction about their decision.

The Sosa VI decision

The Sosa *VI* is another example of Justices' obstacles in getting appropriate information on the salience of an issue to the official agenda. This decision is the last of a series of rulings in which the Justices addressed the situation of the former General Prosecutor of the Province of Santa Cruz, Eduardo Sosa. Mr Sosa served as General Prosecutor until 1995 when, he alleged, he was dismissed and removed from office in the absence of impeachment procedures as required by the provincial Constitution. He, instead, was removed by a law which reformed the Prosecution Office. This occurred when former President Kirchner was governor of the Santa Cruz Province. His case reached the Court after a provincial tribunal denied his petition. In 2000, the Court Justices heard the case and overturned the decision handed by the provincial court (*Sosa I*). In 2001, the Court Justices, in a new ruling (*Sosa II*), ordered the Province to 'reinstate the plaintiff in the office of Prosecutor-General, with the functions he performed prior to his removal.' Despite that, the local judiciary ignored the Court's order and decided to pay compensation instead. Mr Sosa filed an appeal before the Court because he considered that the compensation payment did not constitute an appropriate response. The ruling on that appeal came in 2005 (*Sosa III*), when the Justices interpreted that the payment of compensation was insufficient to safeguard the plaintiff's constitutional guarantees. Given repeated noncompliance on the part of the local judicial

authorities, the Justices ordered the Governor of the Province of Santa Cruz to reinstate Mr Sosa in the position of General Prosecutor. Following further appeals filed by the provincial governor and the Prosecutor with the Court, the Justices issued *Sosa IV* in November 2009. They ordered that Mr Sosa be reinstated in office within 30 days of this new order. They added that criminal investigations should follow if the Governor of the Province, Peralta, did not comply with the ruling. Finally, upon Peralta's noncompliance of the previous ruling, the Justices issued *Sosa V* in September 2010. The ruling initiated a legal criminal investigation against Peralta under the charge of failing to fulfil his duties as a public officer; it also requested the National Congress to study the case and to sanction the Province of Santa Cruz (Sosa, Eduardo Emilio c/ Provincia de Santa Cruz 2010c).

Sosa V was not welcomed by the Government. Different top officers from both the Executive and the Congress made explicit their support to Governor Peralta.¹²⁵ The most eloquent support came from President Fernández and former president Kirchner, who was a Deputy and president of the ruling party at that time. In a public event in which Peralta was present a few days after the ruling, President Fernández warned that the Pink House (where the Executive seats) would protect the Governor if the Congress decided to intervene in the dispute. Later, former president Kirchner flew to Santa Cruz to participate in a public event especially planned to show the Government's support to Governor Peralta (Pagina12 2010g). In his speech, Kirchner was again supportive of the Government, and in relation to the Justices' request to the Congress to intervene in the dispute, he expressed that no federal agency, neither the Congress nor the Executive, had the power to breach the autonomy of the Province of Santa Cruz. Kirchner was accompanied by fifteen provincial governors.

As in *AFIP*, several elements suggest it was plausible that the Justices did not expect such a reaction. Preceding rulings that addressed the situation around Mr Sosa were subject to intense media coverage. Particularly, *Clarín* and *La Nación* used the case to criticise the national

¹²⁵ For reactions from top members of the Congress and Cabinet Members see *Página12*(2010d); *Página12* (2014e), and *Página12*(2010f).

Government, although it was not involved in the case. For that, the media reports regularly highlighted that the former president, Kirchner, was Governor of Santa Cruz when the removal took place. Therefore, they alleged that this removal described the type of practice Kirchner used to govern the province and the country. Second, they used the case to illustrate an alleged feature of Kirchnerist national and provincial governments, namely their lack of respect for institutions and the constitutional division of powers. In relation to the Court, media coverage usually reports the various rulings as instances in which the Justices set the agenda of the Government and ruled against its interests. In doing so, these rulings enhanced the image of independence of the Court. However, in highlighting the provincial government's non-compliance, mentioned above, the coverage frequently remarked that the Justices failed to have their rulings complied with. This last point was not beneficial to the Court's image. Although Peralta was indeed an ally of the national Government and media coverage was not favourable to his image, there are no newspaper articles reporting that the Government's top officers reacted against the Justices' decisions before *Sosa IV*. As a consequence, it is plausible to think that the Justices expected that the Government would retain the same attitude regarding a new ruling.

The official reaction to the ruling might be attributed more to its repercussions rather than its content. The Justices' request that Congress intervene was taken by opposition members of Congress as an excuse to intervene in the provincial government. In fact, the most relevant opposition political parties presented different bills proposing different modes of federal intervention from the Congress into the Province (Jorquera 2010; Fernández Moores 2010; Pagina12 2010h). Also, the fact that the Government had no substantive majority in the Congress exacerbated their reactions. This was so not because the opposition had the majority to pass their own bills but because the parliament became the favourite arena for the opposition to articulate initiatives aimed at delegitimising the Government publicly, even when they were not converted into formal bills or laws.¹²⁶ In fact, most of the public declarations showing support to Governor

¹²⁶These speculations were suggested by various interviewees in the author's field work.

Peralta by the Government's top officers, particularly the ones from Kirchner, included severe critiques towards the opposition members who planned a federal intervention (Pagina12 2010g).

As in *AFIP*, the Justices failed to anticipate the Government's reactions to the ruling, and therefore also the salience of the issue to its agenda. In this case, the political repercussions of the ruling and the actions taken by other actors might be attributed to the unexpected reaction of the government. This suggests that the ability of Justices' to get appropriate information regarding the impact of their rulings is also limited by the context in which they operate.

Strategic Release of Controversial Rulings

As discussed in chapter one, I expect that judges will seek to build public support, not only to calculate the reactions of opinion leaders but also to influence and shape them. In this line, chapter four showed that the Justices deployed a range of activities to accomplish this task. They developed a communication policy and approached different types of opinion leaders. In this section I discuss another practice carried out by the Justices to influence public relations. This involves the strategic release of controversial rulings in order to temper their negative impact on either the public or the Government. As I discussed in chapter three, the Justices have the power of timing their decision discretionally. As Herrero (2008: 212) points out,¹²⁷ there are no formal rules establishing timeframes or deadlines for hearing cases. Therefore, when a case reaches the Justices, it can stay on the docket for as long as the Justices consider it appropriate. As a result, the Justices have the liberty to explore the environment and assess the consequences of their moves before releasing a final judicial decision. I found that six decisions characterised as *DIR/IIR* were released strategically. These decisions were released either simultaneously or temporally close to *ICR+* decisions, that is, decisions validating official policies salient to the official agenda.

Vizzoti, Aquino, and Zavalía - Bustos

As I discussed in chapter five, the *Bustos* case was a controversial decision that negatively impacted the image of independence put forward by the Justices. As I examined earlier, it was very

¹²⁷ In his study of previous Court Justices' strategic behaviour, Herrero (*Ibid*) found that the absence of such rules was intensively used in politically-sensitive cases.

unlikely that the Justices' miscalculated these negative reactions from opinion leaders. *Bustos* validated a policy of high relevance to the Government, which was highly disputed in the courts and the streets. What the evidence shows is that the Justices released *Bustos* immediately after a series of rulings which were seen as crucial to building an image of independence at the onset of the period under investigation in this thesis (Verbitsky 2006). This suggests that the Justices hoped to cushion the impact of *Bustos* in the public's views through the strategic releasing of rulings.

Less than three months after Justice Highton joined the Court, the Justices issued the first of three rulings which had a positive and long-lasting effect on public's perceptions. In September 2004 the Justices ruled *Vizzoti (Vizzoti, Carlos Alberto c/ AMSA S.A. s/despido 2004c)*. They declared the unconstitutionality of Article 245 of the Law of Employment Contract in relation to the system of caps on severance pay provided for in said law. In short, the ruling declared unconstitutional the 'cap on severance pay' established by Article 245, and established a threshold for the calculus of such pay. This ruling reversed the Court's precedents validating labour reforms passed by Menem's Government.

The ruling enhanced the image of independence put forward by the Justices. Although the ruling addressed working relations in the private sector, it had an impact on the Government (Hauser 2004). President Kirchner intended to reconstitute labour regulations in favour of employees. However, the 'cap on severance pay' was not one of his immediate plans. In this context, the Justices were seen as taking the lead in this matter and setting the Government's agenda (Zaiat 2004). Moreover, this ruling did not facilitate the relationship between the Government and powerful actors of the business sector, because it increased the cost of workers' dismissal for employers. This, in the public realm, was also perceived as a sign of independence (Bertello 2010; Cabot 2004a; Stang 2004).

One week later, the Justices released *Zavalía* (Zavalía, José Luis c/ Santiago del Estero, Provincia de y Estado Nacional s/ amparo. 2004d). The decisions declared unconstitutional the call for constitutional convention in the province of Santiago del Estero. The provincial

constitutional reform was the goal of the Federal Intervention sponsored by the national Government. Because the ruling invalidated a salient policy to the official agenda, it provoked a positive impact on public's views.¹²⁸ In fact, it enhanced the image of independence as it portrayed the Justices as willing to set limits on the Government when it trespasses constitutional boundaries (Hauser 2004).

On the same day, the Justices issued *Aquino* (Aquino Isacio c/ Cargos Servicios Industriales S.A. s/accidente Ley 9688 2004), declaring unconstitutional Article 39 of the Risks in the Workplace Act (*LRT*). This Act creates a compensatory system for damages based on insurance: the employer contracts insurance cover for its employees with a Work Risk Insurer (*ART*) and the *ART* fulfils the duties of risk prevention and compensation of damages caused to workers due to accidents or illness at work. As a consequence, the employers are exempt from all liability due to work-related damages suffered by the employees. The Justices found unconstitutional the limitation imposed on the worker against claiming full compensation from the employer for the damages suffered due to an accident at work, and through its exempting the employer from civil responsibility.¹²⁹

As in the previous rulings, *Aquino* enhanced the image of independence of the Court. Actually, most media coverage reported that *Aquino* and *Vizzoti* triggered reactions of the same nature. Particularly, media coverage portrayed the Court as willing to set the agenda of the Government on sensitive issues (Zaiat 2004; Hauser 2004; Página12 2004a; Wainfield 2006). Also, the image of independence was enhanced by the fact that the ruling created tensions between the Government and powerful actors from the business world which saw the ruling as too beneficial for the workers (Cabot 2004a; Stang 2004). In fact, the situation created by the ruling forced the Government to engage in conversation with the business sector in order to reform the disputed regulations (Cufre 2004; Dellatorre 2005; Pagina12 2004b).

¹²⁸ For reactions reaffirming the invalidated policy, see for example *La Nación* (2004m) *La Nación* (2004n), and *Página12* (200d).

¹²⁹ Translation taken from <http://compendium.itcilo.org/en/compendium-decisions/supreme-court-aquino-isacio-v.-cargos-servicios-industriales-s.a.-21-september-2004-a.-2652.-xxxviii>.

On July 13th 2007 the Justices issued two decisions, *Mazzeo* (*Mazzeo, Julio Lilo y otros s/ rec. de casación e inconstitucionalidad* 2007e) and *Bussi* (*Bussi, Antonio Domingo c/ Estado Nacional (Congreso de la Nación-Cámara de Diputados) s/ incorporación a la Cámara de Diputados* 2007a). Both of them referred to a salient issue in the official agenda. In *Mazzeo*, the Justices declared unconstitutional a pardon passed in the early 1990s by President Menem which foreclosed the criminal prosecution of human rights violations committed during the last dictatorship. In doing so, the Justices dismantled the last legal obstacle to the unrestricted prosecution of such crimes, a key policy under both Kirchner and Fernández's administrations. In the second decision, *Bussi*, the Justices ruled against the Government in a policy salient to its agenda. *Bussi*, a former de facto Governor of the Tucuman Province during the last dictatorship, was elected to the Chamber of Deputies in 1999. However, Congress blocked him from taking his seat based on information linking him to crimes against humanity, although he had not been convicted in court due to an amnesty.¹³⁰ In their decision, the Justices ruled in Bussi's favour. They stated that the Congress had no power to prevent Bussi from taking his seat. However, Bussi never occupied it because his term had already expired by the time of the ruling.

Each of the rulings had dissimilar impacts on the same set of actors whose opinions could undermine the image of activism and independence. *Mazzeo*, on the one hand, not only pleased the Government's officers but also the leaders of the most salient human rights organisations, many of whom were opinion leaders that the Justices approached (LaNacion 2007f). On the other hand, the ruling provoked negative reactions from conservative groups and individuals (Ventura 2007a; Fontán Balestra and Del Sel 2007). Similarly, *Bussi* had a good reception from conservative groups, particularly from other military accused of human rights violations (LaNacion 2007e; Serra 2007), but provoked a negative reaction from Government's top officers (Serra, Ibidem), journalists (Wainfield 2007b; Verbitsky 2007) and human rights activists (Ginzberg 2007).

¹³⁰See chapter six for a discussion on amnesties for human rights violations during the last dictatorship in Argentina.

The simultaneous release of the rulings seems to have aimed to temper reactions from both conservative opinion leaders and pro-human rights ones.¹³¹ The evidence suggests that the Justices wanted to divert the attention of opinion leaders in human rights from *Bussi* to *Mazzeo*. In other words, the Justices wanted to move their attention from a matter that had no immediate practical consequences to another which was crucial for advancing their human rights agenda. Likewise, the Justices wanted to show conservative groups that, although favouring criminal prosecution, their decision had not originated in a desire to please the Government without restriction. The strategic release of the rulings brought positive results for the Justices. Although both rulings had been subject to criticism from both groups, the critiques did not amount to undermining either the image of activism or the image of independence.

DNUs and AFIP - Thomas

This strategic practice was also used to temper public reactions in relation to the Justices' intervention in the *Thomas* decision. As discussed in chapter five, in this decision the Justices addressed a highly divisive issue, the regulation of media business. On the one hand, this regulation was a key policy for the Government and was supported by a vast sector of society. On the other, there were strong positions against it, particularly represented by the main media groups and the main political parties in the opposition.

The Justices' intervention in the case had two important resolutions: First, when the Justices' decision to hear the case, and second, when the Justices' final ruling on the matter was emitted. In both cases, as discussed in chapter five, there were legal grounds to think that the Justices would not favour the Government's position. As a result, both decisions might have produced negative views from opinion leaders undermining the image of the Court's independence.

Both crucial decisions were each released in conjunction with a ruling against the Government on issues non-salient to its agenda. On May 20, 2010 the Justices simultaneously

¹³¹ The Justices, according to my theory, did expect negative reactions from the government's top officers. The ruling occurred under an ideal scenario in which the issue was salient to a weak agenda. Thus, the strategic simultaneous release of the rulings was not meant to temper official reactions.

agreed to hear the *Thomas* case and declared unconstitutional the President's use of Decrees of Necessity and Urgency (Decretos de Necesidad y Urgencia or *DNUs*) (Consumidores Argentinos c/ EN - PEN - Dto. 558/02-SS - ley 20.091 s/ amparo ley 16.986 2010a). These decrees were largely used by democratic presidents and were regarded as the Executive overstepping into Congressional powers, as pointed out by legal experts (LP1 2010; LP4 2010; LS1 2010). A decision from the Justices was fervently expected in the public arena. Media reports show that since 2004, journalists, academics, and civil society leaders, among others, were awaiting a decision on the issue (Hauser 2004, 2005; Zommer 2008).¹³² Although it annulled a decree issued by former President Duhalde and not by the incumbent President Fernández, *DNUs* had a positive reaction in the public arena and it enhanced the image of the Court's independence. The ruling was praised for establishing a precedent that could be used by any judge to limit the powers of President Fernández (Ginzberg 2010).¹³³ Similarly, the final ruling in the *Thomas* case was closely followed by *AFIP*.¹³⁴ As discussed above, *AFIP* was known in the public realm. Although nothing indicated that the issue at hand was of salience to the official agenda, the Justices might have expected some level of public repercussion given media coverage previous of the ruling. As discussed in the previous sections, the President reacted against this ruling which was interpreted as an attack on the Court by the media. This, in turn, was beneficial to the Justices as they were perceived as ruling against an issue relevant to the official agenda.

The evidence suggests that the strategic release of rulings was used in this instance as well. Two decisions of public repercussion were released together with their intervention in the *Thomas* case. These decisions had significant public repercussions. They enhanced the image of the Court's independence, although no issue salient to the official agenda was under discussion. In this context,

¹³²The public pressure for such a decision was so intense that the Justices had to clarify, before *DNU*, that they did not rule on the matter because there were no cases on their docket referring to it (LaNación 2005j).

¹³³In practice, it is likely that Fernández did not feel limited by the precedent, as she had hardly use this type of decree. In addition, the ruling had no policy consequences for her government as it annulled a non-incumbent policy. The absence of negative reactions to the ruling from the government's top officers, which characterise the issue as non-salient in my analysis, might be attributed to these factors.

¹³⁴The rulings were released with two days of difference.

I can infer that the Justices carefully chose *DNUs* and *AFIP* to temper the potentially negative impact of their intervention in the *Thomas* case.

Strategic Reduction of the Aggressiveness of Decisions within the Same Mode of Intervention: The *Patti* Decision

Unlike most of *DIR/IIR*, *Patti*, rendered during the second period, occurred when the Government's tolerance interval was short as it contradicted the Government's position on a salient issue. However, it does not contradict my model as it confirms **RH4**, according to which the Justices will decrease the level of aggression of *DIR/IIR* and *ICR*- by altering their basic features when the Government's tolerance interval is short and public reactions are moderate.

Mr Patti, a paradigmatic figure of Argentina's last dictatorship, was elected to the Chamber of Deputies in October 2005. Congress blocked him from taking his seat based on information linking him to crimes against humanity, although he had not been convicted in court. The Argentine Chamber of Deputies decided, in a plenary session, not to accept Patti as a member since he did not have the 'moral standing' to carry out his duties and declared him unsuitable to occupy a congressional seat. The decision was grounded in article 64 of the National Constitution, according to which the Chamber has the right to review whether each elected deputy meets all legal requirements before she is sworn in.¹³⁵ Patti filed a legal complaint against this decision which reached the Court.

In April 8 2008 the Justices ruled in favour of Patti (*Patti, Luis Abelardo s/ promueve acción de amparo c/ Cámara de Diputados de la Nación* 2008d). However, the Justices signed a short decision which referred, for the 'sake of brevity,' to the arguments and conclusions expressed in the *Bussi* precedent. In *Bussi* the majority of Justices decided that the Chamber of Deputies has

¹³⁵ Before the plenary vote, a special internal parliament commission conducted an investigation for three months in which testimonies and other types of evidence were collected. The Commission concluded that the Congress should not allow Patti to become a member of Congress as he did not meet the moral requirement to be sworn in as a Congressmen due to his alleged involvement in human rights violations (Barbuto, 2007: 63).

no right to assess the moral ability of an elected deputy before she takes her seat. The Justices asserted that *Article 64* of the National Constitution empowers the Chamber to review only the legality of the designation procedure which takes place after the election of a candidate and before she swears in. In addition, the Justices added that the Chamber, according to *Article 66* of the National Constitution, could remove a legislator from office with a two-thirds majority vote, on the grounds of a lack of moral ability only under two circumstances. First, the removal can only occur after the deputy has already taken his seat; and, second, it can only take place if the facts proving such a lack of ability occur after the election of the candidate. In conclusion, for the Justices, Patti had to be incorporated to the Chamber of Deputy. However, the decision did not include any enforcement direction.

Unlike most of the cases discussed in this chapter, *Patti* represented a rare case in which the Justices ruled against a powerful Government on a salient agenda issue. Preventing Patti from his legislative seat was promoted by the national Government through its representatives in the Congress and was regarded as part of its human rights agenda. Top Government officers reacted against the ruling, which indicates the salience of the issue to the official agenda. Initially, top Congressmen warned that the Chamber of Deputies was not obliged to modify its original decision as the ruling included no specific direction or provision to be fulfilled by Congress. The President of the Chamber, Fellner (Jorquera 2008), of the official party, claimed that ‘the ruling does not require the Congress to modify its decision.’ Similarly, the chief of the Kirchnerist bench, Rossi, (cited in Jorquera *ibid*) remarked that notwithstanding the decision. ‘[...] the Chamber is still the judge in charge of reviewing all matters concerned with incorporation of deputies to the Congress.’ In addition, the Chief of the Justice Committee of the Deputy Chamber alleged that the ruling represented an overstep into the Congress powers by the Court (LaNacion 2008).

Second, the impact of *Patti* was mixed in terms of public support because it triggered negative and positive views in the public arena. On the one hand, the ruling was perceived as a failure by the Court to effectively fulfill its commitment to protect human rights, as was expressed by academics, journalists, and human rights practitioners. The main argument against the ruling

was that the Justices did not consider the factual conditions that granted Patti impunity for his alleged involvement in human rights violations. Among others, critics such as the influential journalist Wainfield (2008), the renowned legal scholar and practitioner Gil Domínguez (2008), and the well-known human rights organisation CELS (Jorquera 2008) voiced opposition to the ruling remarking that Patti had not been prosecuted for human rights violations, not because of a lack of evidence but because the amnesty laws and pardons decree that prevented criminal prosecutions for human rights crimes committed during the last dictatorship. On the other hand, *Patti* was perceived as a sign of Justices' independence from the Government in the public realm. For instance, Herrero (Zommer 2008), a leader of a well-known think-tank dedicated to judicial issues, remarked that *Patti* was one of several decisions representing a positive development in domestic politics, the Justices' willingness to rule against the interests of the Government whenever it is necessary. In a similar line, the journalist Ventura (2008) asserted that the decision was a positive institutional measure aimed to set limits on the Government's influence. He also considered the decision as 'brave' given that it contradicted the Government's preferences.

Although the decisions occurred when the Government's tolerance interval was short, *Patti* confirms **RH4**. A closer look at its text and the circumstances surrounding it reveals that the Justices strategically reduced the aggressiveness of this remedy as a response to the political circumstances in which it was issued—indicating the Government's short interval. Unlike all the decisions included in this chapter, *Patti* did not offer a final solution to the issue at hand. On the contrary, the decision left Patti's situation unresolved.

Two important facts occurred between Patti's removal from the Deputy Chamber and the Justice's ruling. First, Mr Camaño, Patti's replacement, had already taken his seat in the Chamber. This means that Patti's incorporation required putting in place a procedure to destitute Camaño. However, the grounds for removal after a deputy had taken her seat, explicitly stated in the National Constitution, do not contemplate a situation like the one provoked by the ruling. Thus, such a procedure was nonexistent (Wainfield 2008; Ventura 2008). Second, Patti was indicted, and preventively detained for committing crimes against humanity (Hauser 2008; Jorquera 2008).

Thus, the ruling created the odd situation in which a person in prison and indicted by human rights violations had the right to be incorporated into the Congress, which was against domestic law. These complexities notwithstanding, the Justices expressly omitted in their decision specific references to the enforcement directions.¹³⁶ In this line, in *Patti* the Justices reduced their aggression by leaving the design of the final solution to Congress.¹³⁷

Another element suggests the Justices' willingness to reduce the aggressiveness of their decision. *Patti* did not mean invalidating the official policy, the removal of individuals involved crimes against humanity from the Congress. Rather, it meant only invalidating the means chosen by the Government in the Deputy Chamber. This can be derived from the fact that the Justices implicitly and explicitly offered an alternative course of action to the Government to keep Patti away from his legislative seat. First, in *Patti* the Justices implicitly asserted that Mr Patti could be reincorporated into the Congress and be immediately removed permanently. In *Bussi*, the precedent to which *Patti* referred, the Justices explicitly stated the Chamber, according to *Article 66* of the National Constitution, can remove a legislator from office with a two-thirds majority vote on the grounds of a lack of moral ability. This can happen when the deputy has already taken his seat and when the facts in which such lack of ability is grounded occurred after the election of the candidate. In the case of Mr Patti, the indictment for human rights violations occurred after the legislative election represented enough grounds to allege a lack of moral standing and thus remove him from the Congress. Second, Justice Argibay publicly mentioned a second potential course of action to remove Patti temporarily. She stated that the Deputy Chamber could reinstate Patti and then initiate a process to remove his official immunity to criminal prosecution until a final sentence was dictated (Pagina12 2008). Given that there was an indictment and prison order in place, this

¹³⁶As discussed before, in *Patti* the Justices referred to arguments and conclusion expressed in the *Bussi* precedent. Although the circumstances in *Bussi* were similar to *Patti*, there was a major difference. When the Justices decided *Bussi* the case had become moot as the period in which Mr Bussi would have been a deputy lapsed. As a consequence, the *Bussi* decision did not include any reference to the enforcement of the decision. The circumstances in *Patti* were different. The period for which Mr Patti was elected was still running when the decision took place. Thus, enforcement directions were needed.

¹³⁷The Justices had the chance to amend this omission when Patti, after the ruling, requested that the Court issued an order to a lower judge to release him from prison and another one to the Congress to incorporate him to the Deputy Chamber. However, the Justices decided that the Court's intervention in the case ended with the ruling and proceeding further was unnecessary (Pagina12 2008).

would mean that Patti would have to leave his legislative seat. In fact, the Government chose this late option and Patti was removed from his immunity and removed from Congress fourteen days after the ruling (Wainfield 2008).

All these elements suggest that in Patti the Justices strategically reduced the aggressiveness of this remedy as a response to the political circumstances in which it was issued. In this light, the Justices not only left in the Congress' hand the design of the final solution, but they also implicitly and explicitly suggested alternative means to keep Mr Patti out of Congress. In that regard, the decision did not invalidate the Government's policy but only cancelled one of the several means the Government could have used to implement it.

A Different Type of Strategic Calculation: The *Badaro II* Decision

The *Badaro II* is one of the few cases falling outside my model. Here, the Justices decided against the interests of a powerful Government on an issue salient to its agenda. Moreover, this is not a case of the strategic reduction of Justices' aggression within the same type of remedy. On the contrary, *Badaro II* seems to be a case in which the Justices did not reduce their aggression as a response to the Government's short tolerance interval. In this section I will discuss a tentative explanation to this anomalous case. Presumably, the Justices preferred saving the Court from a high level of public criticism, rather opting for exposing it to a potential conflict with the Government.

The adjustment of retirement pensions, and more generally the social security system, has been in the public agenda for more than two decades (Herrero, 2011: 72). Since the 1950s and until the 1990s, the social security system followed a welfare state model. One of its pillars was the readjustment of pensions enshrined in the National Constitution. However, during the 1990s, President Menem eliminated automatic adjustment mechanisms, which had been invariably implemented by previous governments.¹³⁸ Law 24.463 of 1995 established that Congress had the faculty to decide on the issue on a yearly basis, according to the availability of public funds. Under

¹³⁸ This does not necessarily mean that retired individuals were treated appropriately by these governments. In the midst of recurrent economic crises, several governments found ways to circumvent legal dispositions and to freeze these salaries.

these circumstances, Mr Badaro brought his case to the Court claiming the judicial readjustment of his salary, which had been frozen between 1995 and 2005. He also required the correction of the percentage readjustment applied between 1991 and 1994.

On August 8th 2006, the Justices issued its first decision on the case.¹³⁹ They stated that the constitutional readjustment of pensions should be carried out by the automatic mechanisms reflecting the relation between pension salaries and the salaries of employed workers. Also, they argued that the permanent lack of annual adjustment of pension salaries violated Mr Badaro's social rights. In order to remedy this situation, the Justices requested the Government to enact a new law establishing an adjustment criterion which would guarantee a proportional relationship between employed workers' current salaries, retirements and pensions, disregarding inflation indexes. In December 2006, Congress passed a law in response to *Badaro I*. Law 26.198 lifted the minimum pension salary threshold, established a single 13 percent increase of all retirement salaries, and granted to the President the power to apply further readjustment according to his own discretion and subject to the availability of funds.

Although the law constituted an improvement in the situation of more than four million pensioners and had a positive reception by the public (Herrero, *ibid*), it did not comply with the ruling. Remarkably, it did not implement an automatic adjustment mechanism. It only stipulated a single increase that year and delegated the Congress's powers on the matter to the President. Public criticism against the bill notwithstanding, top Government officials defended it publicly.¹⁴⁰ For example, the Director of the National Social Security Administration remarked that Congress had complied with the ruling, establishing a pension readjustment for 2007 authorising the Executive to establish readjustment for the future (Stang 2007). From this perspective, the Chief of Cabinet explained the Government's own view on *Badaro I*. He argued that the ruling did not request the creation of a fixed and automatic readjustment mechanism (LaNacion 2007). This public defence suggests that the new policy constituted a salient agenda issue for the Government.

¹³⁹This decision and the political circumstances in which they were issued are discussed in chapter seven in great detail as it constituted another type of remedy.

¹⁴⁰Public critics against the law are discussed below.

As a result of the new bill, Mr. Badaro requested the Court review his situation in light of the new legislation which he regarded as unconstitutional.¹⁴¹ In November 2007 the Justices decided *Badaro II* in favour of the claimant (Badaro, Adolfo Valentín c/ ANSeS s/ reajustes varios 2007). They concluded that the new legislation did not establish an automatic readjustment mechanism and thus did not meet their mandate. In order to remedy Mr Badaro's situation, the Justices first declared unconstitutional Law 24.463 of 1995, which established that legislative readjustment of pension salaries would be subject to the availability of funds. Then, the Justices set an 88 percent readjustment of Badaro's salaries to be applied retroactively and prospectively only in his case. For this, the Justices considered that the pension salary should reflect the variation of active workers' salaries. In order to determine this variation and its applicability to the particular case, the Justices used the index of salary variation provided yearly by a governmental agency, the National Institute of Statistic and Census.¹⁴²

As expected, the ruling had a positive impact on the Court's image. First, it was regarded as a positive step towards the effective protection of pensioners' rights. For example, Wainfield (Wainfield 2007) remarked that the ruling incorporated into the Court's jurisprudence a progressive legal doctrine which recognised social rights as full and effective human rights and not merely aspirational constitutional clauses. In addition, he argued that *Badaro II* was another example of the Court's contribution to rebuilding the pension system dismantled during the 1990s. Furthermore, the ruling enhanced the Court's image of independence as the Court was seen as willing to set limits to the discretionary power of the Government and to confront it when necessary (Hauser 2007; Wainfield 2007; LaNacion 2009). In fact, *Badaro II* was considered as one of the cases which contributed to the creation of a supposedly tense relationship between the Court and the Government (Ventura 2009).

In this context, the question is why the Justices decided to rule a case against the Government when its tolerance interval was short, that is, when the issue at hand was salient to the

¹⁴¹ Mr Badaro raised other matters related to its case. However, the Court did not refer to them as the government had already addressed them by the time of the new ruling.

¹⁴² Paragraphs 10-20 of the decision.

agenda of a powerful Government. It might be possible that the Justices calculated that not ruling would have had a negative impact on its image. This tentative explanation is grounded in two interrelated circumstances. First, the Government patently failed to comply with *Badaro I*. The Government's new law was criticised by journalists and opposition leaders in the public arena. All of them agreed on the fact that it failed to establish the automatic readjustment mechanism, which was mandated by the Justices (Jorquera 2006; LaNación 2007; Stang 2007; Wainfield 2006, 2006).. Second, as a consequence of the previous fact, the Justices' final decision on the issue was largely expected in the public realm. Again, journalists, opposition leaders, and practitioners remarked that the Justices had the final word on the issue (Jorquera 2006; LaNación 2007; Stang 2007; Wainfield 2006, 2006).

In light of the public relevance of the issue and the expectation of the Justices' second intervention, not ruling would have had a highly negative impact on the Court's image in two ways. First, this course of action might have had a negative impact on the Justices' attempt to build diffuse support; leaving Mr Badaro's situation unresolved could have been seen as a step back in the Justices' efforts to protect human rights. Also, an implicit validation of a policy that was overtly at odds with the Justices' first decision could have been taken as a sign of the Justices' deference towards the Government. Second, the Government's noncompliance with *Badaro I* was a challenge to the Court's authority. As such, choosing not to rule could have been interpreted publicly as a result of the Justices' inability to enforce their decisions and be a sign of institutional weakness. In fact, the Justices were concerned with this type of situation. In interviews with the author, although not mentioning *Badaro II* explicitly, all Justices highlighted that before deciding cases of public relevance they evaluate which of the alternative solutions at hand is more likely to be enforced. They remarked that the image of the Court as an authoritative agency is affected by noncompliance with their rulings, and that because of this they sought to avoid involving the Court in such situations.

Under these circumstances, not issuing *Badaro II* would have provoked a highly negative impact on the Court's image. For the first time, the Justices would have confronted public criticism

affecting both the activist and independent image. In addition, the Court would have been seen as a weak institution. In this context, at least tentatively, *Badaro II* can be explained in terms of the Justices' attempt to preserve the positive image of the Court in the public arena. They preferred to face a potential political conflict with the Executive rather than undermine the Court's public image. In this regard, *Badaro II* falls outside the remit of my theory as the Justices did not reduce their aggression in response to the Government's short tolerance interval.

Conclusion

In this chapter I discussed the *moderately aggressive forms* of intervention used by the Justices. The use of this form of intervention is likely to bring complications for the Justices' strategy of avoiding political conflicts with the government and building public support simultaneously. Although *DIR* and *IIR* lack of the features of the *ICR*-, their aggressions should not be underestimated. These decisions not only prevent the Government from applying an official policy or practice to an individual case, which is already a relevant development, but they also have an indirect impact on similar cases brought to courts. As a result, this form of intervention is likely to bring about political conflicts for the Court and, as a result, increase the risk of retaliation in contexts characterised by a lack of a culture of judicial independence.

An overall analysis of the Justices' use of this type of remedy suggests the Justices behaved strategically. Most of the decisions, 15 out of 18, confirm several hypotheses put forward in this work. The Justices dictated most decisions of this kind when the Government's tolerance interval was medium, that is, when a decision addressed either a salient issue to a weak Government or a non-salient issue to a powerful Government. Also, they strategically reduced the aggression of their intervention by altering the basic features of this type of remedy in one case as a response to the Government's short tolerance interval. In doing so, the Justices decreased the likelihood of retaliation. In addition, most of these decisions provoked at least moderately positive public reactions. In addition, the use of this form of involvement was crucial for the Justices' attempts to build public support, as most of the decisions provoked explicitly positive reactions.

Furthermore, three decisions confirmed that judges are not able to increase their level of aggression due to obstacles arising from the legal system or culture.

From the three decisions falling outside my model, two reveal that the Justices face real obstacles in collecting appropriate information to measure the Government's tolerance interval. And the last one shows that the Justices sometimes engage in a different type of strategic behaviour. The remaining decisions fall outside the remit of my theory because the Justice appears to have decided to run the risk of engaging in political conflicts rather than being exposed to strongly negative public reactions.

In addition, I discussed in this chapter another practice carried out by the Justices to influence and shape reactions from opinion leaders. I found that Justices strategically released controversial rulings in order to temper their negative impact on either the public or the Government. Justices have the power to time their decision discretionally as there are no formal rules establishing timeframes or deadlines for hearing cases. As a result, the Justices have the liberty to explore the environment and assess the consequences of their moves before releasing a final judicial decision. Capitalising on these powers, I found that the Justices attempted to temper the potential negative repercussion of a controversial ruling by releasing it either simultaneously or temporally close to other decisions with positive repercussions. The evidence suggests that six decisions characterised as *DIR/IIR* were used in context of strategic release of rulings.

Chapter 7 - The Most Aggressive Mode of the Court's Remedies: *Indirect Collective Remedies (-)*

Introduction

In the periods under study, the most aggressive form of involvement used by the Justices is *Indirect Collective Remedies- (ICR-)*. These are interventions in which the Justices delegate the design of the solution to the elected branches, and whose effects go beyond the parties of the case, affecting collective groups whose individuals are not necessarily identified in the case. This type of intervention is rare in comparative constitutional law. That is because, instead of setting limits on state intervention, as courts traditionally do in liberal democracies, they request state agencies to act in particular circumstances.

The Justices dictated 11 *ICR-* decisions, seven in the first period and four in the second period as illustrated in Table 18. These type of remedies represent the Justices' reception of the way judicial intervention affected policy making, which is referred to as legal experimentalism (Sabel and Simon 2004) or a weak form of judicial review (Tushnet 2008). They are judicial responses to structural violations of rights. However, in these cases what was at hand was not the behaviour of a particular state agent. What was in dispute was the behaviour of the state as a complex entity that facilitates and perpetuates this violation. In addition, in these decisions the Justices reserved a prominent role for the Court in the policy making process. In addition to requesting the elaboration, or modification of a public policy, followed by its implementation, Justices limited the discretion of the state officers by setting constitutional and legal standards under which policy should be elaborated and implemented. Also, in these cases the Justices appointed the Court explicitly, but sometimes implicitly, as the agency in charge of monitoring the implementation of such policies. In doing so, the Justices put the Court at the centre of the policy-making process, amplifying its institutional role originally conceived to set limits on the elected branches of Government. Through these remedies, the Justices intervened to initiate, frame, and monitor a process that was intended to elaborate, modify or implement a public policy.

Table 18– ICR(-) Decisions

<i>Indirect Collective Remedies (-)</i>	
First Period	
<i>Verbitsky</i>	The ruling required the creation and implementation of a public prison policy aimed at solving a systemic violation of human rights that occurred under the prison system of the province of Buenos Aires.
<i>Riachuelo I</i>	The ruling requested that the municipal, provincial and national Governments create a specific and coordinated policy to avoid future damages and to start the cleaning of the <i>Riachuelo</i> river.
<i>Badaro I</i>	The decision requested that the Government enact a bill establishing a pension adjustment criterion guaranteeing a proportional relationship between employed workers' current salaries, retirements and pensions.
<i>Lavado</i>	The decisions required that the national and provincial Governments adopt urgent measures to protect the lives and physical integrity of the individuals detained in prisons in the Mendoza province.
<i>Rosza</i>	The ruling requested that both the Congress and the Executive create a new mechanism for the appointment of temporary judges.
<i>Editorial Río Negro</i>	The ruling prohibited the Río Negro provincial Government from discriminating against the news media by arbitrarily withdrawing or reducing the placement of official advertising. It requested the Government create and implement a new policy on the matter.
<i>Defensor del Pueblo</i>	The ruling requested that the National and Provincial Governments implement a series of policies to protect the rights of an aboriginal community.
Second Period	
<i>Riachuelo II</i>	The ruling requested that the Municipal, Provincial and national governments implement a specific and coordinated policy to avoid future damages and start the cleaning of the <i>Riachuelo</i> river. Such policy was elaborated by the implicated state agencies in response to <i>Riachuelo I</i> .
<i>Desmonte Salta</i>	The ruling upheld a petition by seven indigenous communities and an organisation of small producers from Salta Province. It ordered the preventive measure of stopping deforestation of aboriginal lands in the province of Salta.
<i>Fundación Sur</i>	The ruling requested that the Congress and the Executive enact legislation complying with international human rights standards in matters related to juvenile detention.
<i>Halabi</i>	In an action brought by an individual, the ruling declared unconstitutional, with <i>erga omnes</i> effects, a law authorising the tapping of telephones and internet communications.

Source: Analysis elaborated by the author

These rulings are in line with the public image put forward by the Justices showing the Justices as an activist institution. Requesting the implementation of policies goes beyond what it is regularly expected from any active court, particularly in relation to rights protection. However, in a context lacking a culture of judicial independence, the use of *ICR*- might be problematic for any court. These aggressive remedies are likely to be taken as a strong challenge to the authority of a government. Through *ICR*- a court may be seen as expanding its powers over the other branches of government, setting their agendas, and raising the cost of enforcement. This is because the elaboration, or modification, and implementation of policies are usually costly. Moreover, given their rarity in the domestic political arena, they are likely to bring a high level of media attention, which may expose political officers to public criticism. For example, the contamination of the Riachuelo river, which was addressed in the *Riachuelo I* and *Riachuelo II* decisions, was the issue most cited by the media. Three of these remedies ranked among the ten most cited decisions of the author's newspaper articles database, as shown in Table 2. Moreover, the media coverage presented many of these decisions as enhancing the image of independence of the Court, as discussed in this chapter. From this perspective, it is unlikely that these remedies will be welcomed by political leaders and may also increase the likelihood of retaliations, particularly in contexts of low public support, such as the Argentine one. Thus, although Justices have incentives to use these remedies, the political context poses some constraints on their use.

In this chapter I discuss in particular how the Justices' attempts to increase public support and avoid conflicts with the government determined the use of *ICR*-. Specifically, I show that most of the decisions but one are explained by my model. Justices behaved strategically by issuing these kind of remedies in cases positively welcomed in public debate and related to issues not salient for the government in both periods under study. Also, in one case the Justices decreased their aggression by altering the basic features of this type of remedy as a response to the government's shorter interval. In doing so, the Justices decreased the likelihood of retaliation. Finally, one case shows that the Justices faced obstacles collecting the appropriate information to calculate public reactions, which is a problem that I anticipated in my theory early in chapter one.

The present chapter proceeds as follows. First, I present an overview of the main findings confirming the theory put forward in this work in detail. In the following sections I explore in the findings using a qualitative narrative analysis of three decisions. The analysis seeks to offer a more nuanced explanation of the dynamics surrounding the Justices' use of its most aggressive mode of involvement. I first discuss a paradigmatic case, the *Rosza* decision, confirming **RH1** and using it as a reference against which the other two cases are analysed. Then, I discuss *Badaro I* showing that the Justices strategically reduced the aggressiveness of their decisions by altering the basic features of the remedy. Finally, I present *Fundación Sur* as an example of the obstacles Justices face to get appropriate information. The narrative analysis of the decision is not chronological as it is structured in a way that permits an easy understanding of the dynamics of the Justices' behaviour. In the conclusion I summarise the findings of the chapter.

Overview of the findings

Most of the *ICR*- are explained by my model. 90.9 percent of them, ten out of 11, support three of my hypotheses as illustrated by Table 19. Six decisions confirm **RH1** whereas three do for **RH2**. The former hypothesis predicts that *ICR*- will occur when the government's tolerance interval is long, and that they will provoke strong public reactions. Meanwhile, the latter hypothesis predicts the occurrence of these remedies for the second period when the tolerance interval is medium, and that they will provoke strong public reactions. In other words, these two hypotheses expect Justices to reduce the likelihood of retaliation using *ICR*- over issues that are not salient to both weak and powerful governments and that provoke high levels of support. Finally, **RH4** expects that during the first period Justices will decrease the level of aggression of *ICR*- by altering their features when a government's tolerance interval is medium and public reactions are moderate.

Table 19 - *ICR*- by Hypotheses

Hypothesis	Decisions
RH1: <i>ICR</i> - occurs when public reactions are strong and the government's tolerance is long.	<i>Vertbisky</i> ; <i>Riachuelo I</i> ; <i>Lavado</i> ; <i>Rosza</i> ; <i>Editorial Rio Negro</i> ; and, <i>Defensor del Pueblo</i>
RH2: <i>ICR</i> - occurs when public reactions are	<i>Riachuelo II</i> ; <i>Desmonte Salta</i> ; and, <i>Halabi</i>

strong and the government's tolerance is medium.	
RH4: During the first period, Justices will decrease the level of aggression of <i>DIR/IIR</i> and <i>ICR-</i> by altering their features when the government's tolerance interval is medium and public reaction moderate.	<i>Badaro I</i>

Source: Analysis elaborated by the author

The only decision that is not explained by my model is *Fundación Sur*. This is because it provoked negative public reactions that undermined the image of activism. As I explain in the narrative analysis in this chapter, this case, together with the *AFIP* and *Sosa VI* discussed in chapter six, is another example of the obstacle Justices face in collecting information in order to anticipate reactions to their rulings. In the case of *Fundación Sur*, the evidence suggests that the Justices failed to anticipate reactions from opinion leaders.

In terms of the Justices' calculus of public reactions and its impact on public support, the evidence also indicates that they successfully anticipated how the reactions of opinion leaders would serve to build public support in all but one case. These decisions were highly supported in the public realm as 82.5 percent of them provoked strongly positive reactions. This suggests that, for the Justices, specific support, and not only diffuse support, was an important element when issuing the most aggressive modes of involvement. In addition, the figures suggests that *ICR-* were crucial for the construction of diffuse support as 90.9 percent (10 out of 11) did not receive negative views on the images put forward by the Justices. In addition, 10 of these decisions produced explicitly positive views, as 4 of them were explicitly linked to the image of activism and 6 of them to both images of activism and independence. Only *Fundación Sur* was negatively welcomed in the public realm. In fact, opinion leaders' reactions to it suggested that it undermined the image of activism put forward by the Justices. Overall, these findings suggest that the strategy of ruling against the government, for the most part on issues that were not salient to the official agenda, did not prove to be an obstacle to maintaining, and even enhancing an image of independence. This may be due to the fact that the Justices ruled against the government in a high

number of cases. Equally, the evidence suggests that the Justices were able to communicate the relevance of these type of decisions in order to reverse institutional structural deficits provoking human rights violations, as most of the decisions enhanced the image of activism. These two aspects, finally, suggest that the Justices were effective at both choosing the right cases to rule over, and deploying the right communication policy to publicise them.

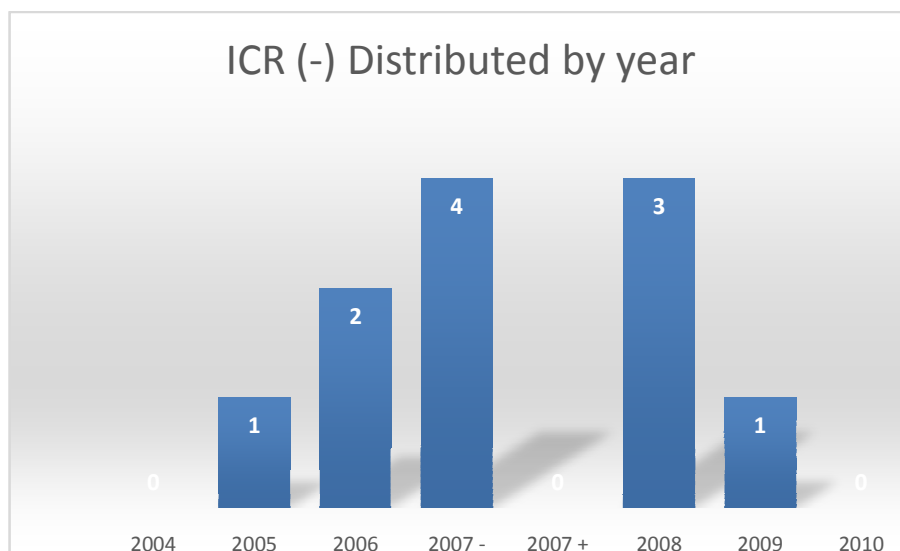
In addition, I observe that this mode of decision-making was used most frequently in the first period, in which the Justices were more active in building support as discussed in chapter four. The seven decisions of this kind that occurred in this period were explicitly linked to the images put forward by the Justices, and six of them occurred in the context of sharp increases in support. These decisions contrast with four other decisions that occurred in the second period, from which only three produced a sharp increase in public support, and one no increase. As discussed in chapter four, this is an expected development given the Justices had to start building diffuse support while breaking well-established negative views of the Court during the first period. Furthermore, it was during this period that the Justices issued the highest number of *ICR+* decisions, including the *Bustos* decision, which negatively affected the image of independence. In this context, it is plausible that the high number of *ICR-* can be attributed to the Justices' attempt to counterbalance the effect of rulings that validated the government's salient policies in a context still marked by a high level of public distrust in the Court.

The evidence is also consistent with the expectations regarding the Justices' calculus of the Government's tolerance interval. In line with the theoretical expectations, although the findings suggest that the Justices dismissed the option to avoid ruling against the Government, it shows that they avoided ruling against it in cases salient to its agenda. Indeed, the Government was involved in eight decisions from which only *Badaro I* was related to an issue that was salient to the official agenda. In other words, the most aggressive mode of intervention was mainly used when either the Government was not involved, or the issue at hand was not salient to its agenda.

Looking to the two periods marked by the Government's strength, I observe that the Justices reduced the number of *ICR*- decisions in the second period. What the evidence shows here is that the Justices' aggressiveness was reduced as the power of the Government increased, as shown in Figure 13. In all, six decisions took place in the context of a weak Government, that is, before the 2007 presidential election. In this period the number of decisions per year progressively increased and the peak was 2007 with three decisions. Conversely, four decisions occurred after the Government gained power, and three were concentrated in 2008 with the last occurring in 2009, which indicates a decreasing intervention of the Justices through this type of remedy. This suggests that the Justices preferred to reduce their aggression when the Government increased its capacity to retaliate as it acquired more power.

In terms of the tolerance interval, the only decision not occurring under predicted interval length is *Badaro I*. It occurred when the Government's tolerance interval was medium. As I explain in the following section, this decision confirms the hypothesis that a decrease in aggressive can occur within the same type of remedy, as highlighted in the discussion of my theoretical framework.

Figure 13- *ICR*- decisions distributed by year



N=38

Note: "2007-" refers to the period of the year 2007 before the Presidential election held in October 2007. Meanwhile, "2007 +" refers to the period of the year 2007 after that election.

Source: Calculation elaborated by the author.

Finally, the evidence also suggests that, when analysed against the other types of remedies, the Justices' increased their level of aggression when the public appeared to be more supportive and the Government's tolerance interval was longer. These types of decisions were the most supported in all three modes of involvement. 81.8 percent of these decisions provoked strongly positive reactions, whereas 11.1 percent and 61.1 percent of the decisions were characterised as less aggressive and moderately aggressive respectively. The increase in aggression is also positively related to the increase of explicit support, as 90.9 percent of the *ICR*- decisions were linked to the images of independence and activism, against 44.4 percent and 72.2 percent of the *ICR*+ and the *DIR/IRR* decisions respectively. In the same line, the Justices mainly used this mode of intervention in circumstances of the largest interval possible, in each period marked by the Government's strength. In the first period, 6 *ICR*- decisions out of 7 occurred when the interval was large, whereas most of the lesser aggressive modes occurred when the interval was medium. Meanwhile, in the second period *ICR*- decisions occurred in the context of the medium interval.

A Paradigmatic Case of Indirect Collective Remedies(-): The Rosza Decision

Rosza is one of the cases confirming *RHI*. In this case the Justices intervened in the policy making process by requesting the elaboration of a new mechanism for the appointment of interim federal judges (*Rosza, Carlos Alberto y otro s/ recurso de casación* 2007f). The Justices declared the exceptional appointment process of interim national judges unconstitutional, and they requested the Congress implement a new appointment procedure within one year from the date of the decision. In doing so, this ruling attempted to remedy an institutional crisis that originated in the unconstitutionality of the previous interim judicial appointment process, and in the lack of legislation regulating this matter.

The case revolved around a critical deficit of the federal judiciary system. In order to secure the independence of the judiciary, the National Constitution established that the Judicial Council, the Executive, and the Senate should be involved in the appointment of federal judges. For that purpose, law 24.937 implemented a procedure that was comprised of subsequent stages in

which each agency played a different role. The law did not set a deadline for the development of each of the stages, which permitted excessive delays in the appointment of new judges. The Judicial Council created a mechanism to appoint one-year interim judges in order to tackle the effects of these delays. Under said mechanism, the Council was the only agency in charge of the appointment and it was empowered to renew temporary appointments. Under the scheme, the interim judges did not enjoy the constitutional protections as regular judges do. According to the ruling, the use of this exceptional mechanism became a regular practice as twenty per cent of federal judges were appointed under this system at the time of the ruling. By analysing the case, the Justices observed that such situations had had two negative ramifications: first, it was alleged that Judicial Council exerted political pressures on interim judges seeking the renewals of their terms; and, second, several Appeals Courts declared the interim judges' decisions null all over the country.

In this context, Mr Rosza filed a case that reached the Court. The claimant alleged, in general terms, that the resolutions made by a interim criminal judge in a prosecution in which he was involved violated his rights to due process. He alleged that the judge in charge of the criminal trial was not appointed through a mechanism fulfilling the constitutional mandate that guaranteed the appointment of independent justices. The Justices faced a complex situation. On the one hand, as remarked by legal experts in fieldwork interviews (LP1 2010; LP3 2010; LS3 2010), there were solid legal grounds to consider the system under discussion unconstitutional. The questioned procedure did not include the intervention of the Executive and the Congress, which is mandated by the Constitution. Also, it did not grant interim justices with constitutional protections such as protection against the reduction of salary and unlawful dismissals. On the other hand, declaring the mechanism unconstitutional would have triggered a wave of nullifications involving thousands of resolutions made by the already appointed interim justices. Also, it would have meant that these judges would have had to eventually leave their positions immediately, resulting in hundreds of vacancies. These consequences would have provoked a serious judicial crisis affecting the access to justice for citizens all over the country.

The Justices found an innovative way to involve itself in the policy-making process. They declared the unconstitutionality of the appointment process and added original elements to its decision. *Rosza* deferred the unconstitutional effects for one year during which the interim positions would remain valid. Meanwhile, it requested that both the Congress and the Executive create a new mechanism. The decision was grounded in the argument that, according to the Constitution, the independence of the judiciary requires both the involvement of the three agencies in the selection and appointment of judges, and the granting of institutional guarantees to the appointees. In this light, the interim appointment procedure was declared unconstitutional.

The enforcement of the ruling was not left under the Congress's complete discretion. In terms of the content of the policy, the Justices set the constitutional standards framing it. Also, the Justices set a one-year deadline for the elaboration of the new policy. In addition, the Justices behaved as would lawmakers in several respects. First, the main feature of the remedy, the request that political branches create and implement a policy, was a Court-made product. In doing this, the Justices created a new form of remedy, a ruling-enforcement mechanism that was alien to Argentine legal culture. In this specific case, the effects of the ruling were meant to be collective even when the legal cases were filed by one individual who claimed an individual remedy. Finally, the characteristics of the Justices' intervention in the enforcement phase of the ruling is even more striking from a legal point of view. Eventually, the Justices issued an administrative resolution in order to virtually extend the effect of the *Rosza* decision. This resolution deferred the validity of the incumbent interim judges until the new law was fully valid. The resolution was issued after Congress passed the bill, but before it was signed off by the Executive. Because the bill would be fully valid one week after the one-year deadline set by the Justices, the resolution was intended to avoid potential legal claims in the future (Corte-Suprema 2008).

This case confirms *RHI* in the following terms. First, it provoked strongly positive reactions from opinion leaders as predicted. The evidence suggests that there were no negative reactions against the ruling by opinion leaders in aspects related to both diffuse and specific support. More importantly, the evidence suggests this ruling was explicitly linked to the image of

independence. The ruling was regarded publicly as showing the independent character of the Justices (Zommer 2008). Although it did not affect a crucial Government policy, the Executive was alleged to be responsible for the delays in the appointment of regular justices. The Government was reputed to engage into this practice because it was able to exert political pressure on interim judges through the Judicial Council, dominated by official counsellors (Ventura 2007b; LaNacion 2007g). In this way, the *Rosza* case was perceived as narrowing the political power of the Government although the ruling did not mention in any way the potential responsibility of the Executive.

Furthermore, the ruling was also perceived as a positive development as it addressed a structural deficit that remained unattended to and was allegedly provoked by other state institutions. The questioned appointment process was highly criticised and many courts of appeal nullified resolutions made by interim justices. This situation created some level of uncertainty in several judicial processes and was leading to a crisis of the judiciary. In fact, in 2005, before the increase in the number of nullifications, the Justices issued an administrative resolution declaring valid any past or future resolution made by interim judges (Corte-Suprema 2005). The resolution also requested that the Judicial Council and the Executive speed up the appointment processes of candidates. As these elements instances suggest, this resolution anticipated an important aspect of what would be the Justices' decision over the *Rosza* case.¹⁴³ The Justices' resolution notwithstanding, however, the gravity of the situation increased by 2007 and originated with the *Rosza* case. In this context, the Justices were seen as the only agency preoccupied with a highly problematic situation (Ventura 2008b).

Equally, the Government's tolerance interval was large. First, the case was dictated before the 2007 presidential elections, and retaliation was therefore an unattractive course of action for the Government. More importantly, the case was not salient to the national Government. Indeed, the case had political repercussions. Although some media reports tried to portray the decision as an

¹⁴³This administrative resolution was another Court innovation as the Court gave legal effects to lower justices' resolutions in abstract rather in a concrete and through an administrative resolutions rather than a proper ruling.

anti-government initiative, no top officials from either the official coalition or the Government criticised the ruling for invalidating the appointment mechanism. In fact, some officials acknowledged the need to create a new mechanism.

In short, *Rosza* is a paradigmatic case of *ICR*- confirming ***RH1***. The implementation of this decision was costly because it required an entirely new policy. However, it was in the Government's hands to design the policy. Also, the ruling, although brought to the courts by an individual, had collective effects because it required a policy to solve the dispute under the Justices' review. *Rosza* addressed an issue of public relevance that was not salient to the official agenda. In addition, it provoked strongly positive public reactions that enhanced the image of Court's independence.

Strategic Reduction of the Aggression of Decisions within the same Mode of Intervention: The *Badaro I* Decision

Badaro I is a case in which the Justices strategically reduced the aggression of their decision by altering the basic features of the remedy. They did so in response to the political circumstances in which the ruling was issued. As discussed earlier, the vast majority of *ICR*-occurred when the Government's tolerance interval was long. However, *Badaro I* occurred when the interval was medium, that is, when the Government was weak but the case was salient to its agenda. In that regard, *Badaro I* confirms ***RH4***.

As all the cases in this section, the issue at hand was triggered by structural conditions provoking human rights violations. As discussed when analysing *Badaro II* in the previous chapter, the adjustment of retirement pensions, and, more generally, the social security system, has been on the public agenda for more than two decades.¹⁴⁴ Although the automatic readjustment of pensions had been enshrined in the National Constitution, it was eliminated in the early 1990s. As a result, there were no adjustments between 1995 and 2002. The Kirchner Government sought to reconstitute the welfare system through an incremental policy. This policy was mainly focused on

¹⁴⁴ In chapter six I discuss in great detail the circumstances surrounding both *Badaro I* and *Badaro II*.

complying with the terms of thousands of court rulings in favour of individual claims for pension readjustments; to make requirements for accessing the system more flexible, particularly for those who lacked pension contributions for a short period of time; and to establish the readjustment of pension salaries by decree (Herrero, 2008). In the last regard, the policy was limited to tackling the situation of the most disadvantaged pensioners who received less than ARS 1000.

In this context, Mr Badaro brought his case to the Justices. He claimed the judicial readjustment of his salary, which was frozen between 1995 and 2005. The salary was not adjusted during the 1990s and was not benefited by Kirchner's adjustment because it exceeded the maximum of ARS 144. The claimant also required the correction of the percentage readjustment that was applied between 1991 and 1994. Following the Justices' jurisprudence of the 1990s, the lower judge applied a minor readjustment. As a consequence, both Mr Badaro and the state appealed to the Justices.

On August 8th 2006 *Badaro I* was issued (Badaro, Adolfo Valentín c/ ANSeS s/ reajustes varios 2006). It stated that the constitutional readjustment of pensions should be carried out by the automatic mechanisms reflecting the relation between the pension salaries and the salaries of employed workers. Also, it argued that the permanent lack of annual adjustment of pension salaries violated Mr Barado's social rights. In order to remedy this situation, the Justices requested that the Government enact a new law establishing an adjustment criterion that would guarantee a proportional relationship between employed workers' current salaries, retirements and pensions, but disregard inflation indexes.

Reductions in the aggressiveness of the decision are observed in the part of the decision referred to as the enforcement phase. For such a phase, the Justices instructed one of the most flexible procedures among all the *ICR*- issued by the Court. As mentioned above, the ruling specified the relation between pensions and salaries of employed workers as the framework for the adjustment mechanism to be created. However, it gave vague timeframe instructions for the

enactment of the law.¹⁴⁵ In this sense, the Justices gave more space to manoeuvre to the other branches to elaborate the requested policy vis-à-vis other decisions falling within this type of remedy.¹⁴⁶ This meant that the Justices did not offer an immediate measure to protect MrBadaro's rights. Rather, this protection was dependent on the political will of the Congress and the Executive.

Notwithstanding this strategic reduction of aggression, *Badaro I* provoked strongly positive public reactions. There is no evidence revealing that reactions from opinion leaders negatively affected either diffuse or specific support for the Justices. On the contrary, the decision was highly welcomed in the public realm and enhanced the image of activism and independence. Media coverage interpreted this ruling as the Justices' attempt to set the agenda of the Government on the pension issue and to provide a remedy for a social deficit which remained largely unattended to by the elected branches (Wainfield 2006a; Verbitsky 2006). Finally, media coverage also implied that it was a sign of independence that the Justices retained their power to evaluate the constitutionality of the new policy. For example, the journalist Wainfield (2006) commented:

'The Supreme Court set the agenda for the other branches of Government again. Now, the Justices aim to redress the neglect of pensioners, one of the greatest injustices consummated by recent Governments, including the Supreme Court itself.'

In the same vein, a *La Nacion*'s editorial (LaNacion 2006) remarked, that:

'The decision to deliver justice in this issue highlights the urgency of returning dignity to a vast sector of society. Also, [it highlights] the need to address structural reforms in the public sector to make it feasible to maintain fiscal solvency without having to resort again to reducing spending at the expense of violating essential State functions.'

And a journalist of *Clarín*(Boschi 2006) highlighted that

'The Justices shall exercise control over the decisions of the Congress, and will have the final say on resolving the conflict.'

¹⁴⁵ The language of the ruling is eloquent. It says that the law should be passed in within "reasonable time period" (Rosza c/...*Ibid*: 8).

¹⁴⁶ According to the author's own analysis of ICR- decisions, only *Badaro I* and *Fundación Sur* stipulated such a vague time frame.

In terms of the Government's tolerance interval, the evidence supports the expectation that the level of aggression decreases when the interval is shorter. In this case, the decrease is not translated into a change in the type of remedy. Rather, it is observed in both the language of the ruling and the particular features constituting this *ICR*-. Thus, this decision also confirms that variation in the level of aggression within each type of remedy is also possible. This, in turn, is consistent with the assumptions that judges take case salience as a relevant aspect in their strategic calculations.

The tone of the ruling denotes an effort to temper the impact of the remedy on the Government. The Justices explicitly praised the official pension policy as a positive development aimed at tackling the effect of the economic and social crises that occurred in 2001 and 2002. These considerations added no elements to the legal arguments supporting the decision. Thus, their inclusion in the ruling was not necessarily made from the legal point of view. After enumerating all the measures taken by the Executive aimed at improving the situation of those who received the less favourable pensions,¹⁴⁷ the Justices declared:

*'[That such measures] were taken in view of the severe economic and social crisis and have the clear purpose to serve primarily the most urgent needs, ensuring indispensable resources to their beneficiaries.'*¹⁴⁸

In addition, the enforcement mechanism included in the remedy can be seen as another cushioning gesture. If we compare the enforcement included in this remedy with those included in other *ICR*- decisions, I observe that the one at hand is much more flexible. In the case of *ICR*-, in which the Justices open up an arena for the elaboration of the policy to be implemented, such as the *Vertbisky* and the *Riachuelo I* decisions, the Justices exercise a stricter control of such processes by requesting, for example, regular reports to the Government and holding public

¹⁴⁷ Paragraph 11 of the ruling.

¹⁴⁸ Paragraph 11 of the ruling.

hearings.¹⁴⁹ With *ICR-*, in which policy elaboration requests are issued to the Government, the Justices set specific timeframes that the Government in question should fulfil the request, as it was discussed in the *Rosza* decision. However, in *Badaro I* such a strict timeframe was replaced by the formula ‘*reasonable time*’. This formula gave the Government a wide temporal margin to discuss and negotiate a new policy with the other parties.

In fact, the evidence reveals that the Justices managed to ameliorate the impact of the decision on the Government. The elements described above, together with the fact that the Justices did not include a specific formula for the readjustment,¹⁵⁰ were seen as features of a Court’s prudent approach to the issue (Wainfield 2006a, 2006). From this perspective, top Government officials initially reacted non-aggressively to the decision. It was viewed as the request of a corrective measure rather than an overt challenge. The head of the National Social Security Administration Office, Sergio Massa, was the top official in charge of communicating the Government’s position on the issue. In one instance he (Boschi 2006) declared that:

‘The ruling preserves the function of each power, leave in Congress’s hand the creation of the readjustment mechanism [...], and acknowledges as positive measures the adjustments granted by a Government’s decrees from the past.’

He (Hauser 2006b) also remarked that diverting the ruling from the jurisprudence of lower judges gave the judiciary as a whole the power to set the adjustment formula:

‘[...] the decision is positive because it establishes that the readjustment of pensions is not under judicial jurisdiction anymore.’

The question, then, is why the Justices enacted this lenient *ICR-*. The evidence suggests that the case was relevant to the Government. As discussed above, the rest of the *ICR-* occurred in

¹⁴⁹ It must be acknowledged that between the *Vertbisky* and the *Riachuelo I* decision there are differences in terms of the intensity of the Justices’ intervention. As discussed by authors such as Puga (2012), the Justices played a more active role in the latter decision.

¹⁵⁰ It should be noted that the lack of a specific readjustment formula cannot be attributed to a strategic motivation. As discussed in another section, the nature of this type of remedy precisely relies on the Justices’ deferral of the elaboration of the content of the policy to the other branches.

the context of a long tolerance interval, which means that issues under decision were not relevant to the official agenda. However, in the *Badaro* case the issue was extremely salient for the Government. First, the pension issue was a key issue for the two subsequent Governments between 2003 and 2010. In particular, the Government's top officials and allies regarded the pension policy as one of the main achievements of Kirchner's administration and one of the aspects that differentiated it from the previous neoliberal administrations (Wainfield 2006c; Montenegro 2006). Second, compliance with the ruling would have had a substantial economic impact regardless of the specific adjustment mechanism to be adopted.¹⁵¹ Thus, complying with the Justices' ruling meant using a great amount of funds in a policy that was not in its official agenda. Thirdly, in the Argentine political arena in which political initiative is concentrated in the President's hands, the image of the Justices as setting the agenda of the Government in a sensitive matter was seen in the public arena as a decision that undermined the President's monopoly of power (Montenegro 2006; Wainfield 2006, 2006a). As I show below, this salience was reflected in the fact that top Government officials did respond to the decision in the public domain.

There are some alternative explanations for the reduction of aggression. It might be argued that the Justices were not aware of the salience of the issue at hand. In other words, they miscalculated the relevance of the issue for the Government. However, it is very unlikely that the Justices did not foresee that the case was of such particular relevance. As mentioned before, the improvements of pensions was a key policy of the Government and one in which it was very successful compared to previous Governments. In fact, I explained above that the ruling remarks upon the main aspects of this policy and acknowledges that it was a positive development. Another alternative response is that the ruling was not a real challenge to the Government. In other words, the remedy was a type of *ICR+* where the decision with collective effects is in line with the interests of the Government. However, the Government's subsequent behaviour leads to a contrary conclusion. As discussed in chapter six, the Government passed a law in response to the ruling in December 2006 which did not comply with the standards set by *Badaro I*. Remarkably, it did not

¹⁵¹ In his Article, Herrero (Herrero: 587) cites different studies which state that the adjustment of pension would require between ARS 9.500.000 and 22.500.000.

implement an automatic adjustment mechanism. It stipulated a single increase that year and delegated the Congress's powers on the matter to the President. The Government's non-compliance suggests that the ruling was not in line with the official agenda.

In fact, some editorials remarked that the *Badaro I* decision is one in a series of rulings that contributed to creating political tensions between the Justices and the Government.¹⁵² Along these lines, the President made evident the ramifications of the *Badaro I* decision amidst a dispute over the judicial budget. In her opening speech to the Congress at the beginning of the legislative year in 2008, the President addressed the issue in which she personally ratified the Government's stance on the issue and implicitly referred to the *Badaro I* decision. Using sarcastic language she responded to Chief Justice Lorenzetti's claim which attributed some of the deficits of the judiciary to the lack of funds. The President (LaNacion 2008b) claimed:

'We have increased their resources 173% since 2003. This prestigious Court has instruments in its hands in order to have a better administration of justice [...] and if they [the Justices] have powers to instruct the legislature to dictate any law or the executive to do something that is of its competency [...] How is it that they [the Justices] do not have the power to get things straight within their own institution?'

Taking these elements into consideration, the *Badaro I* is a decision that falls into the *ICR*-category and confirms the basic postulates of my theory. First, it occurred in the context of a high level of public support. Second, it confirms that the level of aggression decreases when the tolerance interval is shorter. However, this reduction affected not the type of the remedy but its features. In this sense, the analysis of this decision offers a more nuanced explanation of the dynamics involved in the Court's decision, and it points to the level of aggression of the Justices' intervention and how it varies within each type of remedy.

Obstacles to Building Public Support: The Constraints of Collecting Information to Anticipate the Reactions of Opinion Leaders and the Limits of the Activist Profile of the Court

As discussed in chapter six, sometimes the different mechanisms Justices use to get information that will help them to better calculate reactions from the Government's top officers

¹⁵² See for example *La Nación* (2009)

and opinion leaders do not work for a number of circumstantial reasons. This indicates that the Justices have constraints in terms of getting the appropriate information to anticipate reactions to their rulings, an issue discussed earlier in the theoretical chapter of this work. In this section I discuss the constraints Justice had in anticipating reactions from opinion leaders. In addition, I discuss a limit to the Justices' attempts to build public support. As discussed in preceding chapters, Justices aimed to build diffuse support by advancing an activist image of the Court. However, in doing so, the Justices risked being exposed to criticism from conservative sectors of society who had access to media. Although the Justices did not expect to please all sectors of society, conservative criticisms might have been significant given particular circumstances. Conservative groups are not a minority in Argentina, a country in which several generations were educated under authoritarian rule, and the Catholic Church is one of the most important institutions. Also, conservative ideas occupy an important space in the public debate, as the *La Nación* newspaper, for instance, follows a conservative editorial line. Under these conditions, enhancing the image of activism might expose the Court to a high level of conservative criticism. In those situations, it is plausible that Justices find that it is more beneficial for their strategy to save the Court from conservative criticisms rather than enhance the activist image. This suggests, in turn, that specific support might be more important than diffuse support under particular circumstances. I therefore suggest that, sometimes, specific support operates in such a way as to limit the construction of diffuse support.

I use *Fundación Sur* to illustrate both type of constraints the Justices face in building support. Although the ruling requested the elaboration of a new policy addressing the conditions provoking rights violations, it provoked a negative reaction from the public. In fact, it was the only decision in this study that affected the image of activism put forward by the Justices. This outcome is peculiar given that the nature of the decision, characterised as *ICR-*, one could have expected the opposite reaction. I suggest that this situation can be attributed to the combined effects of Justices' attempts to save the Justices from broader criticism, and from the obstacles in getting information that would help them better anticipate the public's reactions.

Under domestic criminal law, a child or adolescent under the age of 16 cannot be held criminally responsible. However, Law 22.278, which ratified a decree issued by the last dictatorship, permits juvenile judges to dictate the detention of children under sixteen accused of illegal acts on the grounds that the state should provide them with moral and material protection. As a result, according to the Justices' ruling (García Méndez, Emilio y Musa, Laura Cristina s/ causa N° 7537 2008a), these children are sent to the same institution in which juvenile offenders are imprisoned. Thus, they not only have to cohabit with juvenile offenders but they are also treated as young criminals. In addition, this system, which is called 'the tutelary system' in Argentine law, was largely extended, and indeed judges resort to it regularly, particularly when the incumbent child comes from a disadvantaged background. In these situations, the implementation of the tutelary system was in breach of international human rights standards and resulted in the regular violation of the rights of children.

Under these circumstances, the *Fundación Sur* and the Juvenile Public Defender Office of the City of Buenos Aires presented a *habeas corpus* in favour of all children under the age of 16 detained in detention centers in the city of Buenos Aires. The claimants requested that Law 22.278 be declared unconstitutional and that the children be released immediately. The request was denied by a judge in the first instance. This early decision was reversed by an Appeal Court which declared the incumbent law unconstitutional, ordering the progressive release of the children from these institutions according to a plan that was to be elaborated by different state agencies and civil society organisations. The Court also requested the National Congress enact appropriate legislation on the subject within the international standard for the protection of children's rights.

The Justices reached a decision over the case on December 2, 2008. They requested the Congress and the Executive to enact legislation complying with international human rights standards. In doing so, they established that such legislation be should enacted within a *reasonable timeframe*. However, they reversed all other aspects of the Appeal Court decision, including the declaration of unconstitutionality of Law 22.278. Although they asserted that the law contradicts international human rights treaties, the Justices maintained the validity of the tutelary system.

Like most of the cases of *ICR*-, the decision did not relate to an issue that was salient to the official agenda. Although the case revolved around the detention of children in institutions under the jurisdiction of the City of Buenos Aires, the decision ordered the national Government to reform its legislation because the National Congress was in charge of legislating on criminal law matters. Notwithstanding, the media did not report any reaction from Government officials. In that regard, and given that the decision occurred after the 2007 presidential election, the Government's tolerance interval was medium. This means that the case happened when the issue was not relevant to a powerful Government, as predicted by the theory.

However, unlike all other *ICR*-, *Fundación Sur* was one of the two decisions of this study provoking negative public reactions that, in turn, affected diffuse public support. The ruling triggered negative reactions from human rights defenders, which undermined the image of the Justices as an activist agency.

The question is then why the Justices rendered a decision contradicting their effort to build public support. One might argue that in this particular case the Justices were not preoccupied with building public support. However, as I explain below, the evidence suggests that they nevertheless cared about it. They attempted to save the Court from massively negative criticism in conservative sectors, though, at the same time, they miscalculated the impact of the decision on progressive groups. Given the nature of the decision, they might have calculated that the decision would indeed produce negative reactions, but that such reactions would not reach the media. In fact only a reduced number of human rights defenders, which did not include the most important ones, raised their voices against the decision.

The discontent with the ruling revolved around aspects that I will turn to now. Although the ruling requested that the tutelary system be modified, this clause was perceived as a validation of an extended institutional practice that had resulted in the systematic violation of children's rights. The claimants strongly criticised the ruling. For example, the President of *Fundación Sur* and member of the Congress, García Méndez, (Cecchi 2008) argued:

'This ruling is a major human rights step back in the democratic history of the country because it validates a decree issued by the dictatorship which (in turn) legalises arbitrary detention explicitly contradicting the National Constitution.'

Along the same lines, Laura Musa (Rodríguez 2008), Juvenile Public Defender of the City of Buenos Aires, also remarked:

'The ruling validates the current tutelary system which is blatantly against the principles of the rule of law in a democracy. What happened is very grave and it is a step back in the field of human rights.'

The public critique against the ruling also came from beyond the claimants, but from a limited circle as the media coverage suggest. Nora Schulman (Cecchi 2008), from the National Monitoring Committee of Children's Rights, declared:

'The ruling is a step back because it dismantled a progressive measure [referring to the Lower Court's decision] which helped the State to recognise and implement international standards for the protection of children's rights.'

Finally, the influential journalist and human rights militant, Horacio Vertbisky, launched a sharp critique. He (2008) asserted that the ruling was a reaffirmation of a lukewarm commitment to rights, a tradition embedded in the Argentine society as the author also claims, which invokes the protection of the weak in order to justify a violation of rights. The journalist was referring to the argument, which is held by some Justices as I discuss below, that the release of the children would have put them under no protection in a society eager to engage in violent retributive actions.

Also, in all the cases the disagreement with the ruling revolved around a further aspect: what was seen as problematic was that the Justices did not issue any other type of Indirect Collective Remedy. As mentioned before, the lower Court dictated a very aggressive remedy of this kind. It ruled Law 22.278 unconstitutional, requested the Government reform its legislation to

meet international human rights standards within a specific deadline,¹⁵³ and ordered the progressive release of the children imprisoned under the tutelary system, according to a policy elaborated by different state officers and civil society actors. The decision overruled this decision and replaced it with a more lenient remedy that left the law untouched and reversed the release order. In this context, the question is why did the Justices rule a lesser aggressive *ICR*- under circumstances that did not increase public support? A superficial analysis might suggest that the Judges were not sensitive to public support in this particular case.

However, a closer look at the context in which the case was dictated suggests the Justices were indeed attentive to public support. But they were more concerned with the reactions of the actors, which represented the sentiment of a large portion of Argentine society that urged harsh sanctions for criminals, including juvenile offenders. According to this view, the Judges calculated that reaffirming the type of *ICR*- dictated by the Lower Court would have brought high levels of criticism, or, in other words, low levels of specific public support. In practice, ruling the tutelary system unconstitutional would mean that thousands of children accused of committing illegal acts would eventually have been released providing they presented legal claims against the law in courts across the country. In this scenario, the Justices would have been accused of releasing these children and putting at risk the security of the rest of the population. In this light, the Judges might have calculated that a loss of public support represented by criticisms from human rights activists would not reach the media and, thus, be less damaging to its image than critiques from extended portions of society, portions that were represented, among others, by the main newspapers and many top Government officials.

The ruling was dictated in a context in which the public agenda was dominated by views arguing for harsher sanctions to criminals and stricter measures against juvenile delinquency, as pointed out by human rights activists in my fieldwork (CSL1 2010; CSL3 2010; CSL4 2010; CSL7

¹⁵³The Lower Court decision could be also characterised as Direct Collective Remedy as, although it deferred the elaboration of the proper legislation to the Congress, it meant to rule the situation of any child imprisoned. Elucidating the nature of the remedy, that is whether it was direct or indirect, will require a deeper technical discussion which is beyond the purpose of this work. Thus, for the purposes of this analysis, I regard the Lower Court's decision as an *ICR*-.

2010). In this context, judges in general were perceived as responsible for the high levels of crime because they did not punish the criminals. For example, President Fernández (Guagnini 2008) declared in her speech to the Congress with which she opened the legislative year by suggesting that the police were fulfilling their duties to protect society by detaining suspects of criminal actions, but that the judges are the ones who release them systematically. Also, there was an extended claim that lowering the age for juvenile offenders was wrong. For instance, the governor of the province of Buenos Aires, one of the most prominent politicians of the official party at that time, claimed, although not referring directly to the ruling, that the increasing levels of juvenile delinquency need to be tackled by lowering the age of criminal accountability and allowing for the criminal prosecution of offenders younger under the age of 16 (Clarín 2008a; García Méndez 2008; Página12 2008c).

In fact, the issue under the Justices' review was framed publicly more as a juvenile delinquency matter than it was a matter of human rights. Two of the most important national newspapers framed the issue along these lines. For example, in reporting the Justices' acceptance of its intervention over the issue, *Clarín* made an explicit link between the liberation of juvenile offenders and the problem of insecurity, explaining how the potential rise in crime would be fueled by measures such as the one taken by the Lower Court (Guagnini 2008). Reporting on the same decision in the same vein, the conservative *La Nación* (Ventura 2008c) entitled its first article over the issue "Juvenile Delinquency." Only *Página 12*, the least important newspaper of the three main papers in terms of sales, framed the issue in the language of human rights. It is particularly telling that although they did not praise the ruling as positive development explicitly, both *Clarín* and *La Nación* gave almost no coverage to the critiques addressed by human rights activists. It was only *Página 12* which gave ample coverage to disapproval from these groups.

In this context, the evidence suggests that the Justices behaved strategically to avoid widespread negative reactions against the ruling. This was evidenced by the main critics of the ruling, such as García Méndez, Shulman, and Verbitsky mentioned above. Also, anonymous interviewees highlighted that the decision served for this purpose, because otherwise the Justices

would have been blamed for releasing criminals and showing an indulgent approach to juvenile delinquency. From this perspective, Justices could have anticipated negative reactions to the release of juvenile offenders given the visibility of the issue and its media coverage. A further element is in line with this reasoning: the ruling contradicted what at least two Justices thought of the tutelary system. Justices Argibay and Zaffaroni stressed publicly that the tutelary system was unconstitutional on several occasions (Clarín 2008a; LaNación 2008b; Hauser 2008a). However, they joined their colleagues in an undivided ruling in what was seen as an unjustified change of position by legal practitioners and scholars (LP1 2010; LP5 2010; LS1 2010; LS2 2010; LS3 2010), journalists (R1 2010; R5 2010), and human rights activists (CSL2 2010; CSL4 2010; CSL5 2010; CSL7 2010).

In addition, it might be possible that the Justices calculated that the negative reactions from human rights activists would not be extended and would cause little damage to its reputation. At least two factors led to this conclusion. First, although the Justices did not meet the expectations of a group from the human rights community, the features of the ruling and the grounds in which it was dictated reveal that the Justices still used an activist approach in their solution to the case. Although less aggressive than what was expected, the Justices maintained the main features of the most aggressive remedies used in other cases. In this regard, the Justices preserved, although partially, its image as activist institution. Also, the Justices argued that they protected the interests of children under the tutelary system. Justices Argibay, Fayt, and Zaffaroni defended the ruling in the public agenda justifying the ruling on the following grounds (Hauser 2008a; LaNación 2008b; Clarín 2008a; Página12 2008c). They argued that ruling the tutelary system unconstitutional would have meant putting children accused of criminal action at serious risk. In this light, high levels of social stigmatisation would have been translated into violent action against them by society at large, including police killings. In this way, the Justices argued, the Justices sought to protect the interests of the young while requesting the Government change the legislation.

The second factor relates to the high level of acceptance the Justices enjoyed among human rights defenders at the time of the ruling. As pointed out by several anonymous

interviewees, a majority of the most prominent progressive legal scholars and human rights activists had a positive view of the Justices, at least at the time of the ruling, and felt that overtly criticising the Justices would undermine its prestige. The relationship between them was described by one legal scholar (LS2 2010) in the following terms:

'There was a sentiment of partnership between progressive scholars, militants and Justices in the struggle to reconstitute the legal protection of human rights dismantled by the previous Court. In this context, raising voices against the Justices in the public arena would mean to play against this partnership.'

In fact, the negative criticism against the ruling was limited, but still public. As discussed above, only a few human rights defenders publicly criticised the ruling. In fact, Laura Zommer interviewed many of the most prominent figures of the human rights community in an article published by *La Nación* after the ruling. The article assessed the work of the Justices and was written in very positive tone. The interviewees highlighted the positive image of the Justices as committed to the defense of human rights. Unsurprisingly, there was no mention of the *Fundación Sur* decision (Zommer 2008).

Taking these elements into consideration, the evidence suggests that the Justices reduced their level of aggression in view of a potential loss of public support, and they also miscalculated the impact of the decision in human rights circles. In this case, they dictated an *ICR*-, the most aggressive type of remedy used during the period under study. However, within this type, it chose a more lenient remedy in order to avoid high levels of criticism from a large portion of society by demanding stricter criminal punishment for juvenile delinquency, and blaming judges for not prosecuting criminals. In doing this, the Justices rather preferred to be exposed to criticism from the human rights community, in which public exposure was to be strategically avoided. It seems that it relied on a calculation that this critique would have not been extended and therefore would have little negative impact on its reputation.

Conclusion

In this chapter I discussed the Justices' use of the most aggressive form of involvement, *Indirect Collective Remedies- (ICR-)*. In a context where a culture of judicial independence is lacking, the use of *ICR-* might be problematic for any court. These aggressive remedies are likely to be taken as a strong challenge to the authority of Government. Moreover, given their rarity in the domestic political arena, they are likely to bring a high level of media attention, which may expose political officers to public criticism.

Most types of decisions confirmed three hypotheses. In the first period, six decisions confirm ***RH1***, whereas three in the second support ***RH2***. Taking these hypotheses together, I expected that the Justices would reduce the likelihood of retaliation using *ICR-* over issues that are not-salient to the official agenda, both when the Government was weak and powerful; and that these decisions will provoke strongly positive public reactions. These expectations were confirmed in eight decisions.

Additionally, one decision confirmed the expectation that the Justices will strategically regulate their level of aggressiveness by altering features of the same type of remedy as a response to the political settings in which they are embedded. In particular, *Badaro I* confirmed the hypothesis that during the first period, Justices will decrease the level of aggression of *ICR-* by altering their features when the Government's tolerance interval is medium. In this case, the reduction of aggression is reflected in the particular features of the decision. More specifically, it is observed in both the language of the ruling and in the particular features constituting this *ICR-*. Thus, the evidence regarding this case confirmed that variation in the level of aggression within each type of remedy is also possible, and that the Justices' regulation of such aggression is a response to the power of Government.

In addition, I found that the Justices successfully anticipated reactions from opinion leaders by building public support in all but one case. In fact, most of these decisions (10) were highly supported in the public realm as they provoked strongly positive public reactions. In

addition *ICR-* were crucial for the construction of diffuse support. Again, most of them (10) received no negative views on the images put forward by the Justices and the same number produced explicitly positive reactions. In addition, in this chapter I found that Justices avoided ruling against the Government in cases salient to its agenda. Indeed, the Government was involved in eight decisions from which only *Badaro I* was related an issue salient to the official agenda.

Finally, this chapter also shows that the Justices face constraints in terms of obtaining information to calculate reactions to their decisions. In the analysis of *Fundación Sur* I showed that the Justices also found difficulties in anticipating public reactions to their rulings. In addition, I found that, sometimes, specific support operated as a limit to the construction of diffuse support. In this ruling the Justices addressed a structural situation provoking an extended violation of rights. Although the ruling requested the elaboration of a new policy addressing the conditions provoking rights violations, it provoked a negative reaction in the public arena. In fact, it was the only decision in this study that affected the image of activism put forward by the Justices. I found that this unexpected outcome can be attributed to the combined effects of Justices' attempt to save the Court from broader criticism, and the obstacles involved in adequately anticipating the public's reactions.

Conclusion

Introduction

This work was motivated by a significant question for the study of the judicialisation of politics: What explains the different forms of involvement of courts in the political arena? A large body of literature on judicial politics has shed light on a number of aspects of the judicialisation of politics in Latin America. Though by no means limited to the following, these include factors that facilitate or prevent the judicialisation of politics, the countries in which it occurs, and the types of issues in which it is more likely to be observed. However, such insightful literature has failed to differentiate and explain the diverse forms in which judges intervene in the political process.

In this work I suggested that, to understand why judges choose different modes of involvement in the political realm, one must first turn their attention to the constraints that judges face when exerting their authority in Latin America. One must also consider the fundamental problem of judicial policymaking, which undermines judicial independence and threatens constitutionalism. Judges in Latin America operate under constant political pressure, and they need to protect their courts in order to achieve their goals. Once we understand how this problem can be solved, an explanation of judicial aggression emerges: the level of aggression exercised by judges sitting in vulnerable courts is a function of their attempt to protect the institutional security of their

courts. In short, I propose that in contexts characterised by a lack of a culture of judicial independence, high levels of judicial delegitimisation, as well as by a high level of visibility of judicial affairs, judges sitting in vulnerable courts calculate both the public's and the government's reactions to their rulings.

Throughout my dissertation I have investigated the behaviour of the Justices sitting in the Argentine Supreme Court between July 2004 and October 2005. Guided by my initial concerns, I aimed to investigate whether the Justices' level of aggression was a function of their attempt to protect the institutional security of their Court in a context marked by the lack of a culture of judicial independence and by a high level of public exposure of judicial affairs. In this regard, I explored whether Judges' interventions increased the level of aggression when the government's tolerance was higher and the public appeared more likely to be supportive. More precisely, I investigated whether their attempts to attain institutional security led judges to engage in strategic behaviour, which I characterised between two extremes: first, the calculus of reactions from opinion leaders who are able to both shape the public views on the general image of the Court (diffuse support), and influence public reaction to decisions over socially-sensitive rulings (specific support); and second, the calculus of the Government's tolerance to decisions contrary to its own interests.

Looking at decisions of contemporary public salience, I found that the Justices chose among three different forms of judicial involvement. Such forms differ from each other in terms of their level of aggression, which refers to the intensity of the involvement in the political arena. I measured 'level of aggression' on a four-point scale built along four dimensions, namely the nature of the remedies, the effect of the remedies, the position of the government in the issue under discussion, and the cost of enforcement for the elected branches. The least aggressive form of intervention rendered by the Justices was represented by nine decisions. Under this form, characterized as *Indirect Collective Remedies(+)* (ICR+), the Justices validated policies already in place, as discussed in chapter one. In addition, the Justices dictated 18 decisions constituting the moderately aggressive mode of intervention, *Direct Individual Remedies* (DIR) and *Indirect*

Individual Remedies (IIR). Finally, 11 decisions are characterised as *Indirect Collective Remedies(-)* (*ICR-*).

In these concluding remarks I discuss the Justices' motivations to engage in the strategic use of these three types of remedies. In doing so, I highlight the main findings supporting the theory put forward in this work. In addition, I discuss the contribution of my dissertation to the study of judicial behaviour in Latin America in three regards: the incorporation of the public as a key factor explaining judicial behaviour; how justices build their legitimacy; and the role of the law in the positive study of judicial behaviour. In doing so, I also propose future research. I conclude highlighting the theoretical value added by my theory to the study of courts in Latin America and a brief reflection on the condition under which the equilibrium proposed here might shift.

Explaining the strategic use of different forms of judicial involvement

The findings confirm the theoretical expectations according to which judges are simultaneously concerned with the construction of public support and the avoidance of conflicts with the government. It is important to highlight that the theoretical assumption that judges see public support as a defensive mechanism has empirical support in the Argentine case. Indeed, I showed in chapter three that the Justices attempted to create the conditions under which public support is more likely to work as a defensive mechanism. Firstly, in terms of the legitimacy condition, the Justices sought to make the Court more popular by presenting it as a transparent, independent and activist agency. This attempt clearly responded to the main popular criticisms that originated in the Court's crisis of legitimacy. Secondly, in terms of the transparency condition, the Justices deliberately sought to use the media to publicise and promote a new image of the Court in order to build public support. Also, the Justices deliberately approached opinion leaders to secure transparency.

In fact, the Justices managed to build public support through their decisions and to enhance the images of independence and activism. This suggests that they were able to anticipate the

reaction of opinion leaders who are thought likely to affect diffuse support and specific support. In fact, I demonstrated that the Justices succeeded in maintaining the images of independence and activism —key aspects of the Justices’ strategy to build diffuse support. Only two decisions, *Bustos* and *Fundación Sur*, provoked negative public reactions undermining the images of independence and activism respectively. More importantly for the Justices’ attempt to build support, most of the rulings enhanced the image of independence and activism. I found that 30 rulings were explicitly linked to the images of activism and/or independence. In relation to specific support, the evidence confirms an expected outcome, that the Justices would not be able to please all sectors of society who are able to reach the media to express their discontent with some rulings. Almost 40 percent of the decisions were criticised in the public realm, although only two decisions, as mentioned, affected the images of independence and activism.

In addition, the Justices not only anticipated public reactions but also attempted to shape them. They sought to control the type and content of information covered by the media as a means of influencing opinion leaders’ reaction to their decisions. For these purposes, the Justices strategically used the media, exerted some control over media coverage, and built public relations with opinion leaders. These elements constituted what I call a ‘*strategic communication policy*.’ This communication policy was complemented with the strategic release of rulings aimed at tempering their negative impact on either the public or the government. The Justices have the power to time their decisions discretionally as there are no formal rules establishing timeframes or deadlines for hearing cases. As a result, the Justices have the liberty to explore the environment and assess the consequences of their moves before releasing a final judicial decision. Capitalising on these powers, I found that the Justices attempted to temper the potential negative repercussions of a controversial ruling by releasing it either simultaneously or temporally close to other decisions with positive repercussions.

I also found support for the theoretical claim that the protection of the institutional security of their court leads judges to calculate the Government’s tolerance interval in order to avoid political conflicts. In line with these theoretical expectations, the findings suggest that the Justices

dismissed the option of preventing a ruling that goes against the Government's interests in order to avoid retaliation. In fact, the Justices challenged the Government's interests in 73.3 percent of the decisions. Also, the Justices defied the government even when it was powerful, between 2007 and 2010, as they ruled against its position in 81.2 percent of the decisions in this period. Furthermore, in line with my theory, the Justices avoided ruling against the Government on issues salient to its agenda in most of the cases. They ruled against the Government on salient issues in only 21 percent of the total sample of this study. Similarly, few of these decisions occurred when the issue was salient to a powerful Government. Only four salient decisions occurred when the Government's interval was short. These elements suggest an interesting development. Overall, the Justices managed to enhance the image of independence, and therefore to build public support. However, the evidence suggests that they did not hit the government on issues that were salient to its agenda in a significant proportion of cases. This suggests that the Justices' strategy to rule against the Government in a high number of cases, but in only a few cases of salience to its agenda, was, indeed, successful in terms of preventing conflicts with the Government while increasing public support.

Remarkably, I found that the Justices' concern with constructing public support and avoiding political conflicts with the government determined the use of the three types of remedies. Overall, the level of aggression exercised by Justices increased when the public appeared to be more supportive and the Government's tolerance was larger. This can be observed through the development of three relevant patterns of behaviour. First, the Justices increased their level of aggression by using different modes of involvement when the public appeared to be more supportive and the government's tolerance interval was higher during both periods. This was the most frequent pattern of Justices' behaviour, as 68 percent of the decisions examined in this work represented this course of action. Also, this behaviour was also dominant if one looks at each type of remedy used by the Justices separately, as 67 percent of *ICR+*, 61 percent of *IIR/DIR*, and 89 percent/*CR-* illustrated this type of behaviour.

A second pattern of behaviour observed, although not extensively, is the decrease in the level of aggression that occurs by altering the features of the same remedy in response to the political conditions in which decisions were issued. This course of action was observed in only two occasions. Unlike most of *DIR/IIR*, *Patti* occurred when the government's tolerance interval was short as it contradicted the government's position on a salient issue during the second period. Here, the Justices had to resolve the situation of the elected Congressman Patti, who was prevented from taking his position by the Congress. The Justices invalidated the Congress's decisions but left in its hands the design of the final solution of the case. Also, the Justices implicitly and explicitly suggested alternative means to keep Mr *Patti* out of Congress. In that regard, the decision did not invalidate the government's policy, cancelling only one of the several means the government could have used to implement it. Similarly, *Badaro I* illustrates this course of action. The vast majority of *ICR*- occurred when the government's tolerance interval was long. However, *Badaro I* occurred when the interval was medium, that is, when the government was weak but the case was salient to its agenda. Here, the strategic reduction of aggression was observed through two elements: First, through the language of the ruling. In other words, the tone of the ruling denotes an effort to temper the impact of the remedy on the government. Second, the enforcement mechanism included in the remedy differed from the ones included by the Justices in decisions of this kind. Most of the *ICR*- decisions rendered by Justices are characterised, among other ways, by requests from the Court to the government to elaborate and implement a particular public policy. For that, the Justices establish specific timeframes within the government to fulfil the request. However, in *Badaro I* such a strict timeframe was replaced by the formula of '*reasonable time*.' This formula gave the Government a wide temporal margin to discuss and negotiate a new policy with the other parties.

The third pattern revealed that existing legal constraints prevented Justices from becoming more aggressive. Three decisions characterised as *DIR/IIR* occurred under conditions in which *ICR*- were theoretically expected. In *Vizzoti* and *Aquino*, characterised as *DIR/IIR* and dictated in September 2004, a more aggressive form of intervention was not materially possible. This is

because Justice Lorenzetti, who did not join the Court until December 2004, was a proponent of the *ICR*-, which is the most aggressive type of intervention that is used by the Justices. *ICR*- were jurisprudentially created by the Justices, and while any other Judge on the bench could have proposed their use, Justice Lorenzetti was the first Judge to propose their use by the Court. Similarly, the *Municipalidad de San Luis* decision was also dictated in the context of a long interval but this time in 2005. Here, the facts of the case brought to courts prevented an increase in aggression.

An increase in the level of aggression is also observed when one looks at the relation between the level of aggression and public support on one hand, and the level of aggression and the government's interval on the other. The evidence indicates that the level of aggression increased when the public appeared to be more supportive in most of the cases. When looking at decisions that provoked strongly positive reactions I found that the least aggressive modes of involvement were the least supported, and, conversely, the most aggressive ones were the most supported. Similarly, the evidence indicated that the level of aggression increased when there were explicitly positive reactions. The least aggressive modes of intervention were the least linked to either or both images put forward by the Justices to build support. Contrary to this, the most aggressive modes of intervention were most linked to the images of independence and activism by opinion leaders.

Likewise, the evidence also suggests that the Justices' level of aggression increased when the Government's tolerance interval was longer. I observed three patterns of behaviour in this direction. In the first place, the evidence suggests that a Justices' tendency is to avoid deciding against a powerful Government's position when the issue at hand is salient to its official agenda. The evidence also showed the Justices' predisposition to issue the most aggressive forms of intervention when the Government either lacked the capacity and interest to retaliate, or simply the interest to do so. Furthermore, the evidence showed that Justices issued moderately aggressive forms of involvement when the likelihood of retaliation decreased. This occurred either when the Government lacked the capacity to retaliate, because it was weak, or when it lacked the interest to do so as the issue at hand was not salient to its agenda.

As in any other rigorous academic study, some cases were not explained by the model I put forward in this work. First, three decisions fell outside my theory due to errors in measurement. In other words, I assumed that judges operate in a context of complete and perfect information. Hence, I took for granted that judges are able to collect necessary information to anticipate the public's reactions to their decisions as well as to measure the two elements constituting the government's tolerance interval. However, reality is far more complicated. Judges live in uncertain worlds, and, hence, they face unavoidable problems collecting information. This, as a result, might lead judges to miscalculate reactions to their decisions from both the public and the government, and, thus, to behave in unpredictable ways. Four decisions confirm that the Justices were indeed confronted with this type of problem. In *Fondo Bicentenario* and *Fundación Sur*, the Justices miscalculated reactions from opinion leaders. The first decision provoked strong public reactions rather than the expected moderate ones. Likewise, *Fundación Sur* was expected to provoke strong public reactions but received negative ones due to criticism that undermined the image of activism. Similarly, in *AFIP* and *Sosa V* the Justices miscalculated the government's tolerance interval, as they were expected to occur under a medium tolerance interval, but rather did so under a short one.

The other three decisions falling outside the theory reveal that the Justices may have been motivated by concerns other than the ones proposed by my model. In all the cases there is no conclusive evidence explaining why they fall outside my theory, which suggests that further research must be conducted in order to explain them. What is clear from the evidence is that they did not occur in circumstances predicted by this theory. For example *Bustos*, characterised as an *ICR+*, validated a key government official policy in 2004. The ruling provoked negative views undermining the Court's image of independence, and, thus, it runs against the expectation that this type of remedy would produce moderately positive public reactions. The question of why the Justices exposed the Court to negative public reactions remains unanswered. However, some tentative and not mutually exclusive explanations arise from the evidence. As suggested by reactions from opinion leaders, the Justices validated this policy in order to secure institutional stability. Alternatively, in fieldwork interviews I conducted, some analysts claimed that *Bustos*

arose from the Justices' desire to avoid a collapse of the economy. In any case, these tentative responses suggest that in some cases Justices prefer to validate the Government's policies even when this runs against their own attempt to build public support. Likewise, in *Badaro II* Justices presumably preferred saving the Court from high levels of public criticism, rather opting to expose it to a potential conflict with the government. According to my theory, in this case, which is characterized as *DIR/IIR*, the Justices should have reduced their aggression as a response to the government's short tolerance interval. Contrary to the model expectations, the Justices decided against the interests of a powerful government in an issue that was salient to its agenda. Why did the Justices prefer to increase the likelihood of a political conflict with the government? The evidence suggests that not issuing *Badaro II* would have provoked a highly negative impact on the Court's image. For the first time, the Justices would have confronted public criticism affecting both the activist and the independent image. In addition, the Court would have been seen as a weak institution. In this context, at least tentatively, *Badaro II* can be explained as an attempt by Justices to preserve the positive image of the Court in the public arena. They preferred to face a potential political conflict with the Executive rather than to undermine the Court's public image. Thus, here the concerns for not affecting public support seem to have guided the Justices' behavior. Finally, *Tejerina*, another example of *ICR+* was the only case of this type in which the national government was not involved. This case was theoretically expected to occur when the government's tolerance interval was medium but occurred when it was long.

Enhancing our Understanding of Judicial Behaviour in Latin American and Future Research

This dissertation contributes largely to the positive study of judicial behaviour in Latin America. It suggests that the public is a key factor determining judicial behaviour in hostile contexts. Second, it enhances our understanding of how judges build their legitimacy. Finally, it underscores the role that the law should play in the design and investigation of judicial politics in general. In the following paragraphs I expand on these aspects by indicating where additional research should be conducted by scholarship on judicial politics in Latin America.

Incorporating the Public as a Determinant of Judicial Behaviour in Latin America

One of the main implications of this work is that the public plays a central role in determining judicial behaviour, particularly when judicial affairs are subject to public scrutiny. My theoretical model builds on the core insights of the political fragmentation and the public support approaches. However, I contribute to overcoming some of their empirical and theoretical limitations by bringing the public to the centre of the judicial decision-making process. In this regard, my empirically tested argument suggests that the public might operate simultaneously as both an enabling and a constraining factor for the judges' attempt to protect their courts.

On the one hand, my argument suggests that the public operates as an enabling factor because it limits the government's ability to launch attacks against judges in two related directions. First, unlike most theories explaining judicial behaviour in Latin America, which are grounded on the political fragmentation hypothesis, I argue that not only the distribution of power among institutional actors constrains a government's ability to retaliate. In situations with high levels of public exposure to judicial matters, it is possible that negative reactions to political retaliation limit the sanctioning powers of governments. Hence, a government's fear of popular backlash operates as a constraining element. This proposition is not empirically groundless in the Latin American context. As discussed in the introduction of this dissertation, there are instances in which the public reacted against political attacks on the courts. In addition, the likelihood of this type of reaction increases in contexts characterised by the increasing public exposure of judicial matters. In fact, I showed that judges indeed calculate the government's strength in order to assess the likelihood of attacks.

Additionally, my argument suggests that the likelihood of public reaction against a government's political attacks against courts is thought to increase when courts enjoy public support. As discussed at the outset of this work, scholars in the behavioural tradition have proposed that the key to inducing compliance with judicial decisions is a deeply held belief among a population regarding the court's legitimacy (Staton 2011:13). Where voters are willing to tolerate political attacks against courts, judges will lack the leverage necessary to exercise their power. In

order to put these mechanisms to work, judges must enjoy sufficient public support, and the public must be sufficiently informed about the decisions they are purportedly enforcing. Throughout this dissertation I showed evidence confirming the claim that judges see public support as a defensive mechanism, and that they are preoccupied with building public support.

On the other hand, the public also constrains judges' attempts to get protection for their courts. The central implication for judges who are both publicly discredited and subject to regular political attacks is that they must build public support in order to use it as a protective mechanism. To do this, judges need to increase the visibility of their work in order to show to the public that they behave impartially. But increasing the transparency of the decision-making process is not enough to make the public perceive judges as impartial. Judges also need to publicise the outcomes of their decisions in a way that will allow them to be perceived as impartial actors (Staton: 15). However, the use of this mechanism currently in Latin America puts judges in a difficult position. Building public support may expose them and their courts to political attacks. Discredited judges aiming to build public support will have to show the public that they behave impartially, which includes but is not exclusively restricted to ruling against governments. However, ruling against governments is a delicate matter in Latin America, where political attacks on courts abound and judges are still not able to use judicial legitimacy as a protective mechanism. Thus, judges might put their court at risk in the early stages of their attempt to get public support. Along these lines, a public that is attentive to judicial affairs place some constraint on the judges' ability to engage in strategic deferential behavior. As a consequence of this, judges are expected to engage in such strategic behavior only when it is strictly necessary. In fact, I found evidence supporting this expectation. The Justices validated the Argentine government's policies only in contexts of the shortest tolerance interval in each period under study.

Although I offered solid evidence confirming that judges acknowledge the significance of the public in the judicial decision-making process, it does not demonstrate that the public actually plays such a relevant role. The findings presented in this work are limited to showing that judges are aware of the dual role that the public plays in judicial affairs and how they incorporate to their

calculations such role. Further research, however, must shed light on important elements, particularly to determine whether a government's ability to retaliate is actually limited by fears of public backlash, and whether positive public sentiments to courts prevent governments from sanctioning judges. Investigating these extremes will foster our understanding of how the public actually plays such a relevant role in the development of judicial behaviour.

The Construction of Judicial Legitimacy

I also contribute to the discussion on how judges build their legitimacy, and ultimately, their own power. It emerges from my dissertation that judges are critical players in the development of their own power. By showing that the judges attempt to build public support, I suggest that judges do not simply accept the exogenous conditions that ultimately limit their authority, as they would under a fragmentation of power account. And they do not necessarily gain authority simply because judicial reform processes vest them with it. As Staton (*Ibid*: 16) argues: “the boundaries of judicial power are neither fully exogenous to judicial choice nor only characterized by the fragmentation of government [...] Instead they are endogenous to judicial behaviour and influenced importantly by societal beliefs in judicial legitimacy”.

Moreover, the findings discussed here suggest that by building public support judges do something else than merely calculate public reactions. They have a certain level of control over the expansion of their own power because they go beyond this and attempt to influence, or shape, public perceptions. As discussed in several chapters of this work, they can set the tone of a decision through skilful writing techniques, choose when to issue their decisions, develop strategic public relations with opinion leaders, among other several alternatives that seek the public's approval. In this regard, my argument is in line with an emergent literature on judicial politics, which proposes that judges have some measure of control over the boundaries of their authority.

In the same vein, I suggest that judges are also protagonists in the construction of the conditions necessary for the use of public support as a defensive mechanism. The evidence summarised in chapter three showed that the Justices attempted to create the conditions under

which public support is more likely to work as a defensive mechanism. Firstly, in terms of the legitimacy condition, I demonstrated that the Justices sought to make the Court more popular by presenting it as a transparent, independent and activist agency. This attempt clearly responded to the main popular criticisms that originated in the Court's crisis of legitimacy. Secondly, in terms of the transparency condition, I showed that the Justices deliberately sought to use the media to publicise and promote the new image of the Court in order to build public support. Also, the Justices deliberately approached opinion leaders to secure transparency.

Related to this point, my dissertation suggests, although still not conclusively, that transparency of judicial affairs may foster legitimacy. As Ruibal (2011: 352) notes in her review of the concept of judicial legitimacy, a controversial issue on the relationship between public exposure of judicial affairs and diffuse support has emerged in the literature as some authors cast doubts on the allegedly positive impact of the former on the latter. Particularly in relation to courts embedded in unfriendly environments, authors such as Staton (*Ibid*) argue that in political contexts in which courts are relatively free to resolve cases sincerely, increasing information about courts is likely associated with strong beliefs in judicial legitimacy. However, as Staton (*Ibid*: 202) notes, in political contexts in which courts are constrained, increasing information about them can undermine legitimacy. Although judges' attempt to exert some control over media coverage, high levels of visibility may expose judges to public scrutiny in situations where obscurity would better advance legitimacy. In relation to this point, I demonstrated that the Justices were indeed aware of the potentially positive relation between these two extremes, and, thus, developed a strategic communication policy in order to advance the images of activism, independence, and transparency. Further, in chapter three I discussed evidence through which it can be inferred that the Justices succeeded in building such legitimacy. Although there are no polls confirming that the Justices' strategy was successful, throughout this chapter there are an important number of declarations by opinion leaders that permit us, at least tentatively, to affirm that the Justices were able to reconstruct their legitimacy and build public support among opinion leaders, if not among the public in general. All this evidence seems to demonstrate that the Justices' communication policy

had a positive impact on building public support. However, this is still a tentative conclusion because a systematic investigation on this topic was beyond the scope of this study.

Connected to the previous point, my study makes a final contribution to our understanding of how judges construct their legitimacy. In the literature on judicial legitimacy there is extensive agreement on the fact that the legitimacy of courts depends on perceptions of impartiality and principled and lawful decision-making. This arises from the conception of judges as a neutral third party to a dispute. If the Justices were indeed able to build diffuse support, the evidence suggests that the Courts' legitimacy is not only determined by their image of impartiality. This, in part, departs from the common wisdom, as the evidence from the Argentine example leads to a different, although not necessarily contradictory, conclusion. Based on the evidence presented here, one can argue that public support is not only a function of the image of impartiality but the ability of judges to redress the origins of public dissatisfaction in the courts. As a result, one can contend that judges seeking to build public support should not only be preoccupied with building a public image of impartiality but also with concentrating on other aspects. In doing so, they might be especially attentive to the context in which they operate to identify the roots of public disaffection towards them. Although these are all tentative conclusions and need a more systematic analysis, which is beyond the remit of this work, they deserve to be highlighted as a contribution to an ongoing discussion of how the public serves as a defensive mechanism for courts in Latin America.

These valuable contributions also point towards future research. A number of important matters were not reached by my work but deserve scholarly attention as they will enhance our understanding of judicial behaviour in Argentina in particular and the region and general. My work offers some preliminary evidence suggesting that the Justices were able to gain legitimacy, at least among opinion leaders able to reach the media. More systematic research in this regard will illuminate whether the Argentine Justices were successful or not in this matter and more broadly, whether diffuse support is only a function of public perceptions related to impartiality or goes beyond it, what the means are for highly distrusted judges to overcome negative public

perceptions, and whether increasing their visibility is an effective course of action for them. These issues are relevant in a region where judges are negatively perceived not only for an alleged lack of independence but also for other reasons, such as their failure to protect human rights violations.

Additionally, further research may investigate whether judges indeed use public support as a defensive mechanism, which circumstances warrant it, and when they succeed in defending their courts. This work showed that Justices were convinced that public support can work to protect their courts. However, we still need to know if the Justices used it and what the result of this use was. Investigating this issue will be important for the study of judicial behaviour in the region as it will shed light on how judges embedded in hostile contexts are able to resist political attacks by using public support.

Another aspect is worth being explored. There is still little information on how judges can effectively and strategically disseminate their work in order to build public support. In this work I discussed how the Justices implemented a strategic communication policy in order to publicise the images of activism, independence, and transparency. However, I did not investigate in significant detail how such policy actually worked, including the obstacles the Justices faced in promoting their work, what elements of the strategy were more effective, among other aspects. As I discussed in this work, judges do not perfectly control how their work is covered, the type of information circulated, or how it is interpreted. As Staton (2010: 200) points out, real political interests and the nature of independent media constrains what judges may do. Thus, investigating the Justices' strategic communication policy will shed light on the constraints judges face in communicating their work and how they can overcome them.

Connected to this point, further research should explore how judges' strategic dissemination of information resolves the tension between visibility and legitimacy. As discussed at the beginning of this work and in line with authors such as Staton (2010) and Helmke and Staton (2011), in situations where judges are relatively free to resolve cases sincerely, increasing information about courts is likely to be associated with strong beliefs in judicial legitimacy (Staton

ibid.: 201-2). Meanwhile, in situations where judges engage in strategic deference to the government as a way to get protection, increasing information about them can undermine legitimacy. These results suggest a problem for high courts in unfriendly political situations, especially if the media cannot be controlled completely. In this work I showed that the Justices were aware of the hostility of the political environment in which they operated and that they avoided engaging in political conflicts with the government. Moreover, I showed, although in a preliminary vein, that the Justices reached some level of diffuse public support. What remains to be explored is how the Justices strategically disseminated the information in cases of strategic deference. That will enhance our understanding of how judges operating in highly hostile contexts, in which judicial affairs are subject to intense public scrutiny, are able to resolve the tension between legitimacy and transparency.

Taking Law Seriously

This dissertation assumes the cross-disciplinary nature of the study of judicial behaviour. As consequence, key elements of the research design in which it is grounded and its analysis are sensitive to how law and legal institutions operate. In this regard, my dissertation enhances our understanding of how the law should be incorporated into the positive study of judicial behaviour.

Indeed, my work is motivated by a crucial failure of the literature on the judicialisation of politics in Latin America. As discussed in length in the introduction and in chapter one, such literature has failed to distinguish among the different forms of judicial involvement in the political process. In doing so, the literature fails to account for variation of the level of aggression of these different forms. This is probably due to one of the three most common failings of the literature on judicial politics in general: the emphasis on decisions at the detriment of the analysis of legal opinion that is written to explain and support their outcomes. As Friedman (2006: 266) notes, political scientists' difficulty with law stems in no small part from their own empirical methodology, which typically casts attention on the outcomes of judicial cases rather than the legal reasoning used by judges in their written decisions. The outcome of decisions might say little about the decisions themselves. For that reason, in my work I look closely at the arguments supporting

the outcome of each decision in order to identify the key aspects constituting the different remedies used by judges and their level of aggression. This further permits me to identify when decisions falling into the same remedy category differentiate from each other in terms of their aggression.

In addition, my work explicitly pays close attention to the bounds the law places on strategic conduct. An additional hypothesis should be added here if one takes the law seriously. Judges are not always completely free to engage in strategic behaviour. In this regard, legal procedural regulations can restrict or enhance the ability of a judge to increase their level of aggression. Also, jurisprudential doctrines can also set limits on the strategic course of actions. Finally, extended practices not necessary crystalised in legal procedures or doctrines can also operate in this direction. As a consequence, research design on judicial behaviour should take into consideration the potential bounds to strategic behaviour placed by law. In this regard, I explicitly did so when I hypothesised that Judges become as aggressive as permitted by conditions of the legal environment in which they operate. Consequently, I showed that procedural regulations limit judges' discretion to choose from different types of remedies.

Although this work accounted for the relevant role of the law in determining judicial behaviour, one important aspect remains unexplored. Particularly, my case selection criteria did not permit me to analyse cases in which the judges did not rule, that is, cases that are pending resolution; and cases the Justices declined to hear. 'Not ruling' or rejecting a case should be considered as forms of judicial intervention in the political arena. As discussed in chapter one, 'not ruling' is a non-aggressive form of intervention that leaves the status quo untouched. In addition, as Friedman (2006: 271) argues, studies aiming to investigate the constraints judges face from political actors necessarily must look not only to cases judges take but to the ones on which they decide not to rule. This is because such decisions may be a response to the political pressure that judges are subject to in hostile environments. Thus, in order to investigate what motivates judges to issue non-aggressive modes of intervention and fully account for political pressure on judicial behaviour, additional research should be grounded on research designs that are able to capture cases of 'not ruling' and rejection.

Conclusion

In responding to the question of what motivates judges to choose different forms of judicial intervention, my dissertation fills the empirical and theoretical gaps left by these alternative approaches. My central argument in this work is the level of aggression of judges operating in contexts of vulnerability is a function of their attempt to protect the institutional security of their courts. I argue that in contexts characterised by a lack of a culture of judicial independence, and by high levels of judicial delegitimisation as well as a high level of public visibility of judicial affairs, judges sitting in vulnerable courts will attempt to simultaneously construct public support and thus avoid political conflicts with the government. As a result, judicial decisions are driven by judges' calculations of both the public's reaction and the government's reaction to their rulings. I claim that the level of aggression of judges' interventions will increase when the government's tolerance is higher and the public appears to be more supportive. More precisely, I propose that the attempts to attain institutional security lead judges to behave strategically. On the one hand, judges seek to shape and anticipate the reaction of opinion leaders who are able to both shape the public views on the general image of a court (diffuse support), and to influence public reaction to decisions over socially-sensitive rulings (specific support). On the other hand, judges calculate the government's tolerance to decisions contrary to its own interests. They anticipate that the risk of retaliation decreases if they avoid ruling against powerful governments in issues of particular salience to the official agenda. The case of the Argentine Supreme Court between July 2004 and October 2004 provides empirical support for this argument. I found that the Justices' use of different forms of intervention in the political arena is determined by their desire to protect the institutional security of their Court. Further, I also discovered that the Justices deliberately attempted to build public support through the implementation of a large set of public relations activities.

I propose a novel approach to the study of the judicial decision-making process. In line with an emergent literature in the field, the central theoretical value added by my thesis to the study of judicial politics in Latin America is the proposition that judges take into consideration a wide range of considerations when deciding cases of public relevance. In particular, my work delineates what types of considerations judges sitting in vulnerable courts incorporate to their strategic

calculations. My argument builds on the core tenets of two, apparently, mutually exclusive theoretical models, the fragmentation of power and public support models. However, it seeks to overcome their limitations in explaining extant developments in Latin America.

Certainly, in line with the fragmentation of power hypothesis, I propose that at protecting their courts judges calculate the ability of governments to launch retaliations. However, my argument proposes that such an ability is not necessarily determined by the formal distribution of power. Sometimes the constraints governments face in retaliating might arise from non-institutional actors. In contexts of high levels of public exposure to judicial matters, it is possible that negative reactions to political retaliation limit the sanctioning powers of governments. In that regard, I propose that the ability of government to retaliate is not necessarily determined by the formal distribution of power which determines whether the government is divided or unified. Fears of popular backlash might determine such ability. This new theoretical element might permit us to explain the occurrence of some developments not predicted by the traditional fragmentation of power view, such as governments' retaliation and judicial deference in contexts of fragmentation of power or, conversely, governments' unwillingness to retaliate and judicial assertiveness in contexts of unified government.

In addition, looking solely at the formal division of powers as a way to measure the government's ability to retaliate relies on the assumption that the only means of retaliation are those which necessitate institutional coordination. However, there are other forms of retaliation which do not necessitate coordination among different branches of government. Indeed, a government can resort to a wide range of forms of retaliation. These attacks can take the forms of, among others, such things as public statements calculated to undermine judges' reputation, judicial budget reductions, and pressure through public demonstrations carried out by government supporters. In these instances, institutional coordination is not required. Thus, unlike previous works embracing the fragmentation of power hypothesis, my theory permits to analyse a whole set of dynamics that indeed affect judicial decision-making.

In addition, my theory incorporates another important theoretical element. Governments only retaliate when they have a motive to do so. That means that retaliation is not always the rule, even when the government's ability to retaliate is unrestricted. However, standard theories grounded on the fragmentation hypothesis fail to accurately discern when a government feels motivated to retaliate. My thesis improves our understanding of when governments activate their ability to retaliate by incorporating case salience. I propose that what triggers retaliation is the relevance of the issue under judicial scrutiny. Thus, in avoiding conflicts with the government, I propose that judges also take into consideration the salience of the issues at hand when deciding cases of political relevance. As a result, my theory proposes that in avoiding conflicts with the government judges take into consideration not only the ability of the government to retaliate but also the salience of the case to the official agenda.

Further, my theory goes beyond the core proposition of the fragmentation of power hypothesis according to which judges' strategic calculation is only aimed to avoid governments' retaliations. In that regard, I also propose that the calculus of potential retaliation is not the sole factor determining judicial decision. I contend that judges in vulnerable courts also attempt to build public support in order to use it as a defensive mechanism. However, the use of this mechanism as the sole defensive strategy seems to be very risky for judges in Latin America. In order to do build public support, untrusted judges subject to political pressures need to increase the visibility of their work to show the public that they behave impartially. But increasing the transparency of the decision-making process is not enough to make the public perceive judges as impartial. Judges also need to publicise the outcomes of their decisions in order to be perceived as impartial actors (Staton: 15). In Latin America building public support may expose them and their courts to political attacks. Discredited judges aiming to build public support will have to show the public that they behave impartially, which includes but is not exclusively restricted to ruling against governments. However, ruling against governments is a delicate matter in a region where political attacks on courts abound and judges are still not able to use judicial legitimacy as a protective mechanism. Thus, judges in the early stages of their attempts to get public support might put their

court at risk. Furthermore, even when publicly discredited judges gain some level of public support, the risk of attacks increases. All this does not necessarily mean that judges are not interested in building public support and using it as a protective mechanism. It means that judges might have a more subtle strategy to do so. Precisely, my theory aims to account for this subtle strategy, proposing that judges strategically aim to both build public support and avoid political sanctions. In summary, I propose a new bivariate, integrated perspective in which the two variables are (a) the court's standing with the public and (b) the government's tolerance interval.

Notwithstanding the theoretical value of my thesis, the equilibrium proposed in my model of judicial decision might shift under particular conditions. My theory is primarily devoted to explaining judicial decisions in the context of judicial vulnerability, that is, when there is a lack of a culture of judicial independence and constant political pressure as well as low level of public support. Thus, I expect that judges will not engage in the strategic calculus proposed here when the condition of vulnerability does not exist. This does not mean that the equilibrium will shift when there would be no political attacks on courts at all. What it means is that the condition will change when retaliation becomes an exceptional practice rather than a regular one. That could occur, for example, when values such as the rule of law and the division of power are deeply embedded in society, making it more difficult or costly for governments to retaliate in a given political system.

Related to this, another condition in which the equilibrium would shift is judges' perception of judicial legitimacy. If judges perceive that they enjoy of high level of popular trust, we might expect that they might feel protected and will be less constrained in deciding against the government on salient cases. This is not to say that such kinds of judges will not be worried about political retaliations. What I mean is that these judges will have a wider margin of manoeuvre which will permit them to incorporate other type of considerations to their calculus.

In addition, my theory is meant to work in contexts also marked by some visibility of judicial affairs. As discussed at length in this work, public support operates as a defensive mechanism when the condition of transparency, visibility, is present. In context in which judicial

affairs are not relevant in the public debate, it is unlikely that judges will strategically attempt to become more popular. In such a context, they will need to first create the condition of visibility of judicial affairs. In these circumstances the proposed model is not expected to function.

In conclusion, my thesis represents an important contribution to the study of judicial politics in Latin America. I propose a new theoretical approach proposing that judges take into consideration a wide range of considerations when deciding cases of public relevance. Particularly, I propose that judges sitting in vulnerable courts aim to simultaneously build public support and to avoid political retaliations. My argument builds on the core tenets of two, apparently, mutually exclusive theoretical models, the fragmentation of power and public support models. Without rejecting these approaches wholesale, I add new theoretical elements to each of them and offer a solid theoretical model of judicial decision making for judges sitting in vulnerable courts. In addition, my thesis underscores the role of the public as a key factor explaining judicial behaviour; offers a still preliminary response to the question of how justices build their legitimacy; and incorporates the law in the positive study of judicial behaviour.

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CC5 2010. Fieldwork Interview with Author.
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CSL2 2010. Fieldwork Interview with Author.
CSL3 2010. Fieldwork Interview with Author.
CSL4 2010. Fieldwork Interview with Author.
CSL5 2010. Fieldwork Interview with Author.
CSL6 2010. Fieldwork Interview with Author.
CSL7 2010. Fieldwork Interview with Author.
J1 2010. Fieldwork Interview Author.
J2 2010. Fieldwork Interview with Author.
J3 2010. Fieldwork Interview with Author.
LP1 2010. Fieldwork Interview with Author.
LP2 2010. Fieldwork Interview with Author.
LP3 2010a. Fieldwork Interview with Author.
LP4 2010. Fieldwork Interview with Author.
LP5 2010. Fieldwork Interview with Author.
LS1 2010. Fieldwork Interview with Author.
LS2 2010. Fieldwork Interview with Author.
LS3 2010. Fieldwork Interview with Author.
R1 2010. Fieldwork Interview with Author.
R2 2010. Fieldwork Interview with Author. Fieldwork Interview with Author.
R3 2010. Fieldwork Interview with Author.
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- 2004c. Vizzoti, Carlos Alberto c/ AMSA S.A. s/despido. Supreme Court of Justice.
- 2004d. Zavalía, José Luis c/ Santiago del Estero, Provincia de y Estado Nacional s/ amparo.: Supreme Court of Justice.
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- 2005a. Sánchez, María del Carmen c/ ANSeS s/ reajustes varios. Supreme Court of Justice.
- 2005b. Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc. Supreme Court of Justice.
- 2005c. Verbitsky, Horacio s/ habeas corpus. Supreme Court of Justice.
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- 2007a. Bussi, Antonio Domingo c/ Estado Nacional (Congreso de la Nación - Cámara de Diputados) s/ incorporación a la Cámara de Diputados. Supreme Court of Justice.
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- 2008a. García Méndez, Emilio y Musa, Laura Cristina s/ causa N° 7537. Supreme Court of Justice.
- 2008b. Mendoza, Beatriz Silvia y otros c/ Estado Nacional y otros s/ daños y perjuicios (daños derivados de la contaminación ambiental del Río Matanza - Riachuelo). Supreme Court of Justice.
- 2008c. Patitó, José Á. y Otro c/Diario La Nación y Otros. Supreme Court of Justice.
- 2008d. Patti, Luis Abelardo s/ promueve acción de amparo c/ Cámara de Diputados de la Nación. Supreme Court of Justice.
- 2008e. Salas, Dino y otros c/ Salta, provincia de y Estado Nacional s/ amparo. Supreme Court of Justice.
- 2008f. Tejerina, Romina Anahí s/ homicidio calificado. Supreme Court of Justice.
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- 2009a. Gualtieri Rugnone de Prieto, Emma Elidia y otros s/ sustracción de menores de 10 años. Supreme Court of Justice.
- 2009b. Gualtieri Rugnone de Prieto, Emma Elidia y otros s/ sustracción de menores de 10 años. Supreme Court of Justice.
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- 2009d. Rossi, Adriana María c/Estado Nacional - Armada Argentina. Supreme Court of Justice.
- 2009e. Sosa, Eduardo Emilio c/ Provincia de Santa Cruz. Supreme Court of Justice.
- 2009f. Telleldín, Carlos Alberto y otros s/ rec. de casación. Supreme Court of Justice.
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2010c. Sosa, Eduardo Emilio c/ Provincia de Santa Cruz. Supreme Court of Justice.

2010d. Thomas, Enrique c/ E.N.A. s/ ampar. Supreme Court of Justice.

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Annex 1 – Interviewees’ Prefixes

Category of Interviewees	Prefixes
Supreme Court Justices	J1
	J2
	J3
	J4
Court’s Clerks	CC1
	CC2
	CC3
	CC4
	CC6
	CC8
	CC9
	CC10
	CC11
	CC12
	CC13
	CC14
Reporters	R1
	R2
	R3
	R4
	R5
Civil Society Leaders	CSL1
	CSL2
	CSL3
	CSL4
	CSL5
	CSL6
	CSL7
Legal Practitioners	LP1
	LP2
	LP3
	LP4
	LP5
Legal Scholars	LS1
	LS2
	LS3
	LS4
	LS5

Annex 2 – List of interviewees

Justices	
Argibay, Carmen	Supreme Court Justice
Highton de Nolasco, Elena	Supreme Court Justice
Lorenzetti, Ricardo	Chief Supreme Court Justice
Zaffaroni, Raúl	Supreme Court Justice
Court Clerks	
Bourdin, María	Director of Public Communication of the Supreme Court
Bloch, Ivana	Justice Fayt's Office
Campora, Mario	Justice Maqueda's Office
Clérici, Sebastián	Pro-Secretary of the Supreme Court
Ekmekdjian, Luciana	Pro-Secretary of the Supreme Court
Gorriá, Rubén	Legal Secretary No 4
Kraut, Alfredo	General Secretary of the Supreme Court
Miljiker, María Eva	Justice Petracchi's Office
Otano, Graciela	Justice Zaffaroni's Office
Prada, Marina	Justice Highton de Nolasco's Office
Saulino, Florencia	Justice Lorenzetti's Office
Urteaga, Alfredo	Justice Argibay's Office
Reporters	
Abiad, Pablo	Former journalist of Clarín
Boschi, Silvana	Journalist of Clarín
Hauser, Irina	Journalist of Página 12
Ventura, Adrian	Journalist of La Nación
Zommer, Laura	Former Journalist of La Nación
Civil Society Leaders	
Abramovich, Víctor	Executive Secretary of the Institute of Public Policy and Human rights
Basch, Fernando	Project Officer of Asociación por los Derechos Civiles
Chillier, Gastón	Executive Director of the Centro de Estudios Legales y Sociales
Herrero, Álvaro	Director of the Justice Programme of Asociación por los Derechos Civiles
Maurino, Gustavo	Co-Executive Director of the Centro de Estudios Legales y Sociales
Morales, Diego	Director of the Litigation Programme of Centro de Estudios Legales y Sociales
Pochak, Andrea	Deputy Director of Centro de Estudios Legales y Sociales
Legal Practitioners	
Carrió, Alejandro	Private Lawyer
Garay, Alberto	Private Lawyer
Gullco, Hernán	Private Lawyer
Oteiza, Eduardo	Private Lawyer
Schwartzman, Sebastián	Private Lawyer
Legal Scholars	
Arrimada, Lucas	Assistant Professor of Constitutional Law at the University of Buenos Aires
Bergallo, Paola	Law Professor at University of San Andrés
Böhmer, Martín	Dean of the School of Law of the University

	of San Andrés
Clérico, Laura	Assistant Professor of Constitutional Law at the University of Buenos Aires
Gargarella, Roberto	Professor of Constitutional Law at the University of Buenos Aires
Saba, Roeberto	Dean of the School of Law of the University of Palermo